UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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In the Matter of
POLYPORE INTERNATIONAL, INC.,
a corporation.

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Table of Abbreviations

The following abbreviations and citation forms are used:

ID	Initial Decision
IDF	Initial decision Finding of Fact
RAB	Respondent's appellate brief
CCFOF	Complaint Counsel Finding of Fact
CCRB	Complaint Counsel Reply Brief
CCRF	Complaint Counsel Reply Finding of Fact
PX	Complaint Counsel Exhibit
RX	Respondents Exhibit

Citations to the trial transcript include the witness name and page number: Whear, Tr. 4683.

In camera material is bracketed and appears in bold

I. Statement of the Case

Polypore International Inc. and its subsidiary, Daramic, acquired Microporous (a.k.a., Amerace), its closest and only competitor in the deep-cycle, motive and UPS separator markets. The acquisition also eliminated a third competitor in the North American market for SLI separators, leaving only two. In the detailed, 376 page Initial Decision largely ignored by Respondent, Administrative Law Judge Chappell correctly found that Complaint Counsel proved by a "preponderance of the evidence that there is a reasonable probability that Respondent's acquisition of Microporous will substantially lessen competition" in these four markets in North America. (ID-7). Evidence of extremely high concentration levels, barriers to entry, and actual post-acquisition price effects establish that the acquisition violates Clayton Act § 7 (15 U.S.C. § 18). (ID-7-8).

None of Respondent's arguments have merit. For example, Respondents' product-market arguments ignore both economic realities and 'practical indicia' of the markets, including their own documents and testimony. Respondent's attempts to confuse the product market boundaries are simply "contrived." (ID-226). Evidence of price discrimination, customers' desire for local supply, and barriers to entry dictate that these are North American geographic markets. (ID-239).

The HHI's are extraordinarily high, but this is not a case that requires deep HHI analysis. Before the acquisition, Respondent was often unsuccessful in raising prices when Microporous competed against it. Indeed, Respondent decided to buy Microporous to "terminate price erosion" (PX0935 at 001) and "eliminate price competition" (PX0932), and that if Polypore failed to buy Microporous (Amerace) as a "defensive move," Respondent knew that Microporous would "drag [its] prices down" (PX0168 at 002). Polypore's predictions proved to

be true: There is substantial evidence of higher prices, decreased output, and a loss of innovation as a result of the acquisition.

As for potential entry, Respondent failed to prove that entry would be timely, likely, or sufficient. There are no entrants anywhere in the world for deep-cycle, motive, or UPS separators. In SLI, none are entering North America. The evidence is undisputed that foreign suppliers cannot enter at Daramic's higher-than-market prices, much less at pre-acquisition prices.

Respondents' claim of power buyers is equally unfounded. Indeed, Daramic's management admitted that "battery manufacturers lack purchasing power despite their scale due to [a] limited number of suppliers." (IDF-435).

Ultimately, Respondent's arguments depend on its assertions that every single one of Complaint Counsel's third party witnesses were not credible and its expert was wrong. Moreover, to believe Respondent, one would have to reject the testimony of Respondent's own executives and witnesses and their contemporaneous documents and statements. The ALJ correctly found Respondent's arguments to be without merit.

Regarding the remedy, a complete divestiture of the assets that Daramic acquired is necessary for a divested entity to restore the competition lost in North America from the acquisition. This includes both the Tennessee plant and the Feistritz facility, which freed up capacity for Microporous in North America and allowed Microporous to expand production in North America and which is necessary for NewCo to do business with large multinational customers. Indeed, after years of study and customer prodding, Microporous' management determined that "to continue to grow, it need[ed] to position itself with an international manufacturing base in the same fashion as its competitors," and that to compete successfully

against Polypore and Entek it had to become a "global player," like Polypore and Entek. (PX0611 at 009); (Gilchrist Tr., 309-311)

