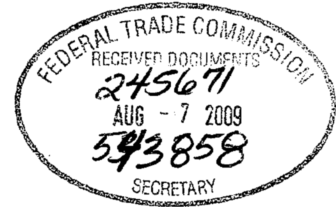
ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

COMPLAINT COUNSEL'S POST-TRIAL REPLY BRIEF

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I. Introduction[1]

"The bottom line is that [Microporous] can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth," wrote Daramic's General Manager, "[w]e must do everything possible to stop this process." (PX0694 at 001) Daramic's Pierre Hauswald said, "I agree…it would be better to solve the [Microporous] case definitively." *Id.* Microporous was a "real threat" to Daramic, and so it acquired Microporous to "secure [its] market share," stop "price erosion," avoid lower prices, and "eliminate price competition."[2] Daramic's acquisition of Microporous, its closest and only competitor in the deep-cycle, motive and UPS battery-separator markets, resulted in a merger to monopoly. The acquisition also eliminated Microporous as a third competitor in the North American SLI separator market, leaving only Daramic and Entek as a duopoly. Under the law, this acquisition cannot stand.

Often misciting the law and using citations that do not support their factual arguments,[3] Daramic's story ignores the evidence at trial. For example, Daramic still insists that all separators (except Flex-Sil and Ace-Sil) are the same because of supposed, "supply-side" substitution. (RB at 11; Kahwaty, Tr. 5152, *in camera*) Contrary to Daramic's argument, "[m]arket definition focuses ***solely*** on ***demand*** substitution factors – *i.e.*, possible consumer responses." (Horizontal Merger Guidelines ¶ 1.0) (Emphasis added). Substantial evidence shows that customers treat these markets separately: *e.g.*, customers will not use a polyethylene separator without rubber (for antimony control) in a deep-cycle battery.[4] Clear proof that customers cannot easily switch, for example to an SLI separator when they need motive

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[1] "CCB" refers to Complaint Counsel Post-Trial Brief; "RB" refers to Respondent's Post-Trial Brief; "CCFOF" and "RFOF" refer to Complaint Counsel's and Respondent's, respectively, Proposed Findings of Fact. "CCRF" is Complaint Counsel's Rebuttal Findings.

[2] PX0168 at 002; PX0935 at 001; PX0932 at 001.

[3] We do not say so lightly. Respondent has had to resort to extreme mischaracterizations of case law and the evidence.

[4] PX0033 at 006, 012; Simpson, Tr. 3169-3172, *in camera*; Gillespie, Tr. 2933 (Using PE would not "make any sense"); Godber, Tr. 151-152 (would only use Flex-Sil, CellForce, or HD).

separators, is that [5]

The evidence at trial demonstrates that North American customers simply cannot grab any separator on the planet for use in a deep cycle, motive, or UPS battery. The Asian producers are not in the market. [6] Daramic's claim that one could change a calendar roll and make another separator is not relevant when no other company has designed, tested, or manufactured a SLI separator for North America, except for Microporous, Daramic, and Entek. Further is qualified in deep cycle, motive, or UPS for any of these customers. This marketplace reality means that Daramic's supply-side substitution is a fantasy and Complaint Counsel has properly measured market concentration.

Moreover, Daramic's claim that Daramic HD and Microporous' Flex-Sil were not competitors in the deep cycle market is false. Customers uniformly agreed that Daramic's HD was a substitute for Daramic's Flex-Sil. (Godber, Tr. 152-153; Wallace, Tr. 1971-1972; Qureshi, Tr. 2004, 2063; Gillespie, Tr. 2933) Over 90% of the "total market" for deep cycle batteries,

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[5] *See, e.g.*, {**Gillespie, Tr. 2953-2954, 3041, *in camera*** **Godber, Tr. 299, *in camera*** ; Wallace, Tr. 1951 ("nowhere to go but to" Daramic); Gagge, Tr. 2611 ("[t]here's no other source"); Leister, Tr. 4028 (Entek not supplying motive separators); Douglas, Tr. 4082 (no other supplier); Benjamin, Tr. 3522 (Daramic is the "sole supplier. That's it. Take it or leave it."), *id.* 3526 ("there is no other supplier, so you're kind of stuck). Daramic also ignores the evidence that Daramic now has "control" over all but the SLI separator market, in which Daramic has only Entek as a competitor. (*See* PX1104 at 001; PX0395 at 023, 025-027)

[6] **(Weerts, Tr. 4507-4509,** *in camera* ; PX1823, *in camera*: CCFOF ¶ 928)

Exide, U.S. Battery, and Trojan, all used Daramic HD as a competitive threat to Microporous' deep cycle separators.[7]

The substantial reduction of competition in deep-cycle, motive, UPS, and SLI separators is impossible to refute. However, faced with four markets with extraordinarily high HHIs and unequivocal evidence of high barriers to entry, Daramic argues that if we use an "all PE market" (combining CellForce, HD, and PE of all types, sizes and ingredients but excluding Flex-Sil), that the concentration levels are just not high enough. Not true. Even without Flex-Sil, Microporous' largest volume product, Daramic's own numbers from an all-PE market yield HHIs that are far above the level in the Merger Guidelines (¶ 1.51) at which "it will be presumed" that the acquisition is "likely to create or enhance market power or facilitate its exercise."[8] No matter how Daramic slices the pie, its acquisition is presumptively illegal.[9]

Despite these high HHIs and the high barriers to entry, Daramic claims that timely, likely, and sufficient entry rebuts Complaint Counsel's case because some unknown Asian producer might enter. But, despite all the talk of Asian companies, the only evidence in the record is that

[7] Gilchrist, Tr. 379-380, 406-407 (Gilchrist, Tr. 467-468, 343, 368; McDonald, Tr. 3911, 3944, 3948-3949 ("no other competitor" other than Daramic in deep cycle).

[8]

[9] Daramic is wrong that acquisition of of a market does not trigger Section 7. *See, e.g.*, *United States v. Pabst Brewing Co.* , 384 U.S. 546, 547 (1966) (holding a merger of a firm having 3.02% of the market, with a firm, having 1.47% of the market, was a Section 7 violation); *Stanley Works v. FTC*, 469 F.2d 498, 505-07 (2d Cir. 1972) (24% with 1%).

Daramic offered ***no*** evidence from any non-Daramic, Asian producer – the supposed entrants. .[10] Even Polypore's CEO, Bob Toth, admitted that the Asians were not in North America because their margins "aren't high enough" to be competitive. (Toth, Tr. 1404)

Absent any evidence of entry, Daramic then claims that efficiencies are a defense to its massive assault on competition. But Daramic failed to show the required, "verifiable," "extraordinary efficiencies" that would be passed through to consumers. [11] Indeed, none of their claimed efficiencies is even cognizable or detailed. At best, Mr. Graff said they (RB at 45, *citing* Graff, Tr. 4863, *in camera*) This is not sufficient.

Daramic's final defense is that although Microporous was a strong, profitable company at the time of the acquisition, now that Daramic controls it, the "viability of Microporous as a stand alone entity is seriously in question." (RB at 49) This "failing-firm" defense was never raised in Daramic's answer and was waived, but more importantly it is contrary to the facts. The evidence

[10] **{Hall, Tr. 2727, *in camera* ; PX0907, *in camera* (Kung, Dep. 153, 155-156 (Gillespie, Tr. 3025-3029, *in camera* Axt, Tr. 2220, *in camera*.}**

[11] *FTC v. CCC Holdings Inc., et al.,* 605 F. Supp. 26, 72-74 (D. D.C. 2009); *Heinz*, 246 F.3d at 720; *FTC v. Univ. Health, Inc* ., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (Defense "must demonstrate…significant economies and that these economies ultimately would benefit competition and, hence, consumers.").

is that Microporous was "profitable" and was "on track to improve its profitability." (Gilchrist, Tr. 344, 403; Trevathan, Tr. 3562, 3659, 3750)

In the end, the complete undoing of this illegal acquisition is mandated as a matter of law. An effective remedy must restore competition to what it would have bee n but for Daramic's illegal conduct. However, Daramic claims that Complaint Counsel has to prove that a "complete" divestiture is necessary; otherwise it is somehow overbroad or punitive. (RB at 59-60) This argument is a complete rerun of *Chicago Bridge*, which rejected this precise argument and which Daramic fails to even cite. Notably, in *Chicago Bridge*, the Fifth Circuit affirmed the ALJ's and Commission's complete divestiture of PDM including a division that was not even at issue in the case. *Chicago Bridge & Iron Co. N.V. v. FTC* , 534 F.3d 410, 441 (5th Cir. 2008). Here, every aspect of Microporous is at issue – even Ace-Sil, which forms the key ingredient for CellForce. Thus, all of the stock and assets of Microporous must be divested so that Microporous can compete on the same "equal footing," as it had prior to the acquisition. *Id.*

This relief must include the Austrian plant because that expansion was what made the company a world-wide competitor that could properly service its world -wide customers, like EnerSys and Exide. Indeed, one of Microporous' key assets [redacted], which requires that the company have [redacted] Microporous' Ace-Sil line in Tennessee was also essential because Ace-Sil is an ingredient vital for the manufacture of CellForce, [redacted] required to be manufactured both in [redacted] [redacted] In short, Microporous' world-wide scale is what put it on equal footing with Daramic and Entek. It hardly makes sense to let the monopolist keep it.

Daramic argues that it should keep ***all*** of Microporous' products, contracts, and five of its six lines (including two in Austria) and divest merely one Daramic product -- Daramic HD -- that Daramic's own brief says is not a "competitive" product. (RB at 24) It makes even less sense to

give the new Microporous the least competitive product Daramic has, and one that Microporous never owned in the first place and hope that it can compete. This would be an absurd result. *Northern Securities Co. v. United States*, 193 U.S. 197, 357 (1904), *quoted by Ford Motor Co. v. United States*, 405 U.S. 562, 574, n.9 (1972) ("To permit Ford to retain" what it bought "would perpetuate the anticompetitive effects of the acquisition").

In addition, the remedy sought in this case is buttressed by the strong evidence of monopolization and other anticompetitive conduct by Daramic over the past decade. Daramic's strong-arm, "no-mercy" tactics against EnerSys and others is clear from the evidence. [12] Daramic's exclusionary contracts were also a clear monopoly tactic -- making it more expensive for customers to take on a competitive supplier, like Microporous. (CCFOF ¶¶ 1069-1076)

What we see here, especially in Daramic's post-acquisition behavior, is anticompetitive conduct that has harmed customers. If this is what Daramic does when it's being sued by the Federal Trade Commission, what do we expect to see if this litigation ends without an adequate remedy? But the law requires that Daramic must be stopped and competition must be reinstated. To paraphrase Exide's Doug Gillespie and the Supreme Court: that is why we are here. (Gillespie, Tr. 2980-2981 ("[T]hat's why you're here"); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953) (FTC's mandated role is "to stop in their incipiency acts and practices which, when full blown, would violate" the antitrust laws).

[12] This was Daramic's pattern of conduct. *See, e.g.,* PX1793 at 001 [redacted] Hauswald Tr. 743, 1132-1133, *in camera* [redacted]; **Bregman, Tr. 2901-2903, *in camera*, 2906, *in camera*; PX1050, *in camera*** [redacted].

II. The Correct Burden of Proof Requires Daramic to Rebut Complaint Counsel's Strong Prima Facie Case

Daramic claims that Complaint Counsel must "show 'demonstrable and substantial anticompetitive effects'" to prove its case. (RB at 6, (*citing New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 359 (S.D. N.Y. 1995));[13] RB 7 n.2). This is hardly a statement of the law. [14] Daramic ignores the legal presumption that evidence of high concentration creates.

The law requires that Complaint Counsel establish its prima facie case by proving only that Daramic's acquisition of Microporous "significantly increase[d] market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition." *Chicago Bridge*, 534 F.3d at 423; *FTC v. Whole Foods Mkt., Inc.,* 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (A prima facie Section 7 case typically "rests on defining a market and showing undue concentration in that market."). As Complaint Counsel's "prima facie case anticipates and addresses the respondent's rebuttal evidence ... the prima facie case is very compelling and significantly strengthened." *Chicago Bridge*, 534 F.3d at 426. Under the law, Daramic has a "heavy burden" to "clearly disprove future anti-competitive effects." *Id.* at 426.

Even if Daramic produces evidence, "the evidence must justify the rebuttal arguments the respondent espouses." *Id.* Daramic's rebuttal case, however, fails to rebut Complaint Counsel's strong prima facie case that shows a likelihood of anti-competitive effects.

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[13] Judge Wood in *Kraft* goes further to explain that the market shares (less than 15% for both firms combined) were insufficient to create a "presumption that the [a]cquisition violates Section 7." 926 F. Supp. at 363.

[14] Daramic claims that Complaint Counsel must show that the merger actually resulted in increased prices and lower output, RB at 23, an assertion contrary to law, including Daramic's cited cases. In *Forsyth,* cited by Daramic, the court stated was addressing a case in which the plaintiff attempted to show monopoly power through *direct* evidence. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475-76 (9th Cir. 1997) (emphasis added). The court explained that one can prove monopoly power through *circumstantial* evidence of the defendant's dominant share in a market. *Id.* (emphasis added).