However, Polypore would like this Commission to divest far less than what Microporous had before the acquisition. This would create an even smaller Microporous and would not come close to fulfilling the requirement under the Clayton Act, § 11(b) (15 U.S.C. § 21(b)), that Polypore divest itself of the assets held in violation of the Act and put Microporous on "equal footing," "equally capable of competing in the future" as it was prior to the acquisition. *Chicago Bridge & Iron Co. N.V. v. F.T.C.,* 534 F.3d 410, 441 (5th Cir. 2008); *FTC v. Western Meat Co.*, 272 U.S. 554, 559 (1926) (Commission has a duty to issue an order directing that a violator of § 7 "cease and desist therefrom and divest itself of what it had no right to hold."). Indeed, "it would be a novel, not to say absurd, interpretation of the anti-trust" laws, that after a finding of liability, Polypore "must be left in possession of the power that it has acquired, with full freedom to exercise it." *Northern Securities Co. v. United States*, 193 U.S. 197, 357 (1904) , *quoted and followed by Ford Motor Co. v. United States*, 405 U.S. 562, 574 (1972). In short, Respondent's proposed remedy "would perpetuate the anticompetitive effects of the acquisition." *Id.*

Faced with the overwhelming evidence in this case, it would be incomprehensible that Polypore would continue its appeal, except for the fact that it has raised prices substantially post-acquisition and, until stopped, will continue to reap supra-competitive profits and thus harm competition and customers. We thus ask for an expedited treatment of this case to limit the harm caused by what the evidence has shown is an extreme violation of Clayton Act, Section 7 and the FTC Act, Section 5. Accordingly, Complaint Counsel asks this Commission to affirm the ALJ's Initial Decision and enter his Order as the Order of this Commission.

II. Statement of Facts:

1. The Relevant Markets

a. Microporous and Daramic competed in four product markets:

Microporous and Daramic competed in four product markets prior to the acquisition. The ALJ correctly identified the relevant product markets as separators for UPS, SLI, deep-cycle, and motive flooded batteries. The acquisition greatly increased concentration levels in each market. (ID-210). The products in each market are differentiated from products in other markets (IDF-94, 97, 122-123, 141, 150, 180, 196, 227, 231, 249, 266), manufacturers design separators for specific end-uses, (IDF-98-113), and the industry recognizes these market distinctions. (IDF-100, 102, 128, 181, 185, 196, 216-218, 244, 268). Separators are tailored to provide functionality for particular applications, and interchanging separators impacts the battery's life and functionality. (IDF-90, 94, 97). These four product markets are widely recognized by Daramic and the industry. (IDF-120, 183-185, 196, 245, 268; PX0316 at 02).

b. North America is the Proper Geographic Market:

Daramic and Microporous produced separators in North America. (IDF-38, 43). North American customers (100% of the market) purchase their separators only from North American suppliers, and have a strong preference for local supply.[1] (IDF-283-311, 346; ID-240-241).

{ }.

(IDF-346-349, 448-451; CCFOF 249-252). Foreign manufacturers have not produced or qualified separators for motive, UPS, and deep-cycle batteries, and therefore Daramic is now the

[1] The only separator imported into North America is Daramic's Darak UPS separator which is only manufactured in Germany, and sells at substantially higher prices than PE or PE/rubber separators. (IDF-234, 283).

sole supplier of those separators. (ID-241-242; IDF-339, 374, 1061). Prices are also quite different in different regions of the world. (IDF-104, 106, 117, 275-280; ID-240). Arbitrage has never occurred in the past, nor have foreign companies ever competed in North America. (IDF-118, 274; Kahwaty Tr. 5363-64, *in camera*).

2. Microporous Mattered:

> *"Amerace is a real threat to our business, not only in the industrial market, but later in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts will expire. I'm still recommending to buy Amerace, as a defensive action."* (Frank Nasisi, Daramic President – PX0168 at 002).