Moreover, Daramic is wrong that Complaint Counsel must "show that the alleged violation affected a substantial volume of commerce." (RB at 6) The Commission has unequivocally held that "the volume or size of commerce affected by an acquisition is not a factor in determining the legality of a horizontal merger." *Chicago Bridge*, 138 F.T.C. at 1098-99 and n. 315; *FTC v. Food Town Stores*, 539 F.2d 1339, 1345 (4th Cir. 1976) ("The fact that the markets in which the firms compete may be small is irrelevant under the Clayton Act, and does not affect the legality of the merger."). The Commission in *Chicago Bridge* also rejected the very interpretation of *Baker Hughes* which Daramic relies on here for its proposition that the entire market must meet some minimum market size. *Chicago Bridge,* 138 FTC at 1098-1099 ("courts have consistently held that the volume or size of commerce affected by an acquisition is not a factor in determining the legality of a horizontal merger "), *aff'd,* 534 F.3d at 433 (size of Thermal Vacuum Chamber market was not relevant).[15]

III. Complaint Counsel Has Proven a Strong Prima Facie Case

A. The Acquisition Led to Undue Concentration in Four Product Markets: Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries.

Complaint Counsel has proven the existence of four relevant product markets: deep-cycle, motive, UPS, and SLI separators for flooded lead acid batteries. (CCB at 12-28) Daramic, however, claims that all of these markets (with the exception of one product, Flex-Sil) are really one product because of what Daramic calls "supply-side substitution." (RB at 10-11) Daramic is wrong as a matter of law and fact. As the Merger Guidelines states emphatically:

[15] Two market sizes affected by this merger include [redacted] (PX0033 at 041, *in camera,* CCFOF ¶¶ 273, 305) These markets are substantially greater than in *Chicago Bridge*, where the four combined markets had average annual sales of only $23 million, and *Baker Hughes* in which total sales over a three year period amounted to about $10 million. *In re Chicago Bridge & Iron Co., et al.* , Complaint Counsel's Answer and Cross Appeal Brief at p. 26, *available at www.ftc.gov/OS/ADJPRO/d9300, U.S. v. Baker Hughes, Inc.*, 731. F. Supp. 3, 9 and n.6 (D.D.C. 1990). *See also FTC v. Whole Foods Mkt., Inc.,* 548 F.3d 1028, 1035 (D.C. Cir. 2008) (each market consisted of a few grocery stores).

"Market definition focuses *solely* on *demand* substitution factors – *i.e.*, possible consumer responses." (Merger Guidelines, ¶ 1.0 (emphasis added)) The relevant issue – cross-elasticity of demand – refers to the "responsiveness of the sales of one product to price changes of the other." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956); *Staples*, 970 F. Supp. at 1074 ("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." (internal quotations omitted); *see also* 2B Phillip Areeda et al., Antitrust Law ¶ 562a, at 371 (3d ed. 2007) ("[A]ctual shifts between two products in response to – or even without – changes in their relative prices indicate a single market."). "[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 for profit in it.'" *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (citations omitted). The uncontroverted evidence shows that customers regard these products as separate products. (*See* CCB at 12-28; CCFOF ¶¶ 63-77 and 92-99 (deep-cycle), 111-120 (motive), 134-142 (UPS), 148-158 (SLI))

Daramic also faults Complaint Counsel as having failed to apply hypothetical monopolist and smallest market principles. (RB at 8-9) This is not true. [redacted]

[redacted]

[redacted]

[redacted].

(PX0033 at 005-007, *in camera*)

Daramic then ignores its own advocacy for smaller markets in arguing that PE, CellForce, and HD should be included in some kind of huge "all PE separator market." (RB at 9) Not surprisingly, Daramic (and its expert) failed to perform any SSNIP test for such a market. While two PE separators may share one characteristic such as thickness, if they differ in other characteristics, such as having different compositions, they may belong in different product

markets, depending on their use. By merely identifying particular overlaps in thickness or profile between products, Daramic does not show that a customer would actually switch from one product to another based on an increase in price or for any other reason.

In this case, the concentration levels here are very high. Moreover, as was the case in *Chicago Bridge*, this "acquisition eliminated ... substantial direct competition and left [Daramic] with an 'undue' percentage share of each market." *In re Chicago Bridge & Iron Co., et al.* , 138 FTC 1024, 1053 (2004). As in *Chicago Bridge*, this "provides an independent reason for finding a strong prima facie case of presumptive liability." *Id.*

1. The Evidence Does Not Require an "All PE" Separator Market, as Endorsed by Daramic.

Daramic's theory of an all PE market (excluding Flex-Sil, Ace-Sil and Darak) relies on two theories: (i) a claimed, "supply-side substitution" argument, and (ii) substitution based on overlapping product characteristics. Complaint counsel has demonstrated that both of these theories are wrong. (RB at 10-11)

a) There is No Supply-side Substitution.

Supply-side substitution is not relevant to market definition because even if a producer could manufacture a different separator easily, the customers must be willing to purchase that separator in order for it to be in the same market. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (full service and self-service gasoline stations sell the same gasoline and can switch from one to the other easily, so belong in the same market). The evidence at trial showed that customers will not substitute products made for one product market with those from another. (*See,* e.g., CCFOF ¶¶ 26-32, 85-91). The separators require extensive design and testing for their use in each market. (*See* CCFOF ¶¶ 928, 931 [redacted] CCFOF ¶¶ 896-903 [redacted])

Daramic argues that Asian manufacturers and Entek may be uncommitted entrants. Not true. An uncommitted entrant must be "capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times." *Merger Guidelines* § 1.0. Entek did not influence the motive market prior to the merger. (CCFOF ¶ 462, 465, 472; Kahwaty Tr. 5385) Entek also has not influenced the motive power market **{or any of Daramic's pricing in the market}** after the merger. (CCFOF ¶ 468) [REDACTED]. (CCFOF ¶¶ 464, 928, 931; Gillespie Tr. 3038-3039) [REDACTED]. (Kahwaty, Tr. 5391, *in camera*)

Tellingly, [REDACTED] (Weerts, Tr. 4507, *in camera*, 4509, *in camera*) [REDACTED].

b) No Realistic Substitution Opportunities Exist Between Separators in Different Product Markets.

Daramic's theory misrepresents the numerous differences between separators in these product markets and that the products are still sufficiently differentiated such that Daramic discriminates in its prices of products for the four relevant markets. (CCFOF ¶¶ 33-55) A separator's suitability for a particular product market depends on numerous factors including its composition, thickness, and profile, and whether a glass mat is added – all of which also determine its price. (PX0582 at 042-050)

The mere fact that polyethylene is an ingredient in certain separators does not make them interchangeable. Daramic's findings and documents distinguish separators based on their entire compositions, not just their inclusion of polyethylene. (*See, e.g.*, RFOF ¶ 15 (defining battery separators as "products of various compositions"); RFOF ¶¶ 87-96 (describing the compositions of Daramic's pre-acquisition separator products); Whear, Tr. 4821-4822, *in camera* [redacted] 4783, 4803-4806 (different separators have many different qualities); PX0582 at 042-050 (same))

Composition alone also does not determine a separator's suitability for a particular product market. While certain separators may have the same composition, they are sufficiently differentiated by other characteristics permitting Daramic to differentiate them significantly by price. [redacted] (PX0395 at 041, *in camera*) [redacted] (PX0395 at 040, *in camera*)

Daramic's argument for an all PE market rests on a theory that all products of a particular thickness must be in the same market. (RB at 11) This argument perpetuates Daramic's false premise that the backweb thicknesses of separators in these markets "overlap significantly." (RB at 9) At trial, no witness could come forward to say that any of the supposed, overlapping thicknesses that Daramic's attorneys asked about were "typical" at all. (*E.g.,* Whear, Tr. 4765 (he would have to "speculate")) The undisputed evidence, moreover, was to the contrary. For example, over 99% of SLI separators are less than 10 mils, and no deep-cycle separators are less than 12 mils. (Roe, Tr. 1312-1315; Hauswald, Tr. 678-679)[16]

[16] Backweb thicknesses are not relevant, as each separator has numerous properties, but nonetheless it became a theme in Daramic's case that no witness could substantiate on cross. [redacted] (Kahwaty, Tr. 5438-5444, 5445, *in camera*) [redacted] *Id.* at

Daramic's data shows that the products are sufficiently differentiated in other ways that Daramic can discriminate in the prices for separators between each of Complaint Counsel's product markets. (CCRF ¶ 71) (CCRF ¶ 73) (CCRF ¶ 74)

In the end, Daramic never attempts to prove its initial premise, that a correct application of the hypothetical monopolist test will show the existence of a single PE separator market. (*See* RB at 9)[17] It makes more sense to aggregate the markets at the le vel at which customers simply will not switch on the basis of price. (*See* Simpson Report, PX0033 at 005-007, *in camera*)

5445, *in camera* (*Id.* at 5443, *in camera*)

[17] Daramic suggests that Complaint Counsel should have included PVC and AGM separators in the market definitions. AGM separators are not used in flooded lead acid batteries, and *See* (CCFOF ¶¶ 92-96, 121-125, 129-130) (Kahwaty Tr. 5449-5450, *in camera*)

(1) SLI, Deep-cycle and UPS Separators Are Not Substitutes for Motive Separators.

Motive battery separators are a relevant product market. (CCB at 20-23) Daramic would combine the motive separator market into its "all-PE" market (including automotive and golf cart) because of some claimed, slight overlap in thickness and/or profile. The products for motive, however, differ significantly and are priced as a separate market. [REDACTED] (PX0395 at 032, *in camera*) [REDACTED] (PX00395 at 041, *in camera*) [REDACTED] (PX0395 at 041, *in camera*) Also, motive separators are so much thicker than other separators that Daramic allocates a separate part of its plant capacity for them. (CCFOF ¶ 113)

Most importantly, motive battery manufacturers have no alternative to Daramic's motive battery separators in response to a five percent price increase in Daramic's motive separators. (CCFOF ¶¶126-132) [REDACTED] (*See* CCFOF ¶¶ 284) Daramic's only competitive constraint in motive power separators prior to the merger was Microporous. (CCFOF ¶¶ 465-468, 472-491) The acquisition of Microporous was thus a merger to monopoly in the motive market. (CCFOF ¶¶ 461) By eliminating the competition between Daramic and Microporous, the acquisition enabled Daramic to increase prices on motive power separators. (CCFOF ¶¶ 461, 470-471)

In addition to this market concentration, there is substantial evidence bolstering Complaint Counsel's prima facie case. Daramic and Microporous closely monitored each other's activities in the motive market. (*See, e.g.,* (CCFOF ¶¶ 287)) Customers were also able to play one firm off against the other in order to obtain lower prices for motive power separators. (CCFOF ¶¶ 465-467, 472-478) The acquisition eliminated this substantial competition and left

Daramic with an undue percentage of the motive market, 100%. (Craig, Tr. 2611 ("[t]here's no other source"); Leister, Tr. 4028 (Entek not supplying motive separators); Douglas, Tr. 4082 (no other supplier; no reason to go overseas to find another source, even with a 5% price increase); Benjamin, Tr. 3522 (Daramic is the "sole supplier. That's it. Take it or leave it."), *id.* 3526 ("there is no other supplier"); Gilchrist, Tr. 342). Competitive harm is clear here.

(2) UPS Separators Constitute a Product Market.

Again, Daramic's disagreement with a UPS separator market is based on an alleged overlap in the products used for the UPS market and used in the other product markets, and again, Daramic provides no evidence that a particular product used in UPS is also used in the other markets. (RB at 10) UPS battery separators are a relevant product market in which Microporous was actually competing prior to the acquisition. [18] (CCB at 23-25) The evidence shows that UPS separators have distinct characteristics, (CCFOF ¶¶ 135-146), and are considered a separate market in the industry. (CCFOF ¶¶ 134, 501) Daramic's pricing also shows it recognizes a separate market for UPS separators. For example, Daramic

(*See* PX1450, *in camera* showing

CCFOF ¶ 1113

Also, if all 12 mil separators are the same, as Daramic argues,

(*See* Exhibit PX01450, *in camera* showing Instead,

(*Id., in camera*) Following the acquisition,

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[18] Because Daramic did not produce the figures for these sales, we cannot determine Microporous' market share, except to say it was small and was quickly moving up to a large percentage with EnerSys.

UPS battery manufacturers do not have any alternative to Daramic's UPS battery separators. (CCFOF ¶¶ 126-132)

(3) Motive, UPS, and Deep-cycle Separators are Not Substitutes for SLI Battery Separators.

SLI battery separators are a relevant product market. (CCB at 25-28) SLI requires separators with particular characteristics, including higher resistance to puncturing and lower electrical resistance. (CCFOF ¶¶ 149-150) SLI separators are also much thinner than those in other product markets – [redacted] (CCRF ¶ 65) The documents overwhelmingly show that the market participants analyze their competition separately for this product market. (CCFOF ¶ 148)

Daramic's supply-side substitution argument again does not apply to the SLI market. SLI separators do not have the characteristics required by separators in the other product markets, are much thinner separators, and sell for much lower prices than the separators in the other product markets. (PX0582 at 043-044; Roe, Tr. 1313-1315 (in North America, average SLI separator price is $0.70 versus $1.50-$2.90 for Daramic HD for deep-cycle and $1.90-$3.00 for motive))

(4) There is No Substitution From Deep Cycle Separators.

The evidence of the deep-cycle battery market does not support Daramic's theory that PE+rubber separators for deep-cycle belong in the same product market with other PE separators. (RB at 9-11) North American battery customers will not use a PE separator without a rubber additive for antimony suppression for deep-cycle applications. (*See* CCFOF ¶¶ 85-91) Daramic itself considers only rubber and PE+rubber separators to be suitable for this application. (PX1791-001) For deep-cycle separators, customers would not switch to other types of PE separators in response to a SSNIP in deep-cycle separators. (CCFOF ¶¶ 103-109) PE+rubber separators for deep-cycle are already sold at quite a premium over products in the other separator

markets. (*See, e.g.*, CCRF ¶ 73

; PX0395 at 041, *in camera*

) With this price differential, customers have not substituted to other PE separators. (CCFOF ¶¶ 103-107) Even the severe shortage of deep-cycle separators during the 2008 strike at Daramic's Owensboro plant did not induce customers to substitute to pure PE separators or any other type of separator. (CCFOF ¶¶ 108-109) With the acquisition, Daramic now controls the only three products for use in North America for deep-cycle: Flex-Sil, Daramic HD, and CellForce. (CCFOF ¶¶ 258-273)

In addition to the high change in HHIs in the deep-cycle market, substantial evidence bolsters Complaint Counsel's prima facie case.

(*See, e.g.,* Hauswald, Tr. 834-835, *in camera*) Customers were also able to play one firm off against the other in order to obtain lower prices. (CCFOF ¶¶ 395-421) In the end, the acquisition eliminated this substantial competition and left Daramic with a monopoly in the deep-cycle separator market.

2. Flex-Sil is One of Three Products in the Deep-Cycle Product Market.

The only products in this market are Flex-Sil, Daramic HD, and CellForce, all Daramic products after the merger. (CCFOF ¶¶ 99-107; see CCB at 14-19) Complaint counsel has proven a product market for deep-cycle battery separators. (*See* CCB at 13-20) Daramic's only argument that it does not have a monopoly in the deep-cycle market is that it disapproves of Complaint Counsel's market definition. (RB at 18) Yet, no other company makes separators for deep-cycle but Daramic. (*See* CCFOF ¶¶ 99-107; CCB at 14-19)

Daramic argues that Flex-Sil constitutes its own product market because it is unique. (RB at 12) Daramic further argues that customers' continued purchases of Flex-Sil, despite its higher cost, indicates that it is not in the same product market. (*Id.* at 12) Even assuming these facts are correct, Daramic has the law wrong. *Hack v. The Presidents and Fellows of Yale College,* 237 F.3d 81, 86 (2d Cir. 2000) (an admittedly unique product, a Yale education, is not its own product market); *SPAHR v. Leegin Creative Leather Products* , 2008 WL 3914461, at *11 (E.D. Tenn. Aug. 20, 2008) (For a single product to constitute its own market, it must be "so unique that there are no substitutes reasonably interchangeable with them in the market.").

"Courts have repeatedly rejected efforts to define markets by price variances or product quality variances." *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.* , 889 F.2d 524, 528 (4th Cir. 1989). "[T]he relevant product market is defined by the (reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.)" *Id.* The *du Pont* (cellophane) case is directly on point. *United States v. E. I. du Pont de Nemours & Co. ("du Pont")* , 351 U.S. 377 (1955). There, the Government argued that cellophane constitutes a product market separate from other wrapping materials because cellophane was three times as expensive as other materials like wrapping paper. (*Id.* at 380) The Court disagreed and held that in determining the market, "it is the use or uses to which the commodity is put that control." (*Id.* at 395-396) Thus, although cellophane cost three times as much as some other wrapping materials and had superior characteristics, they all belonged in the same product market in the Court's view because the were functionally interchangeable and because du Pont lowered its prices for cellophane in order to compete with these lower priced products. (*Id.* at 401)

Similarly here, Flex-Sil's unique characteristics do not place it in its own product market. Flex-Sil is functionally interchangeable with Daramic HD and CellForce – all of these are used

in the deep-cycle market for golf cart, scrubber, and scissor lift batteries. (*See, e.g.,* PX1791 at 001 (Daramic's own brochure marketing all three products for golf cart batteries); CCB at 13-20) Daramic specifically introduced HD to compete in deep-cycle with Flex-Sil. (CCFOF ¶¶ 356-357) Customers consider Daramic HD and Flex-Sil to be substitutes. (*See* CCFOF ¶¶ 375-384) In fact, customers offer the two products in the same batteries, sold under the same name, for the same price. (CCFOF ¶¶ 376, 378) Daramic is also wrong that customers will not use Daramic HD for their higher end, OE batteries, and thus do not consider the products in the same market. RB, at 13; *see* Wallace, Tr. 1934-1935, 1939; CCFOF ¶¶ 100, 432-433 [redacted]

[redacted].

As in *du Pont*, while Flex-Sil may sell for a higher price, this does not mean it cannot be in the same product market. Rather, as in *du Pont*, the products compete because the price of Flex-Sil was constrained by Daramic HD. (CCFOF ¶¶ 330-334, 395-430); *du Pont*, 351 U.S. at 401. [redacted]

[redacted] **(Gilchrist, Tr. 379-380, 406-407, 526, in camera; Gillespie, Tr. 2947-2950** [redacted] **2951-2953** [redacted]

[redacted] Because "[s]ensitivity to price change, not price differential, is usually regarded as a proper element to measure cross-elasticity of demand," Flex-Sil and HD belong in the same product market. *American Crystal Sugar Co. v. Cuban-American Sugar Co.* , 259 F.2d 524, 530 (2d Cir. 1958) (*citing Du Pont*, 351 U.S. at 395) (finding that cane and beet sugar constitute a single product market despite price differentials).

Daramic argues that because customers have not already substituted all of their sales from Flex-Sil to the lower priced HD they would not switch in response to a SSNIP in Flex-Sil. Here, the evidence undisputedly shows that buyers shift purchases from Flex-Sil to HD, and have considered shifting additional purchases, and that Microporous reduced its price on all Flex-Sil

sale to some customers to prevent buyer substitution to HD. (CCFOF ¶¶ 395-424) As Mr. Gilchrist testified: (Gilchrist, Tr. 526, *in camera*) The evidence therefore indicates that customers *would* shift enough purchases from Flex-Sil to HD in response to a SSNIP to defeat the price increase, the proper question in a *hypothetical* monopolist test.

(PX0033 at 005-009, *in camera*, 012-018, *in camera* (Simpson Report); c.f. Kahwaty, Tr. 5331-5332, *in camera* *c.f.* Wallace, Tr. 1977-1979; Qureshi, Tr. 2044, 2090 (U.S. Battery wanted to switch up to 50% with HD but Daramic refused))

B. Geographic Market

Daramic advocates for a global geographic market. Yet, Daramic cannot avoid the facts: it analyzes its own markets in terms of a North American geographic mar ket, price discriminates between markets, provides local supply to North American customers that prefer and often demand local supply, and its continued price increases have not caused any North American customers to switch to supplies from any foreign producers. (*See* CCB at 28-33)

(Roe, Tr. 1799, *in camera*; CCFOF ¶¶ 164-169) Price discrimination is thus not just possible, but ongoing. In such a market, the Merger Guidelines advocate looking at particular locations where a hypothetical monopolist would profitably and separately impose a SSNIP. (Merger Guidelines, § 1.22) As Dr. Simpson concluded, a hypothetical monopolist could impose such a price increase on buyers in North America. (Simpson, Tr. 3183)

Daramic's claim that imports from Asia might defeat price discrimination is unsupported. Daramic's significant price discrimination has not led to any importation by North American customers. [19] (CCFOF ¶¶ 192, 213, 234, 252); *see* also Kahwaty Tr. 5288-5289, *in camera*)

Absent evidence of any possible other source for supply, Daramic argues that it would be "economically feasible" for North American customers to import separators from **Daramic's** Thailand facility to North America. (RB at 16) Would Daramic really sell product from its own Thailand facility knowing it was being used to undercut its own prices in North America? This has never happened and makes no sense.

Daramic then says that some purchasers overseas buy from North America. (RB at 15) However, whether customers overseas buy from a non-local supplier is irrelevant. The issue is, whether North American customers, would in fact switch to a distant supplier in response to a SSNIP price increase in its local supply. (*See* Merger Guidelines § 1.21 (considering whether buyers have in fact shifted purchases in response to changes in price)) (Seibert, Tr. 4267, *in*

[19] **{Hall, Tr. 2727, *in camera* Hall, Tr., 2734-2736, *in camera*, 2745, *in camera* ; PX0907, *in camera* (Kung, Dep. 153, 155-156 ; 176); Gillespie, Tr. 3025-3029, *in camera***

camera; Weerts, Tr. 4500, *in camera*; CCFOF ¶¶ 170-198, 937-939)

IV. Daramic Has Not Shown That Anti-Competitive Effects Are Unlikely.

In three markets, Daramic's acquisition led to monopoly. "No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized." (Areeda, Para. 911a) Daramic does not even attempt to rebut the presumption that anti-competitive effects are likely in these markets. (RB at 30-51 (Daramic's Rebuttal Case)) Although Complaint Counsel is "not required to prove that anticompetitive e ffects have in fact occurred," CBI Initial Decision at 114, the evidence demonstrates actual anti-competitive effects have and are likely to continue to result from the acquisition.

A. Post-acquisition, There is Evidence of Likely Coordinated Anti-competitive Effects in the SLI Market

In the SLI market, the acquisition leaves Daramic and Entek as the only two competitors in North America. There is a strong "presumption of collusion in a merger to duopoly." *Heinz*, 246 F.3d at 725. "The combination of a concentrated market and barriers to entry is a recipe for price coordination," or the coordination of markets or customers. *Id.* (citing *University Health*, 938 F.2d at 1218 n.24); CCC Holdings, 605 F. Supp. at 64-65. It is Daramic's burden to rebut this presumption by showing the existence of "'structural market barriers to collusion' that are unique to the [relevant markets]." *Id.* at 60; Heinz, 246 F.3d at 723.

First, Daramic did not even attempt to rebut this presumption of coordination and offered no evidence of structural barriers to coordination. (RB at 21-22) Daramic merely points to a single contract (JCI) that Entek won from Daramic pre-acquisition and to claimed "power buyers." *Id.* There is no evidence that these characteristics are "so much greater in the [separator] industry than in other industries that they rebut the normal presumption." *Heinz*, 246 F.3d at 724. Daramic's failure to rebut the presumption of coordination means that the presumption stands. In addition, the evidence in this case shows that Daramic's theory of

"power buyers" is fictitious.

(PX265 at 008)

Although Complaint Counsel need not do so, there is ample evidence of a higher likelihood of coordination in the SLI separator market. Prior to Microporous entering into SLI,

(Hall, Tr. 2666-2667, 2692).

(Hall Tr. 2873-2874, *in camera*, RX00044 at 002, *in camera*). This is far more evidence than the Courts in *Heinz* and *CCC* relied upon to find coordination likely. *Heinz*, 246 F.3d at 723; *CCC Holdings*, 605 F. Supp. at 64-66.

Price competition was eliminated by the acquisition. There is no evi dence that the separator industry will not return to its former (Hall, Tr. 2873, 2874, *in camera*); *CCC Holdings*, 605 F. Supp. at 65 (A duopoly is more likely to focus on "existing customers, rather than engaging in price wars"). Daramic has provided no evidence that "structural barriers to coordination" have arisen, that did not exist in the past, to make the likelihood of a return to such a duopoly environment likely.

B. The Evidence Shows Actual and Likely Unilateral Effects.

Daramic's documents from 2003 through the date of the acquisition uniformly show that its intent in acquiring Microporous was to eliminate it as a competitor. *See* (CCB at 42-44)

(PX0275 at 017, *in camera*; *see also* CCFOF ¶¶ 764-772; 760-763

(PX0275 at 014, *in camera* ; *see also* CCFOF ¶¶ 773-779) A party's intent should be considered when predicting the probable future effect of a merger. *Brown Shoe v. United States*, 370 U.S. 294, 329 n.48 (1962); Areeda ¶964a (2d ed. 2006).

Daramic ignores this evidence and suggests that price increases had nothing to do with the acquisition. Not true. (*See* CCFOF ¶¶ 809-816; CCB at 44-45) Daramic's only explanation is that its price increases were justified by its cost increases. (RB at 26) (*See* exhibits cited by Daramic (RX00631; RX00677, *in camera* ; RX01189; RX01323, *in camera*; RX01604, *in camera*; RX01605, *in camera*; PX1450, *in camera*)) (CCFOF ¶¶ 760-763, 765-772; PX0203 at 086, 088, *in camera*)

By eliminating the existence of an independent supplier in the market, the acquisition has eliminated the opportunity for customers to negotiate prices and constrain Daramic's demands. (CCFOF ¶¶ 166, 168, 292-284, 298; *see* Simpson, Tr. 3194-3195, *in camera*) (*See* CCFOF ¶¶ 434-443, 748) For example, Trojan had used Daramic HD as competitive leverage to achieve an agreement from Microporous for a 2009 price increase of 2.5% for Flex-Sil and 1.5% for CellForce. (PX1664; CCRF ¶¶ 748, 759) Daramic expressed that it was "prepared to stand behind the commitments that [Microporous] made to [Trojan] before this acquisition ."

(PX1666) (CCFOF ¶ 439; CCRF ¶ 759) (CCFOF ¶¶ 421, 434, 436, 438) Trojan (CCFOF ¶¶ 437, 441) Therefore, Trojan was (CCFOF 441; Godber, Tr. 236-237, *in camera*) (Godber, Tr. 247-248, *in camera*, 238, *in camera*; CCFOF 443)

(CCFOF ¶ 444) (CCFOF ¶ 445)

Also, as an exercise of its monopoly position, Daramic has had a consistent strategy (CCFOF ¶450; PX0617 at 001-002, *in camera*) For example, (PX1741 at 003, *in camera*; Qureshi, Tr. 2042; CCFOF ¶¶ 446-449) Daramic also (CCFOF ¶¶ 453-456) (PX0441 at 001-002, *in*

camera; CCFOF ¶ 450) Mr. McDonald, Daramic's Sales Manager for the America explicitly stated that Daramic should [redacted]. These actions do not indicate the presence of "power buyers," a defense throughout Daramic's brief. Rather, North American customers are captive to Daramic's pricing and supply decisions.