For years prior to the acquisition, Daramic viewed Microporous as a competitive threat that was harming Daramic's margins. (IDF-582-596, 750-759). As early as 2003 Daramic understood that Microporous was a threat to Daramic's business model due to "continued price erosion" from competition with Microporous. (IDF-750). Soon thereafter, the President of Daramic put an acquisition of Microporous at the top of his list of possible acquisitions, for the sole purpose to "[e]liminate price competition." (IDF-751-752).

a. Competition between Microporous and Daramic drove prices down in deep-cycle and motive:

> *"We had reacted to the Amerace initial threat by adjusting the price and had no idea Amerace would continue to lower the price."* (Daramic's VP of Sales – PX0836 at 001)

In deep-cycle and motive, Microporous and Daramic were the sole competitors in North America, and the two companies had been competing fiercely on price in both. (IDF-371-383, 386-388, 392-398, 577-581). In deep-cycle, the acquisition increased Daramic's market share to 100%, and increased the HHI by 1,891 points to 10,000. (ID-247). In motive, the acquisition

also increased Daramic's market share to 100%, and increased the HHI by 1,663 points to 10,000.[2] (ID-249).

In motive, the threat of competition from Microporous forced Daramic to drop prices on numerous occasions. (IDF-582-602). Daramic lowered motive pricing to East Penn and EnerSys, and others due to competition from Microporous. (IDF-583-595). Prior to the acquisition, Microporous was the *only* price constraining competitor for motive separators in North America. (IDF-580; Roe, Tr. 1264-66, 1278-79, 1812-13).

In deep-cycle, Microporous and Daramic were the only competitors. Competition from Daramic's HD deep-cycle separators constrained Microporous' prices of Flex-Sil and CellForce. (ID-247-248; IDF-520-542). The three largest customers repeatedly used Daramic's deep-cycle separators to get better pricing and terms from Microporous. (ID-248). For example, Trojan Battery "continually used the threat of buying Daramic HD to get lower prices from Microporous." (ID-248).

b. Microporous was a "viable competitor" which was disrupting a comfortable duopoly in SLI:

> *"[U]nlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes."* (Daramic VP of Sales – PX0238 at 001).

Prior to Microporous' entry into SLI, Daramic and Entek had been the only two suppliers, and "were not aggressively competing against each other for [SLI] business." (ID-266). The duopoly was viewed as "lazy and unresponsive; they do not appear to compete and do

[2] By 2010, Microporous would have had a market share greater than 50% in motive. (ID-249; IDF-IDF-404-405). Post-acquisition Daramic had a 94% market share in motive worldwide. (PX78-7) The remaining player in Europe had a different technology (PVC) and is not likely to compete in North America. (*Id.*; IDF-1051; PX1516-7 (Daramic says European company is "no serious threat").

not have to, given the absence of market forces." (ID-266). With Microporous' decision to enter SLI, this duopoly was destroyed.

Microporous' attempt to gain JCI's SLI business in 2003 was the first serious threat by Microporous in SLI. (IDF-663, 666). Daramic successfully forced JCI into a contract by threatening to cut off supply, but even that move could not eliminate the threat of Microporous' entry into SLI. (IDF-667, 671,676-684).

By 2005, Daramic concluded that Microporous would target Daramic's largest customers, and was a "real threat" to its business, including in SLI. (IDF-755-756). Daramic recognized that Microporous was disruptive in SLI, remarking that "there had not been an aggressive rivalry among competitors" until Microporous' entry. (ID-265-266; IDF-435-436, 646-650, 656, 660, 663, 666-667, 678-683).[3]

Microporous had targeted an expansion into the SLI business for years and by January 2006, had expansion plans for North America and Europe. (IDF-642, 766-804; PX0611). Microporous shook up the SLI market when it began competing aggressively to supply the three largest customers:

- JCI - In 2007, Daramic feared the loss of a significant portion of JCI's SLI business to Microporous. Microporous' SLI separators were qualified by JCI, and Microporous was actively bidding for JCI's SLI business. (IDF-689-690; 780; 806-807). Microporous' SLI work with JCI also led Entek to consider Microporous a threat. (IDF-436).[4]

- Exide – Attempting to break Daramic's stranglehold on its business, Exide worked with Microporous throughout 2007 and into 2008 to develop it as an SLI supplier in North

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" (PX1800, *in camera*).

JCI's decision to move to Entek took place in 2007 when Daramic, Entek and Microporous were actively competing for that business. (IDF-734; Gilchrist, Tr. 423, 466-467, *in camera*; Roe, Tr. 1685-1686, *in camera*; Hall, Tr. 2884, *in camera*).

America and Europe.[5] (IDF-697-699, 707-710; Gillespie, Tr. 2966, 2976-2978). Exide had the "full intention" "to be buying Microporous [SLI] separators in 2010." (Gillespie, Tr. 2976).

- East Penn - In fall 2007, East Penn wanted sought SLI separators from Microporous to get an alternative supplier on the East Coast. (IDF-717-719). Daramic recognized that its SLI business with East Penn was might be lost to Microporous. (IDF-820-821). The acquisition halted Microporous' work with East Penn. (Trevathan, Tr. 3722-23).

Daramic viewed Microporous as a viable competitor for SLI separators. (IDF-805). Just months before the acquisition, Daramic's VP of Sales, informed his management that 2008 would be "the most challenging year ever faced by Daramic," because Daramic was "beginning to feel the real effects" of price competition from Microporous. (IDF-809). He recognized the unique disruptive effect of Microporous, noting that "unlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes." (IDF-809).

c. Microporous Was A Threat To Daramic's UPS Monopoly:

Microporous was a thorn in Daramic's side in UPS. (IDF-422-423, 616; ID-252). Microporous was in the process of developing an innovative separator designed to overcome a technical hurdle (known as black scum) that had plagued Daramic's UPS separators. (ID-252-53; IDF-618-622). Microporous was optimistic that there would be customer demand for this new separator and expected the project would soon be generating revenue. (IDF-625-628). This optimism was not unfounded. One customer was already testing samples and had ***already decided*** to switch to Microporous' new separator. (IDF-623-624). Business from this customer alone would have given Microporous more than half the UPS market. (*See* CCFOF ¶¶ 503-504, 520).

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[5] { } owners of Microporous testified that nothing in the so-called draft mandate prevented Microporous from pursuing SLI opportunities, and that absent the acquisition Microporous intended to supply Exide. (IDF-712-714, 716, 800-804; Gilchrist, Tr. 438-439, *in camera*).

d. Daramic Developed its Microporous "MP Plan" To Stem its Losses:

"What do we want to achieve? Secure select LT agreement to fight the Amerace threat." (MP Plan – PX0258 at 001).

In late 2007, Daramic believed that absent an acquisition, it was facing an EBITDA loss of { } between 2008 and 2010 due to competition from Microporous. (IDF-808). With this projected loss of EBITDA in mind, Daramic implemented a project dubbed the "MP Plan" to try to prevent the further loss of millions of square meters of motive and SLI sales to Microporous.[6] The goal of the MP Plan was to secure long term agreements from customers identified by Daramic as at risk of loss to Microporous. (IDF-820-823).

The MP Plan demonstrates that Microporous was a competitive constraint in SLI. (ID-257; IDF-638; 820-823, 849-852). Under the MP Plan, Daramic specifically identified business in North America that might be lost to Microporous, including SLI business with East Penn and Crown, and offered them terms, including { }. (IDF-852). Daramic got long term contracts with the MP Plan customers, and in so doing, { }. (IDF-849-851).

e. Daramic acquired Microporous to Eliminate Competition:

"No Acquisition – Sales volume loss and aggressive approach to block MP phase 3 expansion." (PX0738 at 017)

In the fall of 2007, Daramic's General Manager informed the Polypore Board that absent an acquisition, Daramic would lower prices to prevent Microporous' planned expansion. (IDF-856). The Board was informed that without the acquisition, Daramic would target specific

[6] Daramic was so fixated on the potential loss of business to Microporous that the MP Plan indicated that "[a]s a last resort we play hard – no agreement – no supply." (IDF-IDF-823).