In addition, innovation competition has been eliminated post-acquisition. For example, in the UPS market, Daramic has disbanded the R&D group working on project LENO and slowed work on that project. (CCFOF ¶ 525) [redacted] (*See, e.g.*, CCFOF ¶¶ 720-722)

Daramic also argues that the acquisition of Microporous, with a [redacted] share of Daramic's claimed total PE market in North America cannot have anticompetitive effects. (RB at 24-25) Daramic is wrong that acquisition of [redacted] of a market cannot have anticompetitive effects. *See, e.g.*, *Pabst Brewing*, 384 U.S. at 547 (finding a merger of firm having 3.02% of the market with firm having 1.47% of the market was sufficient to find a section 7 violatio n); *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 278, 280 (1964) (27.8% with 1.3%); *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 25, 27 (2d Cir. 1973) (16.3% with 0.3%); *Stanley Works*, 469 F.2d at 505-07 (24% with 1%).[20]

Finally, Daramic claims that a post-acquisition loss of the JCI contract in SLI shows it lacks market power. Not true. [redacted]

[20] Again, Daramic makes an incorrect citation in arguing that the Merger Guidelines support its theory that Microporous' [redacted] share of its total PE market will not allow Daramic to impose unilateral effects – the section cited refers to the percentage of the market controlled by the merged entity, not the acquired entity. *See* Horizontal Merger Guidelines, § 2.0. Mathematically, an acquisition of a competitor with greater than .5% market share by a 50% market share holder would still trigger an adverse presumption under the Horizontal Merger Guidelines, §1.51(c) and n. 18 (*i.e.,* 2ab = 2(.5)(50) = 50).

(RX00072, *in camera* (contract, June 4, 2007), CCFOF ¶ 600) If anything, Daramic's JCI loss shows what can happen when three competitors are competing vigorously.

V. Microporous Was an Actual Competitor in the UPS and SLI Markets.

Daramic is incorrect when it asserts that this case involves Microporous' *potential competition* in the UPS and SLI market. (RB at 20) Microporous was an *actual competitor* in UPS and was selling into the market at the time of the acquisition. (CCFOF ¶ 501-505) The undisputed evidence is that Microporous was a very real competitor and had made sales for over a year and a half to C&D prior to the acquisition. (CCFOF ¶ 505) Moreover, Microporous also had an agreement with EnerSys that EnerSys would move its UPS business to Microporous.[21] (CCFOF ¶¶ 515, 517-518, 712, Axt, Tr. 2104; Burkert, Tr. 2326) Thus, Microporous competed in the UPS market for flooded lead acid batteries in North America (not gel batteries as Daramic asserts). PX0663-003

(CCFOF ¶ 521)

Given the *pre-acquisition* agreement with EnerSys, Microporous would have had 40% of the UPS separator market, after completion of testing. (Gilchrist, Tr. 398-399; Axt, Tr. 2104) Daramic had the only other product used in the UPS market. (CCFOF ¶¶ 145-146) Regardless of the precise HHI change, (*see* CCB at 24), the acquisition eliminated the only other competitor in the UPS separator market, a quintessential Section 7 violation. (*See* Areeda, ¶ 911a ("No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized."))

[21] Microporous gave samples to EnerSys at its Kansas facility for testing in its North American UPS batteries (not solely to EnerSys in Europe as Daramic asserts). CCFOF ¶¶ 515, 517.

In addition to this market concentration, there is substantial evidence bolstering Complaint Counsel's prima facie case. For example, [redacted]

(CCFOF ¶¶ 503-504, 516-518) Now, customers are stuck with Daramic alone. (CCFOF ¶¶ 506-507) The acquisition eliminated this substantial competition and left Daramic with an undue percentage of the UPS separator market, 100%. (CCFOF ¶¶ 292, 506-507) Customers simply have no other choice but Daramic. (CCFOF ¶¶ 588, 591-592, 601)

Prior to the acquisition, Daramic, Entek, and Microporous were the only companies with active sales of SLI separators. (CCFOF ¶ 295; Gilchrist, Tr. 307-308, 313, 341-342) To be clear, Microporous ***had manufactured and sold*** SLI separators in North America and, at the time of the acquisition, marketed itself to be a competitor in that market. (Gilchrist, Tr. 307-308, 313, 341-342) Microporous was definitely going to sell SLI separators out of Feistritz (Gaugl, Tr. 4626) and was also going to sell SLI from Tennessee. It had already been approved as an SLI separator producer by JCI and had agreed to produce SLI separators for Exide in North America and in Europe. (Gilchrist, Tr. 562 (JCI had even approved CellForce as an SLI separator); Gillespie, Tr. 2976 ("We had [the] full intention that we were going to be buying Microporous separators in 2010")) Microporous would also have produced SLI separators for East Penn, but for the acquisition. (Trevathan, Tr. 3722-3723 (Phase III for East Penn was "discontinued because of the acquisition of Microporous by Daramic"); Leister, Tr. 4009-4010, 4016-4018 (East Penn was in discussions with Microporous to purchase SLI separators and viewed Microporous as a "viable" supplier))

Nevertheless, a firm need not have made a sale in order to be an actual competitor in a market. Rather, once the decision to enter the market has been made, a qualified firm that is preparing to make its first bid or its first sale must be counted as an actual competitor. (Antitrust

Law, Antitrust Law, Areeda & Hovenkamp ("Areeda"), Vol. IV, ¶ 912a (2006)) The Areeda treatise explains:

> The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly. If the rival has already made its first sale in the monopolist's market the merger is clearly "horizontal." *If the rival has not yet made its first sale, the tendency is to call the acquisition a "potential competition"* or nonhorizontal merger. But the distinction between "actual" and "potential" competition is readily exaggerated. For example, a firm that has submitted bids against the dominant firm but lost is clearly an "actual" competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder. But *even the firm that is preparing to make its first bid or its first sale must be counted as an "actual" rival once the entry decision has been made.*

IV Areeda & Hovenkamp, *Antitrust Law* ¶ 912a (2006) (emphasis added).

Thus, even a firm that never makes a sale but causes a competitor to lower prices, as Microporous did in all these markets, is an ***actual***, not a potential, competitor. *See United States v. Marine Bancorp. Inc.*, 418 US 602, 625 n.24 (1974).

Daramic argues that the acquisition does not increase concentration in the SLI market due to the merger on the basis that Microporous was not a potential competitor in the SLI market. Yet, Microporous was an ***actual competitor*** in the SLI separator market, and besides Daramic

(Gilchrist, Tr. 423-424)

Microporous had sold SLI separators and had "submitted bids" in the SLI separator market just prior to the acquisition, and was impacting competition in the market – Microporous was therefore "clearly" an actual competitor in the SLI market. (CCFOF ¶¶ 624-630, 725-747) (*See* Areeda, § 912a) Directly on point is *El Paso Natural Gas*. As the U.S. Supreme Court explained in *Marine Bancorp.*, the acquired firm in *EL Paso* was not merely a potential competitor, but an actual competitor, where it bid on business, "compel[ed] the acquiring firm to make significant price and delivery concessions in order to retain that customer." 418 U.S. at 625 n. 24, explaining *El Paso Natural Gas*, 376 U.S. at 659. That is exactly what happened here.

Indeed, Microporous was no less a competitor than Chicago Bridge was in thermal vacuum chambers even though it had not sold on in years. (Chicago Bridge cite JRR)

Microporous had an existing PE separator line in Piney Flats on which it produced SLI separators which were qualified by JCI and which East Penn considered buying. (CCFOF ¶¶ 627-628) Microporous' Board supported expanding in the SLI market and adding SLI production capacity, particularly if the company was able to secure a contract for those sales. (CCFOF ¶¶ 527, 614)

(PX0203 at 088, *in camera*) (PX0463 at 003, *in camera*) (PX0738 at 017, *in camera*; CCFOF ¶ 769) (CCFOF ¶¶ 725-727, 728)

Thus, contrary to its brief, Daramic reacted to Microporous as a real threat in SLI. All three competitors in the North America SLI market "closely monitored each other's activities" in the market. (CCFOF ¶ 527, 547, 549) Prior to Microporous' entry into the SLI market, however, there had been a lack of competition between the duopoly of Entek and Daramic. (Roe, Tr. 1281; Hall, Tr. 2667-2668, 2692; 2873-2874, RX00044 at 002, *in camera*) (Weerts, Tr. 4517, *in camera*) The acquisition eliminated the third competitor and

left Daramic and Entek with their previous, non-competitive duopoly in the SLI separator market in North America.

VI. Daramic Has Not Rebutted Complaint Counsel's Strong Showing of a Section 7 Violation

"Once Complaint Counsel has established a prima facie case, the burden shifts to the respondent to establish that the case inaccurately predicts the probable effects of the merger." Here, Complaint Counsel's evidence is particularly strong and requires Daramic to present a strong rebuttal case. *Chicago Bridge*, 534 F.3d at 426.

Daramic does not dispute that the markets in this case were highly concentrated prior to the merger. (RB at 28 ("SLI, Motive and UPS ... markets were substantiall y concentrated"); RB at 17-18 (no allegation of participants other than Daramic or Microporous in deep-cycle)) Daramic's defenses, rather, are 1) entry by other firms; 2) efficiencies; and 3) that Microporous would have been too weak to be a viable competitor.

VII. High Barriers to Entry Strengthen Complaint Counsel's Prima Facie Case

Daramic asserts that entry barriers are low. (RB 31) It is wrong. "[E]vidence of high entry barriers . . . strengthens the conclusions to be drawn from Complaint Counsel's showing of high concentration levels." *Chicago Bridge*, 138 F.T.C. at 1065-1066. Daramic's assertion that entry barriers are low, (RB at 31-32), is contradicted by all of their own pre-merger documentary evidence, unbiased by this litigation. (*See* CCB at 35-37) Daramic's own documents and testimony overwhelmingly demonstrate the significant barriers to entry of the deep-cycle, UPS, motive, and SLI separators markets in North America. (*See* CCB at 35-37) Daramic repeatedly told the financial community and its investors, to whom it understood it had a high duty of candor, that its flooded lead acid separator business had high entry barriers. (CCFOF ¶ 988-990) Owners of both Daramic and Microporous also concluded that barriers to entry were high. (CCFOF ¶¶ 989-990; PX1124 at 001)

Numerous entry barriers exist here: capital requirements to achieve the scale necessary for profitable entry, long testing times, customer desire for local supply, access to customers tied into exclusive contracts, reputation, and know how and intellectual property. (*See* CCFOF ¶¶ 817-1036; CCB at 35-37) Daramic's Opening Brief addresses none of its own admissions.

Scale and capital investment required by entrants is also a significant barrier to entry. (CCFOF ¶¶ 1030-1043) [REDACTED] (PX0265 at 004, *in camera*; *see also* PX1124 at 001 (Microporous owners also admitting that major capital costs are a barrier to entry)) No other supplier has the scale to compete in North America. (Gilchrist Tr. 424[REDACTED])

Customers look for a separator suppliers' reputation for financial stability, technical innovation and expertise, research capabilities, customer service and support, and manufacturing and leadership capabilities. (CCFOF ¶¶ 915, 917) [REDACTED] (PX0265 at 011, *in camera*; CCFOF ¶ 915) Microporous had a very good reputation in the marketplace. (CCFOF ¶ 918)

"Experience, learning effects" also pose a somewhat large barrier to entry. (PX0265 at 011; *see also* CCFOF ¶¶ 1009-1029) Daramic acknowledges that those who operate the particular lines and particular equipment have specialized knowledge. (*See* CCFOF ¶¶ 909-912; RFOF ¶¶ 181-185) Indeed, when Daramic had a strike, it could not operate its own plant with management personnel. (Gillespie, Tr. 2989, 2992 (showing wavy separators))

Patents also serve as a barrier in these markets. Rubber patents and patents for clean oil are examples. (*See*, e.g., PX2164 (two rubber-PE patents); Whear, Tr. 4807)[22] Research and development and testing of a new product could take many years, preventing entry in the deep - cycle market. See PX2181, PX2182 at 084 (Daramic dropped DC after years of development).

In sum, these high barriers to entry make it more likely that the high concentrations in the four relevant markets will lead to anti-competitive effects. These are exactly the kinds of barriers to entry that were upheld in Chicago Bridge and apply with equal force here. *Chicago Bridge*, 534 F.3d at 437-440.

VIII. Daramic Has Not Shown That Entry is Timely, Likely, and Sufficient Given the Significant Entry Barriers.

Despite Complaint Counsel's substantial evidence of high barriers to entry, Daramic asserts that entry will be timely, likely and sufficient. (RB at 31-33)

A. Entry Will Not Be Timely.

Daramic argues that entry will be timely. (RB at 31-33) It will not. (CCFOF ¶¶ 818, 821, 826-880) Current separator manufacturers require 16 to 22 months simply to set up a new line producing separators for a market in which they already compete. [23] None of the timelines pointed to by Daramic account for testing when entering a new product market. Testing in the SLI, motive, deep-cycle, and UPS markets all require an additional 18 to 40 months before a customer will agree to purchase the products. (CCFOF ¶¶ 889-892; 896-908) Daramic is also flat wrong that

(RB at 35) (Unsupported by any evidence)

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[22] While Daramic argues that another additive exists that works for this purpose, it points to no evidence that the additive has ever been tested or would work as intended.

[23] *See* RX01045 (Microporous timeline showing design of lines in Feistritz beginning in July 2006); CCFOF ¶ 874 (Feistritz operating on a regular schedule in June 2008); CCRF ¶ 259 ; RX00147 at 001

B. Daramic Has Not Shown That Entry Is Likely.

Daramic argues that entry will occur either by an Asian manufacturer, Entek, or through sponsorship by an unidentified battery separator customer.

Chicago Bridge, 534 F.3d at 430.

(*See* CCB 38-41)

1. Entek is Not likely to Enter the Deep-Cycle, Motive or UPS Markets

(CCFOF ¶¶ 919-923)

(*See, e.g.,* CCFOF ¶ 931)

(CCFOF ¶¶ 906-907) At this point, there is no evidence that Entek is even contemplating such a move.

(CCFOF 924-925)

(CCFOF 926)

Chicago Bridge, 534 F.3d at 430.

(Gillespie, Tr. 3037, *in camera*) (CCFOF ¶¶ 929-930) (CCFOF ¶ 932 (citing PX1515 at 006))

2. Entry By an Asian Separator Manufacturer is Unlikely.

Daramic claims that Asian manufacturers may enter the four product markets in North America. (RB at 32-33) In order to provide a defense, Daramic must demonstrate that entry by these manufacturers would be profitable at pre-merger prices, and that they could secure such prices. Merger Guidelines § 3.3; *Chicago Bridge*, 534 F.3d at 430.

(RB at 32), (PX0265 at 016, *in camera*)

(*See* CCRF 995)

See id.

See id.

(RX01497 at 001-002, *in camera*) Moreover,

(Roe, Tr. 1812-1813; Weerts, Tr. 4501, *in camera*, 4512, *in camera*)

Moreover, any evidence of foreign entry must be "responsive to the localized sales opportunities," i.e., in North America. (Merger Guidelines at § 3.4) While proposing numerous findings of fact regarding Asian battery manufacturers,

[24] (*See, e.g.,* CCRF ¶¶ 977-1051)

Id. Such evidence does not show that such manufacturers could successfully enter the North American market.

RX00061,

(PX0907, *in camera* (Kung, Dep. 262-263));

(*id., in camera* at 153-156 **;**

[24] RFOF ¶¶ 1020, 1022.

(Axt, Tr. 2220, *in camera*; *see* also CCFOF ¶¶ 947-949, 966; CCRF ¶ 991)

3. Entry By Customers is Unlikely.

Daramic's repeated mantra that the relevant product markets have "power buyers" is unsupported. (*See* CCRF ¶ 478; PX0265 at 008, *in camera* Even according to Daramic's documents, it is the (*See id.*; PX0265 at 004 and 007-008, *in camera* ; PX0204 at 001) Daramic's negotiations and contracts with customers confirm that, in fact, Daramic has (CCRF ¶ 478; PX0265 at 011, *in camera*) (*See* CCFOF ¶¶ 1037-1043)

C. Entry Will Not Be Sufficient.

Any entry will not be sufficient to overcome the anti-competitive effects of the acquisition. Daramic argues that a sufficient entrant only needs to supply the separators made by one small PE production line in North America, rather than the five to six lines Microporous had. (RB at 32) Entry, however, "must be able to restore competitive pricing" by permitting the new entrant to "compete on the same playing field as [Daramic]." *Coca-Cola,* 117 F.T.C. at 953, 960; *Chicago Bridge,* 534 F.3d at 430. That is what Microporous was doing, and that is what Daramic feared. Microporous was competing aggressively in ***all*** of the relevant product markets. (CCFOF ¶¶ 324-747) Entry sufficient to restore competition in all these markets must restore this competitive environment. Daramic has not shown that any competitor is likely to enter the

North American market and compete on an equal playing field as Microporous had. (CCB at 39-41)

IX. Daramic Has Not Shown That Efficiencies Justify the Anti-Competitive Merger

Daramic argues an efficiencies defense. (RB at 44) Due to the high concentration in the relevant markets, Daramic would need to show "extraordinary efficiencies" to prevent the merger from being anti-competitive. Merger Guidelines, § 4 ("When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary"); *see also* *Heinz,* 246 F.3d at 720 ("the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies, which the appellees failed to supply."). Daramic has failed to do so. Even Daramic's expert did not argue an efficiencies defense. (Kahwaty, Tr. 5249-5250, *in camera*)

In addition, efficiencies claims cannot be "vague or speculative." Merger Guidelines, § 4. But a claim of "approximately [redacted] (RB at 45), is by its very language both vague and speculative. Indeed, the Court excluded evidence on this point because Daramic failed to produce specific information on this claim. (CCFOF ¶ 1056) These unverifiable efficiencies should not be considered. *See* Horizontal Merger Guidelines § 4 (Because efficiencies "are difficult to verify and quantify," respondent must provide proof sufficient to verify "the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.")

Even if Daramic's evidence of the existence of efficiencies were sufficient, the defense still fails. [redacted] (RB at 45-46) Such savings are not a cognizable efficiency in a merger analysis. *See* Kahwaty, Tr. 5253-5254, *in camera* [redacted]

; *accord* 4A Phillip Areeda et al., Antitrust Law, par. 975i (2006) ("there seems little room for a defense alleging size economies in procurement"); *FTC v. Staples, Inc*., 970 F. Supp. 1066, 1090 (D. D.C. 1997) (Rejecting defense); *Arch Coal*, 329 F. Supp. 2d at 152.

The asserted efficiencies also must be "merger-specific," i.e., "they must be efficiencies that cannot be achieved by either company alone, because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 721-722; *see also* Merger Guidelines § 4. Daramic's claims of efficiencies by improving the production techniques at Feistritz and Piney Flats are not "merger -specific." Daramic does not explain why Microporous could not have achieved these efficiencies itself, without the acquisition. (*See, e.g.*, Hauswald, Tr. 1166 (stating that people are available on the market to help improve production efficiencies)) Thus, Daramic has not proven that these efficiencies are merger specific. *See Heinz*, 246 F.3d at 722 (holding that Heinz failed to explain why its claimed efficiencies could not be achieved without the merger). There is also no evidence that customers here benefitted from these efficiencies [25] or that they have completely countered the anti-competitive effects of the acquisition. *See CCC Holdings*, 605 F. Supp. at 72-74; *Univ. Health*, 938 F.2d 1218 n.24; *Heinz*, 246 F.3d at 720.

"Cognizable efficiencies [in a merger analysis] are assessed net of costs produced by the merger or incurred in achieving those efficiencies." Merger Guidelines, § 4.

(CCFOF ¶¶ 1053, 1051-

[25] Efficiencies did not result in

(RB at 46; see CCRF ¶ 560)

(*See* CCRF ¶ 560)

1057 (lack of efficiencies evidence)) In sum, Daramic's efficiency defense wholly fails to rebut Complaint Counsel's strong prima facie showing of anti-competitive effects.

X. Daramic's Rebuttal Related to Microporous' Viability Also Fails

Daramic admits it does not argue a failing firm defense. However, Daramic argues that Microporous' financial condition indicates that it might have failed. (RB at 47 -52) But there is no reason why this defense should not follow the requirements of a failing firm defense, and Daramic cannot prove it. *Chicago Bridge*, 138 F.T.C. at 1366-68. [26] In particular, Daramic cannot prove that no other entity would buy Microporous. *Id.*; *Arch Coal*, 329 F. Supp. at 156.

(RB 47-49)

(CCFOF ¶¶ 1045-1046)

Microporous also felt it would have no problem filling the SLI line with demand from some of the numerous battery manufacturers in Europe. (Gilchrist, Tr. 344-347)

(CCFOF ¶ 1047)

Daramic's argues that Microporous had low margins.

See PX1450, *in camera*

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[26] To the extent Daramic's argument relies on *Arch Coal*, its should be noted that the court there emphasized that "financial weakness" is probably the weakest ground of all for justifying a merger" and "certainly cannot be the primary justification for permitting one." *FTC v. Arch Coal*, 329 F. Supp. 109. 154 (D.D.C. 2004), quoting *FTC v. Warner Comm., Inc.*, 742 F.3d 1156, 1164 (9th Cir. 1984). Notably, the court required a showing that an alternative buyer was not available, which is in accord with *Chicago Bridge*. *Arch Coal*, 329 F. Supp. at 156; *Chicago Bridge*, 138 F.T.C. at 1367-1368.

(RB at 35)

(Gilchrist, Tr. 344, 403, 507; Trevathan 3562, 3569, 3750)

(RFOF ¶ 422) Daramic's' margins are not typical. Perhaps Daramic has simply become accustomed to the anti-competitive pricing it achieves due to a lack of competition in the product markets.[27]

Finally, the documents cited by Daramic also do not support a "financially frail" Microporous, as Daramic claims. The documents merely show that Microporous' investors were interested in trying to improve financial performance – not the company's viability. The investors were also taking steps to improve the company's production efficiency, to provide better financial performance. (*See, e.g.*, RX00244) (Gilchrist, Tr. 344, 403, 507, *in camera*; Trevathan, Tr. 3659, 3750)

Nevertheless, it seems strange that Microporous has, in Daramic's view, performed below par only after Daramic got its hands on it. (RX01227 at 021-022, *in camera*) This is exactly the kind of case in

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[27] (PX0395 at 040-041, *in camera*)

which such post-acquisition evidence proffered by Daramic should not be given any credence. *Chicago Bridge*, 534 F.3d at 435 (Explaining that post-acquisition evidence that can be controlled by defendant should be given little weight); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986) ("Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight.").

Daramic also does not explain why ***only it*** can operate Microporous profitably. If Daramic is right that battery manufacturers will sponsor a new entrant (RB at 35-37), it would seem logical that they would support an independent Microporous, which is the only qualified vendor in North America that would not need years of design, testing, and qualification. In short, Daramic's so-called defense makes no sense and is not supported by the law. In any case, if Microporous was in any way weakened by the economy (or more likely by Daramic), it is even more imperative that it be given back all of the assets that it once had, so that it has the same chance of success that it had before.

XI. Daramic's Monopolization and Attempted Monopolization

Complaint Counsel's post-trial brief extensively laid out the evidence adduced at trial of Daramic's monopolization and attempted monopolization, (CCB at 50-63), and unreasonable restraints of trade, (CCB at 63-68), in violation of the Sherman Act § 2. The evidence throughout the trial showed that Daramic wielded power over its customers, including threatening to cut off supply in order to obtain long-term exclusive contracts. Such behavior is not indicative of a competitive market.

A. Daramic Possessed Monopoly Power.

Courts "typically examine market structure in search of circumstantial evidence of monopoly power." *United States v. Microsoft*, 253, F.3d 34, 51 (D.C. Cir. 2001). "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 by entry barriers." *Id.* (citing *Rebel Oil*, 51 F.3d at 1434). Pre-acquisition, Daramic possessed [redacted] of the UPS and over [redacted] of the motive markets, and both were markets protected by high entry barriers. (*See* PX33 at 42, 17) Post acquisition, Daramic still possesses a monopoly in both of these markets. Daramic asserts that Complaint Counsel must show direct proof that it had the power to control process or to exclude competition in order to demonstrate market power. (RB at 51-53) Like *Microsoft*, Daramic has no authority for this proposition. *See Microsoft*, 253 F.3d at 57. But Complaint Counsel has offered significant direct evidence here. (CCFOF ¶¶ 1059-1166)

B. Monopoly Conduct

Daramic's conduct, as evidenced by its contemporaneous documents, show that it had the ability to discipline customers who sought supply from other producers. By threatening to cutoff customers from supply, when only Daramic had the necessary capacity to supply them, it forced customers into exclusionary contracts. These contracts foreclosed Microporous from securing contracts for future sales, which would enable it to expand its capacity.

In analyzing anticompetitive conduct, courts first require that the plaintiff make a prima facie case that the monopolist's conduct has an anticompetitive effect. *Microsoft*, 253 F.3d at 58. The monopolist must then come forward with a "procompetitive justification" for its conduct. *Id.* The plaintiff may then "rebut that claim" or show "that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* Complaint counsel has made a prima facie case that several of Daramic's actions resulted in anticompetitive effects. (*See* CCB at 58-61).

1. Withholding Supply

Daramic explains its negotiation tactics as [redacted] even when using a pretextual force majeure to prevent customers from receiving their supplies. (RB at 53) These explanations do not provide procompetitive

justifications for Daramic's conduct.

(Axt, Tr. 2146, *in camera*) In response, Daramic decided to "play hard ball." (PX0456 at 001-002) Using as pretext a materials shortage in Europe which did not affect U.S. materials supply, Daramic notified EnerSys that it would supply it with only 10-20% of its separator requirements, while promising to provide other North American customers with 90-100%. (PX1207; PX0487) Daramic made this threat even though, contractually, it was required to maintain three to four weeks of inventory for EnerSys. (PX0480 at 001) When EnerSys expressed alarm at the low allocation, Daramic simply responded that the low allocation was "based on demand vs supply." (PX1208) This was obviously untrue, because Daramic fully supplied other customers in North America and covered whatever shortage it had. (*See* CCB at 56-57; CCFOF ¶¶ 1111-1116)

(Axt, Tr. 2128-2129, 2146, *in camera*, 2148, 2166; *see also* CCFOF ¶ 1156) (CCFOF ¶ 1151; PX1266 (EnerSys tried to buy Darak to substitute but was told it had a 6 week lead time).