Microporous customers with a minimum { } price reduction and would "[b]uild low cost production line to compete on price." (IDF-876).

Daramic's rationale for acquiring Microporous was set forth in its presentations made to the Polypore Board: without the acquisition, prices would go down; with the acquisition, it could raise prices. (IDF-882-885, 867-868) Before the acquisition, Daramic was set to lose upwards of { }million square meters of business to Microporous over the next three years if it did not make the acquisition. (IDF-855, 873, 867-868). This translated into a projected "5-year EBITDA loss of { } by fighting against" Microporous' planned expansion, and "[e]xcess supply and market price erosion" ultimately resulting in a "market share loss of { }" for Daramic. (IDF-858, 872). Conversely, Daramic was well aware that with an acquisition of Microporous it would be able to increase prices. (ID-269). The ALJ thus correctly found that Daramic acquired Microporous "to eliminate Microporous as a competitive threat, protect Daramic's market share, prevent price decreases, and implement price increases." (ID-266, *see also* ID-266-269).

3. The Acquisition Permitted Daramic To Raise Prices:

The acquisition gave Daramic a monopoly in deep-cycle, motive, and UPS. (ID-247-249, 252; IDF-385, 410). It also returned the SLI market to a comfortable duopoly. (ID-253; IDF-435, 439, 646-648). The elimination of Microporous has allowed Daramic to raise prices.[7] (ID-251, 262, 269; IDF-723-729, 856, 861, 867, 880-881; 917-922). The ALJ correctly found that post-acquisition, Daramic has exerted unilateral market power in the deep-cycle, motive, and UPS markets where it has a monopoly.[8] (ID-262). The ALJ also correctly found that the acquisition "has had unilateral anticompetitive effects in the SLI market, . . ." and that without Microporous as an SLI competitor, "there are fewer incentives to engage in healthy competition." (ID-264, 266).

a. Daramic Has Exerted Unilateral Market Power In Deep-Cycle, Motive And UPS:

After the acquisition "there was no way to negotiate a lower price. There was no place to go." (Benjamin, Tr. 3522)

Following the acquisition, purchasers of deep-cycle and motive separators no longer have an alternative. (ID-251; IDF-167-168, 206, 210, 376, 379, 384-385, 407-410). Thus, Microporous' former president informed his owners that the "strategic implications" of the acquisition would provide Daramic with "[t]otal control of deep-cycle markets (no competitor); Total control of [motive] markets (no competitor)." (IDF-887). Prior to the acquisition, for these reasons, Microporous and Daramic agreed that assignment of Microporous' contracts to

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[7] The acquisition also eliminated Daramic's planned price reductions, and eliminated Microporous' planned capacity expansion, negatively impacting competition in all four markets. (IDF-766-804, 810-813).

[8] Exertion of market power was an explicit goal for Polypore's CEO, whose "CEO/Company Goals for 2008" included {

(PX0468 at 001, in camera).

Daramic was irrelevant, because the "reality is that everyone would be stuck with Daramic –like it or not." (IDF-895-896).

There has been actual post-merger anticompetitive effects in deep-cycle[9]:

- **Trojan**: Microporous and Trojan had a pre-acquisition agreement on prices for 2008 and had negotiated long-term pricing. Immediately post-acquisition, Daramic informed Trojan that it would "stand behind the commitments [Microporous] made to you before this acquisition." However, Daramic then instituted two price increases during 2008 and insisted on material changes to the contract.[10] (IDF-552-561; ID-262; Godber, Tr. 223-224, 232-241*in camera*, 291-292).

- **Exide**: Daramic implemented a post-acquisition rubber surcharge on deep-cycle separators. Exide had previously avoided paying a surcharge due to the competition between Microporous and Daramic. (ID-263; Gillespie, Tr. 2952-2953, 3132-3134, *in camera*). Thus Exide pays { } higher prices for Flex-Sil post-acquisition. (ID-263).

- **US Battery**: US Battery must purchase higher-priced Flex-Sil separators instead of HD separators post-acquisition because Daramic has restricted availability of HD. (IDF-169, 473, 570-573; ID-263).

Daramic raised priced in motive separators as well, [11] raising prices from { } for motive customers in North America not protected under the MP Plan.[12] (ID-263-2644; IDF-582-602). Bulldog Battery is a motive customer that received two post-acquisition price increases from Daramic, and it had no choice but to pay because without an alternative supplier, "there was no way to negotiate a lower price. There was no place to go."[13] (ID-263-264).

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[9] In deep-cycle, Daramic has not lost ***any*** business since the acquisition, despite imposing price increases. (ID-263; IDF-170).

[10] { }. (PX2117, *in camera*).

[11] In motive, Daramic has not lost <u>any</u> business since the acquisition, nor has it made <u>any</u> price concessions due to competition, despite imposing price increases. (ID-264).

[12] These price increases stand in stark contrast to {

(IDF-611, 849-852, 856, 867-868).

In the five-year period prior to the acquisition, Bulldog Battery's cumulative price increases for the CellForce separators it uses in motive batteries totaled about 3%, with no increase higher than 1.5%. (ID-263). After the acquisition, Daramic instituted a 7% energy surcharge on CellForce separators, and subsequently raised them 10%. (ID-263).

In UPS, the ALJ correctly found additional anticompetitive effects from the merger in the form of Daramic's elimination of innovation. (ID-264). Following the acquisition, Daramic broke up Microporous' R&D group, and chose not to pursue a separator that Microporous was developing for the UPS market because the separator under development was set to replace a costly "very high-margin" product sold by Daramic, with a less expensive, lower margin separator. (ID-264).

b. Unilateral And Coordinated Effects In SLI:

In SLI, Daramic's acquisition led to unilateral anticompetitive effects. (ID-264). Before the acquisition, Microporous was finalizing an agreement to supply SLI separators to Exide and Exide had every intention of purchasing SLI separators from Microporous beginning in 2010. (ID-264, IDF-710). Microporous also planned to sell SLI separators to East Penn. (Trevathan Tr. 3722-3723) However, once Daramic bought Microporous, these customers lost the Microporous option, and Daramic raised prices. (ID-264-265).

The acquisition also made coordinated effects more likely in SLI. Microporous' presence was shaking up an "unhealthy" SLI market where Daramic and Entek had not been operating as competitors. (ID-266).

4. There is no Timely, Likely, or Sufficient Entry:

> *"Battery manufacturers lack purchasing power despite their scale due to limited number oF. Supp.liers."* (Daramic's 2007 Strategic Audit – PX0265 at 008, *in camera*)

Entry is not likely due to substantial barriers to entry. These include scale, experience and learning effects, capital requirements, reputation, brand, access to distribution, and know-how. (IDF-928-930). These are not the only barriers to entry -- other barriers include (1) product development (IDF-993-1000); (2) global supply capabilities (IDF-928; PX0611 at 011, 028); (3) time to build a production line (IDF-973-992);(4) lack of a manufacturing facility in

North America (IDF-923); (5) patent protected technology (IDF-924; 931-934); (6) limited market size (IDF-927); and (7) product testing (IDF-1001-1026).

No other company is able to enter the deep cycle, motive or UPS separator markets. For example, Entek does not currently sell these products, nor is it likely to enter these markets within the next two years. (IDF-1027-1048). Entek {

} the other markets. (IDF-1029-1030). Entek has passed up opportunities to enter these markets (IDF-394-397, 1031-1034, 1041, 1045), and has indicated that {

}. (IDF-1035). Moreover,

{

}. (IDF-1050).