(PX1211 at 002, *in camera*) Daramic "held a gun" to its head, EnerSys signed the contract, the force majeure just "went away," and EnerSys had all the supply it needed. (Craig, Tr. 2562 -2563,

2570) ██████████████████████████████

██████████████████████████████ (Axt, Tr. 2148, *in camera* ; *see also* CCFOF ¶¶ 1158, 1160) ██████████████ ██████████████████████████████ ██████████████ (*See* CCFOF ¶¶ 1156-1160) Daramic used its monopoly power in motive separators to extract an exclusive contract with EnerSys which directly prevented EnerSys from switching to a lower priced competitor.

Directly on point is *Microsoft*. In that case, Microsoft understood that Apple needed continued support of its Mac Office suite of applications, used by 90% of Mac OS users. *Microsoft*, 253 F.3d at 73. Microsoft's Chairman Bill Gates wanted Apple to use Microsoft's Internet Explorer web browser in all of its computers, but Apple at the time installed Netscape as its default browser. *Id.* In order to coerce Apple to use Internet Explorer, Mr. Gates called Apple's CEO and threatened to cancel future support of Mac Office. *Id.* Shortly thereafter, Microsoft and Apple reached an agreement pursuant to which Microsoft would continue supporting Mac Office for five years, and Apple agreed to install Microsoft's browser, Internet Explorer, on its computers and encourage its use. *Id.* The court held that Microsoft's dealings with Apple violated the Sherman Act by excluding Netscape's browser with no pro -competitive justification.

Similarly here, Daramic's outrageous behavior establishes a strong prima facie case under Section 2. *See Microsoft*, 253 F.3d at 58-59. Daramic must come forward with a procompetitive justification. *Id.* at 59. But Daramic's claimed justification is simply not a procompetitive justification – its conduct "serve[d no] purpose other than protecting its . . .

monopoly." *Microsoft*, 253 F.3d at 67; RB at 54. [28]

(Craig, Tr. 2570; CCFOF ¶ 1154) Indeed, it was admittedly a (Gilchrist, Tr. 414, 621, *in camera*; CCFOF ¶ 1146) Daramic's CEO threatened to cut off supply unless EnerSys signed the contract. (Craig, Tr. 2556-2559) Daramic's existing contract with EnerSys had required it to maintain a 3-4 week supply for EnerSys' use; a force majeure should not have had any effect on EnerSys for weeks. (PX0480 at 001); *see also Microsoft*, 253 F.3d at 59 (holding that monopolist's precompetitive justification must be "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal"). Complaint Counsel's evidence therefore soundly rebuts Daramic's pretextual justifications.

(*See* CCFOF ¶ 1064 (**{"no mercy"}**); CCFOF ¶ 1108 (threatening to cutoff supply to JCI in Europe in 2004 if a contract was not signed); CCFOF ¶ 1109 .[29]

2. Market Share Discounts Helped Daramic Maintain Its Monopoly.

(RB at 53)

[28] Again, Daramic cites a case that wholly fails to support the proposition. The case cited, *Cliffstar Corp. v. Riverbend Products, Inc.* , solely states that whether an allocation is fair and reasonable under the U.C.C. is a jury question, without addressing whether it might be illegal under the antitrust or any other laws. 750 F. Supp. 81, 87 (W.D.N.Y. 1990).

[29] (CCFOF ¶ 446-460)

(CCRF ¶ 591)

(CCFOF ¶ 1075).[30]

(*See* CCFOF ¶ 1072; CCRF ¶ 596)

(CCFOF ¶ 1074)

3. Exclusive Contracts

Complaint Counsel has shown the exclusionary effect of Daramic's exclusive contracts. (See CCB at 59-61; CCFOF ¶¶ 1155-1160) In defense of Daramic's numerous exclusive contracts, Daramic does not put forth any precompetitive justification and thus fails to rebut Complaint Counsel's prima facie case. (RB at 53-54) Instead, Daramic argues (1)

[31] (2)

[30] (CCFOF ¶ 1075; PX1028 at 059)

[31] **RX00983, *in camera*** (RX00957 at 001, *in camera*, and 002) a document that is simply not in evidence, RX00965.

and (3) These arguments fail.

The correct legal standard is whether the foreclosure is sufficient to impair the competitive effectiveness of the monopolist's rivals. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 454-55 (1922). Daramic's exclusive contracts directly impaired the competitive effectiveness of its rivals, most clearly, Microporous. (*Id.*; *see* CCB 60-61)

In these product markets, new capacity was typically built to satisfy customer demand. Thus, Daramic's exclusive contracts had the direct anticompetitive effect of preventing Microporous from having the necessary purchase commitments to expand its plants.

CCFOF ¶¶ 1115, 1118)

(CCFOF ¶ 1155)

(CCFOF ¶¶ 1156-1160; Simpson, Tr. 3232-3233, *in camera*)

(CCRF ¶ 1392)

(*Id.*) This prevented Microporous from achieving the commitments necessary to compete effectively. Moreover, this level of fo reclosure is

significant. *Microsoft*, 253 F.3d at 68 (Microsoft required internet access providers to keep shipments of Netscape's browser under 25% which was illegal). It is disingenuous for Daramic to argue today that its contracts were not exclusionary because Microporous did not have the capacity to satisfy those contracts, (*see* RB 53-54), when it was Daramic's monopoly conduct itself that caused Microporous not to have that capacity available.

Finally, numerous Daramic documents indicate its intent to monopolize the North American motive market, and maintain its duopoly in the SLI market. (*See* CCB at 62) [redacted] (RB at 21), [redacted] [redacted] (RB at 53)

XII. Daramic's Agreement With H&V Was an Unreasonable Restraint of Trade.

As explained in Complaint Counsel's opening brief, the only issue with respect to Daramic's agreement not to compete with H&V is whether the agreement unreasonable restrains competition. (*See* CCB at 65) Daramic argues that it did not for three reasons: (1) because Daramic and H&V were not interested in competing in each other's markets; (2) that the non - compete was ancillary to a legitimate sales joint venture between the parties; and (3) [redacted] [redacted] [redacted]. These arguments are without merit.

Regarding Daramic's first argument, the weight of the evidence proves that [redacted] [redacted] its agreement not to compete with Daramic. (CCFOF ¶¶ 1168-1181). H&V testified that it is "always looking for opportunities to provide other types of separator [other than AGM] to the industry," including PE battery separators. (PX0925 (Porter, Dep. at 37)) In addition, contemporaneous evidence proves that Daramic had plans to produce AGM separators prior to the Agreement. (RX00366, (Daramic had made "3 serious efforts for entering AGM" prior to March 2000). As the result of

the agreement, Daramic has not developed its own AGM separator and has been relegated to having to develop a "me too" product which is not AGM in order to compete. (PX0035 at 002) Daramic also has been prevented from purchasing an AGM separator manufacturer to compete in the market. (PX0169 at 001)

Similarly, Daramic's argument that its agreement was ancillary to its joint venture for sales and marketing is unsupported by the evidence. In addition, Daramic's general manager explained the true, anticompetitive purpose of the agreement in an internal email:

> A few years ago, **H&V announced that they want to go into the PE** business, and plan to make an acquisition (it was Exide) or build their own plant.
> **In order to stop them, we made a written agreement with them**, through a partnership, saying that:
> - we will work together where ever possible
> **- they will not go in the PE business**
> **- we will not go in the glass business (AGM)**

(PX0169 at 001 (emphasis added); CCFOF ¶ 1181) The pretextual nature of the agreement is evident.[32] The agreement [REDACTED] (PX0035 at 006; CCFOF ¶¶ 1186, 1196) [REDACTED] (RB at 57-58) [REDACTED] (PX0094 at 007-008, *in camera*; CCFOF ¶ 1195)

[REDACTED] (RB at 57) [REDACTED]

[32] Similarly, Daramic repeatedly stated over a period of six years, that its purpose for acquiring Microporous was to eliminate competition. (CCFOF ¶¶ 646-659) [REDACTED] (PX2124 at 002, *in camera*)

In sum, there is no justification to allow Daramic's non-compete to continue for the next five years, especially when the supposed H&V joint venture has ended.

XIII. Complaint Counsel's Proposed Relief is Proper and Designed to Ensure Effective Relief for Respondent's Violations

Respondent argues that Complaint Counsel's recommendations regarding relief are overbroad, inappropriate and punitive. (RB at 58-70; RFOF ¶¶ 1133-1158, 1294-1301, 1399-1414; RCOL ¶¶ 1541-1547) Attempting to support its arguments, Respondent misapplies or misstates the law on remedy and distorts the record facts.

The Commission's long-standing benchmark for divestiture relief is that it must "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." *In re B.F. Goodrich*, 110 F.T.C. 207, 345 (1988). In this case, complete and effective divestiture relief is needed to restore the competition that was lost as a result of Daramic's acquisition of Microporous. Effective relief is also needed to prevent Daramic from undermining the newly-reconstituted competitor ("Newco") post-divestiture through the kinds of coercive tactics and illegal conduct that enabled it to first weaken Microporous as an emerging competitive threat, and then eliminate it through the acquisition. Every element of Complaint Counsel's recommended relief is designed to restore competition, enjoin Daramic's illegal conduct and remedy the adverse effects of Daramic's violations. (*See* CCB at 70-78, and Proposed Order)

A. Every Element of Complaint Counsel's Recommended Divestiture Relief is Supported by Established Law and the Facts of this Case.

Respondent asserts that the divestiture and ancillary relief Complaint Counsel seeks is overbroad. In particular, Respondent opposes divestiture of the Feistritz, Austria facility ("Feistritz Plant") and the entire Piney Flats, Tennessee complex, including all production lines for CellForce, PE, Ace-Sil and Flex-Sil separators ("Piney Flats Plant"). (RB at 59, 68-70)

As the Supreme Court has made clear, however, "**[c]omplete** divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor Co. v. U.S.*, 405 U.S. 562, 573 (1972) (emphasis added).[33] Indeed, that is what the law requires. 21 U.S.C. §21(b). Consistent with this standard, this Court in *Chicago Bridge* ordered complete divestiture of what CB&I acquired – both the former PDM Engineered Construction Division, which made the relevant products, and its former Water Division, which made products outside the relevant markets. *In re Chicago Bridge & Iron Co.,* 138 F.T.C. 1024, 1375-1376 (2003). Citing *Olin,* in which the Commission ordered divestiture of a facility that manufactured both a relevant product and a product outside the relevant market,[34] this Court held that divestiture of closely interrelated business operations was appropriate to "ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success." *Id.* On appeal, the Commission agreed: "no evidence to suggest that a smaller set of assets than those illegally acquired by CB&I will suffice to restore competition, and what we know with certainty is that this combination of assets has made a saleable package in the past." *Chicago Bridge*, 138 F.T.C. 1024, 1164 (2005); *aff'd Chicago Bridge*, 534 F.3d 410 (2008).

The pre-acquisition Microporous consisted of integrated business operations, interrelated production lines and other assets that together comprised an autonomous, stand-alone business unit. At the very least, appropriate divestiture relief should replicate the pre-acquisition Microporous as completely as possible to restore the competition lost through the acquisition.

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[33] *See In re Fruehauf Corp.*, 91 F.T.C. 132, 240 (1978) ("[A] strong presumption favors total divestiture . . . as the surest means of accomplishing" the objective "of restoring the acquired entity as a viable competitor."); *In re Fruehauf Corp.,* 90 F.T.C. 891, 892 n.1 (1977) ("[A] presumption should favor total divestiture" versus partial divestiture in merger cases, and "the burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found."); *In re RSR Corp.*, 88 F.T.C. 800, 893 (1976), *aff'd, RSR Corp. v. FTC*, 602 F. 2d 1317 (9th Cir. 1979) ("Ordinarily, a presumption should favor total divestiture.").
[34] *Olin Corp.*, 113 F.T.C. 400, 619-620 (1991).

Accordingly, Respondent must divest ***everything*** Daramic acquired, including the Feistritz Plant and the entire Piney Flats Plant. Complaint Counsel's Proposed Order provides for just that. (CCFOF ¶ 1197; Proposed Order ¶¶ I.AA, II.).

Divestiture relief must also be ***effective*** to fully restore pre-acquisition competition, for "if the Government proves a violation but fails to secure a remedy adequate to redress it," it has "'won a lawsuit and lost a cause.'" *du Pont*, 366 U.S. at 323-24. Accordingly, the Supreme Court has instructed that "[t]he relief which can be afforded" from an illegal acquisition "is not limited to the restoration of the *status quo ante* . . . [but] must be directed to that which is 'necessary and appropriate in the public interest to *eliminate the effects* of the acquisition offensive to the statute.'" *Ford Motor Co.*, 405 U.S. at 573 n.8; *accord Chicago Bridge,* 138 F.T.C. at 1164-1165. To ensure that the divestiture will be effective, Complaint Counsel's Proposed Order provides for appropriate ancillary injunctive relief. (*E.g.,* Proposed Order ¶¶ II.D-F, VI, VII).

B. Under The Relevant Remedial Standards Correctly Applied To The Facts Of This Case, Complaint Counsel's Proposed Divestiture Relief Is Appropriate.

Respondent makes three general arguments regarding the scope and propriety of the proposed remedy that distort the facts and misapply the standards for relief.

First, Respondent contends that appropriate relief should take into account what Microporous would look like today if it had not been acquired because it "was in a precarious financial position at the time of acquisition and its survival far from clear." (RB at 59, 64-66; RFOF ¶¶ 1142-1143; RCOL ¶ 1543). The record does not support such a claim. [35] [redacted]

[redacted]

[redacted], and (Gilchrist, Tr. 344,

[35] This affirmative defense was never raised in Daramic's answer and was waived, but more importantly it is contrary to the facts.

403, 507, *in camera*; Trevathan, Tr. 3562, 3659, 3750 (If the Daramic deal had not happened, Microporous was "on track to improve ... profitability"). (RB at 35, *citing* RFOF ¶ 300; Riney, Tr. 4962, *in camera*) Microporous certainly was not a failing company.

However, to the extent that Microporous was profitable, but weakened, this was caused by Daramic's pre-acquisition and post-acquisition conduct. (CCFOF ¶¶ 1089-1094, 1101-1103). For several years prior to the acquisition, Daramic engaged in a relentless campaign to undercut and eliminate the emerging competitive threat to its battery separator business posed by Microporous. (CCB at 7-11, 50, 55-60; CCFOF ¶¶ 1089-1090, 1101-1103) (RX 1227 at 021-022, *in camera*; Riney, Tr. 5058, *in camera* In any case, Microporous relative performance is now within Daramic's control, and any evidence related thereto must be viewed skeptically. *See Chicago Bridge,* 534 F.3d at 435 (post-acquisition evidence that can be controlled by defendant should be given little weight); *Hosp. Corp. of Am.,* 807 F.2d at 1384 (same).

Having first weakened Microporous, then eliminated it as a competitor through the acquisition, Daramic is in no position to insist that this Court make allowances for the very conditions Daramic helped create and is now exploiting. [36] Accordingly, Paragraph VI of the Proposed Order requires Respondent to allow customers to reopen and renegotiate or terminate,

[36] Daramic shows real chutzpah here. "Chutzpah" is when "a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." *Motorola Credit Corp. v. Uzan,* 561 F.3d 123, 128 n.5 (2d Cir. 2009).

without penalty, the exclusive contracts they were forced to sign with Daramic (CCB at 77-78; CCFOF ¶ 1218), and Paragraph VII contains injunctive prohibitions designed to prevent Daramic from similarly undermining the viability of Newco post-divestiture. [37] (CCB at 77). Respondent's professed concern that divestiture of the Feistritz Plant may create viability issues for the Newco (RB at 64-65; RFOF ¶¶ 1143-1144), will be adequately addressed through the process by which the Commission supervises divestitures to ensure, among other things, that the acquirer will have sufficient financial means to operate the Newco and maintain its competitive viability in the relevant markets.[38]

Second, Respondent states that the divestiture and other relief in this case "should be fashioned giving consideration to post-transaction developments and market conditions at the time the relief is ordered." (RCOL ¶¶ 1545-1546). It is unclear what Respondent means by this. Elsewhere Respondent refers to the current economic downturn, (RB at 59-60), but fails to explain why relief should not be directed to make Newco stronger not weaker. The current economic downturn suggests an acquirer will likely need *all* of the revenue potential represented by a Newco that fully restores Microporous' premerger stand-alone business to the same competitive state in which it had been. This is consistent with the common sense approach taken by the Commission in *Chicago Bridge* when it ordered divestiture of everything CB&I acquired, including the water tank assets.

The *Goodrich* case is on point. *In re B. F. Goodrich*, 110 F.T.C. 207 (1998). In that case the consummated merger occurred during the period of severe economic recession in the early 1980s. *In re B.F. Goodrich* , 110 F.T.C. 207 (1988). The parties in *Goodrich* argued that the

[37] These provisions are similar to the kinds of provisions ordered by the district court in *U.S. v. Dentsply Int'l Inc*. on remand from the Third Circuit, No. 99-005, 2006 U.S. Dist. LEXIS 94907 (D. Del. 2006), and are tailored to the facts and the record in this case.
[38] *See* Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (2003), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm.

challenged merger had no anticompetitive effects because profitability was low and there was substantial excess capacity due to the recession. However, the Commission held that the post-merger performance evidence resulting from "the dramatic effects of the recession" did not rebut the presumption of anticompetitive effects based on the structural case. *Id.* at 343-344. The Commission found that despite the recession, the manufacturers were in "a strong position to control the price and terms under which these materials are purchased" and "to demand prices resulting in high profits for themselves regardless of the conditions" of the market in which their customers competed. *Id.* Thus, the Commission ordered Goodrich to divest the plant that it had acquired in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act. *Id.* at 345. Here, too, the structural and conduct evidence overwhelmingly support an order for complete divestiture of what Respondent acquired and for other appropriate relief, regardless of current economic conditions.

Finally, Respondent suggests that Complaint Counsel's proposed relief is punitive. (RB at 59-61, 68-69). However, the mere fact that effective divestiture and other relief may impose some costs on the violator is not relevant: "[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *du Pont*, 366 U.S. at 326-27. In this case, Daramic does not explain how any of the relief could be considered as punitive. Indeed, the relief is necessary to undo the compet itive harm that Daramic deliberately caused.

C. Every Element Of Complaint Counsel's Proposed Divestiture Remedy Is Necessary To Restore Competition.

1. Divestiture Of The Feistritz Plant Is Proper And Necessary.

Respondent presents an array of arguments opposing any divestiture of the Feistritz Plant. (RB at 62-66; RFOF ¶¶ 1133-1149, 1400-1401) These arguments are without merit.

Respondent's claim that the Commission cannot order divestiture of the Feistritz Plant because it is outside the Commission's jurisdiction (RB at 62-63; ¶¶ RFOF 1133-35) is wrong as a matter of law and on the facts of this case. The jurisdictional scope of Section 7 of the Clayton Act, and the Commission's authority under that Act,[39] extend to transactions between companies engaged "in commerce *or in any activity affecting* commerce,"[40] and relief for Section 7 violations can properly reach foreign firms and assets.[41] *See, e.g., U.S. v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd per curiam*, 385 U.S. 37 (1966) (upholding order in Section 7 Clayton action requiring divestiture by U.S. firm of its interest in a Canadian firm). The Commission's authority under Section 5 of the FTC Act extends to unfair methods of competition "in *or affecting* commerce,"[42] and is coextensive with the outer boundaries of the Commerce Clause.[43] Accordingly, courts have upheld the Commission's authority to order

[39] Section 7 applies to "person[s] subject to the jurisdiction of the Federal Trade Commission." 15 U.S.C. § 18

[40] Under the Clayton Act, commerce encompasses "trade or commerce among the several States and with foreign nations." 15 U.S.C. § 12.

[41] Respondent's reference to the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, is inapt (RB at 63 n. 12). The FTAIA did not amend the Clayton Act, nor does it limit the Commission's authority under the Clayton Act to order divestiture of foreign assets in an appropriate case, including the Feistritz Plant in this case.

[42] Under the FTC Act, commerce is defined to include "commerce...with foreign nations." 15 U.S.C. § 44.

[43] The extraterritorial application of the Commission's authority under § 5, however, is irrelevant here, as the Complaint challenges Polypore's acquisition combining two U.S. firms operating in the U.S., and the effects of its domestic conduct. Section 5(a)(3)(A) of the FTC Act may apply in cases involving *foreign* conduct and *foreign* commerce, but it does not limit the Commission's authority in this case. *F. Hoffmann-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004), which is cited by Respondent (RB at 63 n. 12), is also inapplicable. *Empagran* involved an attempt by foreign, private plaintiffs to bring claims in the U.S. under §1 of the Sherman Act. The Supreme Court found the FTAIA barred the foreign plaintiffs' claims because the foreign effects were ***independent*** of the United States. But the Court made it clear that the ***"government"*** is ***not precluded from doing so***. *Id.*, 542 U.S. at 168.

divestiture of non-U.S. assets and injunctive relief against foreign companies in cases involving conduct occurring outside the United States.[44]

More importantly, however, Respondent misstates the essential facts relevant to the Commission's proper exercise of its jurisdiction in this case, which involves neither a foreign corporation nor a foreign transaction. The Complaint challenges the acquisition by Polypore, a U.S. company engaged in U.S. commerce, [45] of the stock of Microporous, a U.S. company engaged in U.S. commerce.[46] The Commission's authority to order Polypore to perform actions or to cease and desist from actions, including outside the United States, is based on its personal jurisdiction over Polypore and subject matter jurisdiction over the challenged acquisition under the Clayton and FTC Acts. Respondent even admits (Answer, at 1-3) all of the relevant jurisdictional facts needed to support an order against Polypore to divest what it acquired when it bought 100 percent of the stock of the Microporous Holding Company which owns Microporous L.P., which in turn owns Microporous GmbH in Austria, and for appropriate injunctive relief. Complete divestiture relief, including the Feistritz Plant, can be accomplished through the Proposed Order's requirement that Polypore divest "Microporous," defined to include its subsidiaries, Microporous Products L.P. and Microporous Products, GmbH (formed to hold the Feistritz Plant),[47] to reflect Microporous' pre-acquisition business operations and assets and post-acquisition additions and improvements. (*See* Proposed Order ¶¶ I.AA., II.).

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[44] *See, e.g., In re Brunswick Corp.* , 94 F.T.C. 1174, *aff'd sub nom. Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981) (Commission's authority to order a U.S. company to divest its stockholdings in a foreign company); *FTC v. Mylan Laboratories, Inc.* , 62 F. Supp 2d 25 (D.D.C. 1999) (Commission's authority against foreign co-conspirator).

[45] Polypore is Delaware corporation headquartered in North Carolina. (PX2160 at 006, 024)

[46] Microporous Products, L.P. is a Delaware corporation qualified to do business in Tennessee. (RX01227 at 089, *in camera* (Stock Purchase Agreement))

[47] Respondent's claim that the Feistritz Plant was not owned by Microporous Products L.P. is incorrect. (RB at 62; RFOF ¶ 1136) The Feistritz Plant was owned by Microporous Products GmbH, which in turn was wholly owned by Microporous Products, L.P. (*See* RX01227 *in camera*, at 089, 091 (Stock Purchase Agreement))

In a related argument, Respondent contends that because the Feistritz Plant is located outside the North American geographic market, it should not be divested because Complaint Counsel has not shown that products made there "enhanced North American (or United States) competitive conditions." (RB at 62-63; RFOF ¶¶ 1138-1139, 1141, 1145-1150, 1400) First, Respondent erroneously conflates the standards for establishing § 7 ***liability*** (*i.e.,* proof of a relevant geographic market) with the separate and distinct standards for ***remedy*** that apply once a violation of Section 7 of the Clayton Act has been established. As the Supreme Court in *du Pont* made clear, "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." 366 U.S. at 334. Thus, the Commission has ample authority to order complete divestiture, including the Feistritz Plant, consistent with a finding of violation in a North American geographic market.[48]

Divestiture of the Feistritz Plant is necessary to restore the competitive scope and scale that Microporous had before Daramic's illegal acquisition, and would have had but for Daramic's wrongful conduct. (CCB at 71-75) The Feistritz Plant is critical to assuring that the acquirer will have the "global footprint" demanded by large customers in the North America market so that Newco can compete effectively for the business of those customers against Daramic and Entek, both of which have a global footprint. (*See, e.g.,* CCFOF ¶¶ 1206-1207; Hauswald, Tr. 722, 726-727, 807, *in camera*

[48] *In re Union Carbide Corp.*, 59 F.T.C. 614, 658-59 (1961) ("This is not to say that a finding of proscribed effects in all lines of commerce in which the acquired corporation is engages is a necessary prerequisite to an order of total divestiture. The Act is violated if the forbidden effect or tendency occurs in any line of commerce. And once a violation has been found, the entire acquisition is subject to a divestment order."); *RSR Corp. v. FTC*, 602 F.2d 1317, 1326 n.5 (9th Cir. 1979) (requiring divestiture of plant not involved in the product market).

[REDACTED]. An effective divestiture must also restore a competitor that can provide customers with the security of supply they demand. (CCB at 72; CCFOF ¶¶ 1212-1215) The Feistritz Plant is needed to provide the acquirer with backup capacity at an alternative location in case of a supply disruption at the Piney Fl ats Plant. (Gillespie, Tr. 2992-2993 (lessons from the Daramic strike); Gaugl, Tr. 4602 ("continuity of supply" important); CCFOF ¶¶ 1208-1209, 1216) Finally, the Feistritz Plant is needed so that the acquirer will have a sufficient scale of operations to serve the large customers [REDACTED] (Gillespie, Tr., 3052-3053; Gillespie, Tr. 2129-2131, *in camera*; Simpson, Tr. 3225-3226, *in camera,* 3229, *in camera,* 3233, *in camera* (citing PX0241, *in camera*)) [REDACTED] (Axt, Tr. 2129)

Finally, Respondent asserts that the Feistritz Plant should not be included in any divestiture because it was somehow "not part of the acquisition" insofar as it was "not in operation as of February 29, 2008." (RB at 62-63; RFOF ¶¶ 337, 1134, 1140) This argument grossly distorts both the facts and the case law. It is undisputed that the Feistritz Plant was owned by Microporous, and the record establishes that its construction was complete, it was capable of producing product, and it was less than a week away from full operational status when Daramic acquired Microporous. (Gilchrist, Tr. 309, 334-335; Gaugl, Tr. 4601-4603, 4626) Moreover, the cases cited by Respondent do not support its argument. Rather, the cases support the proposition that divestiture of a plant that becomes operational post-acquisition is proper where it is "the fruit of the acquisition," [49] as the Feistritz Plant clearly is. *See Chicago Bridge,*

[49] *See Reynolds Metals Company v. Federal Trade Commission* , 309 F.2d 223, 230 (D.C. Cir. 1962) (plant built after the acquisition); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222-23 (N.D.N.Y. 1978) (Department of Justice acted within its authority in agreeing to a settlement that did not include theaters constructed after the acquisition at issue); *United States v. Ford Motor Co.* , 315 F. Supp. 372, 379-380 (E.D. Mich. 1970) ("The Shreveport plant was

138 F.T.C. 1165 (divesting after-acquired contracts). Ultimately, however, the operational status of the Feistritz Plant is irrelevant because the acquisition was structured as a stock deal that covered all assets held by Microporous Holding Company and its subsidiaries, including the Feistritz Plant. *See* (RX01227 (Stock Purchase Agreement, *in camera*), at 010, 012, 018, 026-027, 100-103) Under 15 U.S.C. § 821(b), the stock must be "divested."

2. Divestiture Of The Entire Piney Flats Plant, Including The Ace-Sil And Flex-Sil Lines, Is Necessary For Effective Relief.

Respondent's assertion that "Complaint Counsel cannot obtain complete divestiture unless it ***proves*** that such a remedy would be necessary to restore the competition allegedly lost through the acquisition," (RB at 61) (emphasis in original) is simply wrong. Indeed , "a strong presumption favors total divestiture of the unlawfully acquired entity as the surest means of accomplishing" the objective "of restoring the acquired entity as a viable competitor in the markets in which competition has been restrained," *Fruehauf*, 91 F.T.C. at 240, and "the burden rests ***with respondent*** to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found." *Fruehauf*, 90 F.T.C. at 892 n.1 (emphasis added). In this case, Respondent's piecemeal proposal, (RB at 60-62; 66-67; RFOF ¶¶ 1151-1156, 1403-1406), is facially inadequate to restore a viable competitor or effective competition in all four battery separator markets in which Microporous competed.

We must emphasize that we have never sai d, contrary to Daramic's claim, that the Ace - Sil line is not an issue in this case. Despite the fact that it Ace-Sil a small player in the UPS separator market, the line produces the key ingredient in Microporous' CellForce product in both Tennessee and in Austria.

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constructed by Ford but was not a fruit of the acquisition"); *In re Union Carbide Corp.* , 59 F.T.C. 614, at 657 (plant built by Union Carbide "sometime after the date of the acquisition.").

(PX0738 at 004, *in camera*)

(RB at 61-62, 66-67) This cannot replace what Microporous was and what Daramic thought was such a threat to them. [50] Turning the concept of "complete divestiture" on its head, Respondent proposes to retain Microporous' Flex-Sil and Ace-Sil located at the Piney Flats complex, and instead offers a long-term supply agreement between Daramic and the acquirer of Newco for the Ace-Sil dust used in the manufacturing process of CellForce products. (RB at 60 & n.9) This proposal would create a long-term continuing entanglement between Daramic and its new competitor and very serious *de novo* concerns given Daramic's past history of soliciting arrangements with its competitors not to compete. (CCB at 65-68; CCFOF ¶¶ 1180-1196) As the Supreme Court admonished in *du Pont,* "the public is entitled to the surer, *cleaner* remedy of divestiture," *du Pont,* 366 U.S. at 329-331, 334 (emphasis added); this proposal, however, is anything but "clean."

As an alternative, Respondent proposes to divest its own HD line of products (RB at 67; RFOF ¶¶ 1152-1153, 1403-1406), [51] but divestiture of a single, small product line totally unrelated to the pre-acquisition business of the former Microporous would not, on its face, restore pre-acquisition competition. (*See also* CCB at 74-75) It also makes no sense to give Newco HD when it would then have to design and test a new motive separator for 2-3 years to try to re-enter the motive separator market! Not only is there no law of any kind to support such

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[50] Any divestiture in Tennessee must also include the "line in the box," which was destined for Tennessee and would have been installed there to service Microporous' contract with EnerSys but for Daramic's illegal acquisition (CCB at 74; Gilchrist, Tr. 374; CCFOF ¶¶ 698-699). (Kahwaty, Tr. 5541-5542, *in camera*)

[51] Provided that all that Microporous had owned is divested, Complaint Counsel is not seeking divestiture of Respondent's PE facilities, either in addition to or as a substitute for the former Microporous plants in Piney Flats or Feistritz. (*See* RB at 60; RCOL ¶ 1487).

a divestiture of one of the acquirers' products rather than what it actually bought,[52] such a remedy that would allow Daramic to keep the stock, all of Microporous' products, its contracts, and five of the six lines that Microporous had bought is "absurd." As the Supreme Court explained:

> "[I]t would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and [the acquirer] has acquired the power which it [has] no right to acquire, -- namely, to restrain commerce by suppressing competition, -- and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it."[53]

The proposed remedy would allow Daramic to continue occupying the former Microporous and the orphaned, new Microporous, which would be one sixth of its former size, will need to compete against its neighbor, Daramic, just ten feet away in an adjacent building. How could anyone explain that a remedy gives Daramic a dominant position in all four markets, when it had dominance in three (SLI, motive and UPS) and had lost its dominance in one of those (motive) just prior to the acquisition?[54] Indeed, no one can explain how Daramic's proposal supports the law or is anything but absurd. The law demands a complete remedy. Not one that will increase Daramic's market power.

The record establishes that there is ***no*** partial divestiture that would restore competition completely. Only complete divestiture of everything Daramic acquired from Microporous is likely to restore the competition that has been lost. *See* (CCB at 71-75).

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[52] Indeed, the Clayton Act suggests the opposite, requiring an order to "divest itself of the "stock, or other share capital, or assets, held" in violation of the law – not of some other property owned by Daramic before the acquisition. 15 U.S.C. § 21(b).

[53] *Northern Securities Co.*, 193 U.S. at 357, quoted by *Ford Motor Co.*, 405 U.S. at 574, n.9 ("To permit Ford to retain" what it bought "would perpetuate the anticompetitive effects of the acquisition").

[54] Microporous had the largest share of deep-cycle prior to the acquisition [redacted] Under Daramic's proposal, it would retain almost all of the deep-cycle market [redacted]

D. Complaint Counsel's Proposed Ancillary Relief Is Proper And Necessary To Ensure That The Divestiture Is Effective.

Respondent makes a sweeping assertion that other provisions for relief proposed by Complaint Counsel are unwarranted and punitive. (RB at 68-69). Contrary to Respondent's claim, however, all of the relief proposed is needed to ensure that the divestiture will be effective and viable, and to undo the anticompetitive effects of Respondent's violations.

The assignment of contracts to the acquirer is necessary to ensure that the Newco will have a base of business consistent with its ongoing operations at the time of divestiture. (Proposed Order ¶¶ I.H, AA, DD, II). A similar provision was included in the final order in *Chicago Bridge*. 138 F.T.C. at 1165.

The technology and other intellectual property that Respondent must divest is limited to what it acquired from Microporous in the acquisition, together with an y additions and improvements since the acquisition. (Proposed Order ¶¶ I.AA, FF., II.A.). This requirement is necessary to restore competition to the state in which it would likely have continued to exist "but for" the illegal merger. Respondent must also grant the acquirer a perpetual, worldwide, royalty-free license to use any Daramic technology that Respondent introduced into use at the former Microporous plants after the acquisition to ensure that those plants can continue to operate post-divestiture without disruption. (Proposed Order ¶¶ II.C.4). This requirement is necessary since there would be no effective way to purge certain information, such as best practices, from the minds of personnel involved in those operations who might become employees of the acquirer in connection with the divestiture. It is also fair, since any changes Respondent implemented at either Microporous plant, including the use of Daramic technology, were made with full knowledge that the Commission was investigating the acquisition.

The requirement that Daramic must covenant not to sue the acquirer over any technology that it owns or licenses at the point of divestiture, including the Jungfer technology (Proposed

Order ¶ II.F.1.), is necessary to ensure that the Newco's ability to compete in the relevant markets is not impeded through Daramic's resumption of its pre -acquisition exclusionary conduct that weakened Microporous as a competitor. (CCFOF ¶¶ 657-659) This is also a reasonable measure to prevent Daramic from threatening future infringement actions and using the settlement process as a means to eliminate competition through non-compete proposals. (CCFOF ¶¶ 1096-1100) "[R]espondent . . . must remember that those caught violating the Act must expect some fencing in." *Hospital Corporation of America v. FTC* , 807 F.2d 1381, 1393 (7th Cir. 1986).

Daramic challenges a supposed termination of contracts. (RB at 51-55) is belied by the record evidence. But as explained in Complaint Counsel's Brief (CCB at 77-78), Paragraph VII of the Proposed Order does not require across-the-board termination of customer contracts, but rather provides customers with the ***option*** to reopen and renegotiate or terminate the contracts they were forced to enter into with Daramic during a period in which it unlawfully exercised its market power. (CCB at 55-59; CCFOF ¶¶ 1089-1090, 1101-1103). This provision is necessary to prevent Daramic from continuing to reap the benefits of its unlawful conduct. (CCB at 44 -45) The provision in the Proposed Order is narrower than what the Commission required in the final order in *North Texas Specialty Physicians* because it does not require Respondent to terminate all contracts,[55] but instead leaves it up to the customer to determine whether to opt for reopening.

The potential provision of transitional services if needed by the acquirer (Proposed Order ¶ II.F.3), and the removal of impediments to the acquirer's ability to recruit and hire employees of "Microporous," including non-compete agreements (Proposed Order ¶ II.D.2), are also necessary to ensure the viability of the Newco immediately following divestiture. Prior to the

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[55] *In re North Texas Specialty Physicians* , 140 F.T.C. 715, 774-76 (2005) (respondent was ordered to terminate all non-risk contracts with payors that it negotiated on behalf of its physicians); the Commission's final order on remand did not alter this requirement. Http://www.ftc.gov/os/adjpro/d9312/080912orderonremand.pdf.

acquisition, Microporous had an entire infrastructure to provide shared services to the plants, including administrative, payroll, information technology and human resources, which are now being provided by Respondent. Accordingly, it is reasonable to require Respondent to continue to provide these services for a transitional period if necessary. A similar provision was included in the final order in *Chicago Bridge*. 138 F.T.C. at 1166-1169. The removal of non-compete agreements is necessary to allow the acquirer to hire and utilize the personnel working at the Microporous plants who are now employed by Respondent, and is needed to ensure the viability of those plants post-divestiture. Contrary to Respondent's assertion, the requirement does not apply to all of Respondent's employees, only to those who worked at Microporous before the acquisition and those who have worked in the former Microporous plants after the acquisition. (Proposed Order ¶¶ I.EE, II.D.2.). A similar provision was included in the final order in *Chicago Bridge*. 138 F.T.C. at 1165-1166, 1173 & n.592.

Paragraph IX of the Proposed Order prohibits Respondent from introducing any battery separator using cross-linked rubber for a period of two years following the divestiture. (CCB at 78). Microporous' pre-acquisition use of cross-linked rubber technology in its battery separators distinguished them from Daramic's, and this technology, which was exclusively Microporous' before the acquisition, will be divested pursuant to the Order. Although it would be a violation of the Order for Daramic to use any Microporous intellectual property after the divestiture, much of the critical manufacturing technology is in the form of trade secrets, which can be particularly difficult to protect, making it difficult and costly for the acquirer to determine whether similar technology later used by Daramic was misappropriated. To assure that the viability of the divestiture is not undermined from the outset by Daramic's introduction of a "me-too" product improperly based on Microporous technology, a brief moratorium period of two years on any such product introduction is reasonable.

The remaining provisions of Complaint Counsel's Proposed Order are standard reporting, notice, compliance monitoring and sunset provisions that are typically required in Commission orders. (Proposed Order ¶¶ X-XIV); s *ee Chicago Bridge,* 138 F.T.C. at 1197-99; *In re North Texas Specialty Physicians*, 140 F.T.C. at 787-88.

E. The Proposed Relief for Daramic's Illegal Conduct is Appropriate and Necessary.

Respondent denies that its agreement with Hollingsworth & Vose Company ("H&V Agreement") violated Section 5 of the FTC Act, and thus asserts no relief is necessary. (RB at 55-58, 69; RFOF ¶¶ 1123-1132, 1157, 1395-1398; RCOL ¶¶ 1484-1486) We disagree. The record establishes, and the law is clear, that Respondent's agreement with H&V was nothing more than an illegal market allocation arrangement. (CCB at 63-68; CCFOF ¶¶ 1179-1196) The relief requested in Paragraph VIII of the Proposed Order regarding the H&V Agreement is appropriate and tailored to the violation found, and provides appropriate fencing-in relief. (*See, e.g.,* CCFOF ¶¶ 1098-1100) Contrary to the assertion of Respondent, the non-competition portion of the H&V Agreement continues to have effect because, under its terms, H&V cannot enter the U.S. market for five more years. (CCOF ¶ ¶ 1189, 1191) In addition, it is appropriate to prohibit Respondent from entering into similar agreements in the future. *See Polygram Holdings, Inc. v. Federal Trade Commission,* 416 F.3d 29, 38-39 (D.C. Cir. 2005).

XIV. Conclusion

For the reasons stated above, and as fully supported by the evidence at trial, Daramic's acquisition of Microporous and its anti-competitive conduct are illegal, thus requiring a complete remedy to restore competition and prevent further harm to competition.

Dated: August 7, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2009, I filed *via* hand delivery an original and two copies of the foregoing public version of Complaint Counsel's Post-Trial Reply Brief with:

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I hereby certify that on August 7, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing public version of Complaint Counsel's Post-Trial Reply Brief with:

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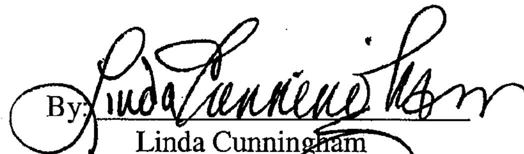

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