Entry by Asian firms is unlikely and could not replace the competition eliminated by the acquisition. Indeed, {

.} (IDF-1079-1107, 1110-1112). Second, Asian companies cannot overcome the large cost-disadvantage to compete effectively in North America (IDF-314-338), nor are Asian competitors able to overcome any of the other barriers to entry in order to replace the competition lost by the acquisition in a timely, likely and sufficient manner. (IDF-335-336, 1059, 1064-1067, 1073-1075). The Asian producers {

} (IDF-346, 349; CCFOF 249-252), and there is no reason to think that they will in the future. (IDF-332-333, 335, 337-338, 341-343, 1060, 1063).[14]

[14] Even Polypore's CEO admitted that Asian firms have not entered because they cannot make enough money here. (IDF-347).

III. Complaint Counsel Established A Strong *Prima Facie* Case.

The ALJ found that Complaint Counsel met its burden of establishing a strong *prima facie* case. (ID-270). Judge Chappell found four product markets (UPS, SLI, deep-cycle, and motive separators) within which the acquisition greatly increased concentration levels. (ID-210). The ALJ also appropriately rejected Respondent's proposed all PE and Flex-Sil product markets. (ID-210).

A *prima facie* Section 7 case typically "rests on defining a market and showing undue concentration in that market." *FTC v. Whole Foods Mkt., Inc.,* 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (*citing Baker Hughes*, 908 F.2d at 982-83).[15] In determining product markets, courts have traditionally considered two factors: (1) "the reasonable interchangeability of use [and (2)] the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). In other words, the issue is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) (internal quotations omitted). 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) (finding cellophane in same market as other wrapping products even though the prices were very different); *See* 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.").

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[15] *But see Whole Foods*, 548 F.3d at 1036 (Brown, J.) (noting that "this analytical structure does not exhaust the possible ways to prove a § 7 violation").

Ultimately, however, markets are best defined by the firms that operate within them. *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (citations omitted)("the 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. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 42 n.18 (D.D.C. 2009). Indeed, the Merger Guidelines, ¶ 1.0 (Dept. of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* (1992, rev. 1997) explains that market definition must focus "solely on demand substitution factors," which is why "possible customer responses" are critical. Thus, "'industry or public recognition of the [market] as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 219 (D.C. Cir. 1986). "Courts generally will include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the same market." *CCC Holdings,* 605 F. Supp. 2d at 38).

1. Complaint Counsel Proved Four Product Markets

> "*Any confusion about the product market boundaries for battery separators seems more contrived than real.*" (ID-226).

Judge Chappell correctly found four product markets. (ID-210). Respondent devotes nearly five pages to criticizing Dr. Simpson's critical loss analysis while ignoring Judge Chappell opinion that such analysis "is not necessary to support [Simpson's] overall product market analysis..." (ID-213). Critically, the ALJ found "considerable evidence" of no, or very few, alternatives to the products made by the merged parties. (ID-213). Taking each market in turn, the ALJ found Complaint Counsel sustained its burden of proving product markets.

a. Deep-Cycle Separators

In describing the deep-cycle market the ALJ found "both producers and customers note the rubber or PE/rubber deep-cycle separators meet a unique need that other separators cannot meet." (ID-215; IDF-174). Citing *Brown Shoe*, the ALJ found that the practical indicia, such as industry recognition and peculiar characteristics, established deep-cycle separators as a product market. (ID-215). The parties themselves viewed deep-cycle separators as a distinct market. (IDF-174, 184, 186-87).

Deep-cycle separators have distinct characteristics and the batteries that employ them have distinctive uses and functions. (IDF-128-56, 162-66, 180). This product market is made up of separators for golf carts and floor scrubber machines. (IDF-19). Due to the uniquely high levels of antimony in deep-cycle batteries (IDF-136-137; ID-214), separators used in these batteries must have the ability to suppress antimony migration from the positive to the negative plate in order to prevent cycle reduction and, ultimately, battery failure. (IDF-136-140; ID-214). The ALJ correctly found that only separators made of rubber or a combination of rubber and PE provide sufficient antimony suppression for deep-cycle applications. (ID-214-215; IDF-140, 150, 152).

Before the acquisition, Microporous and Daramic were the sole deep-cycle competitors. (ID-246). Microporous made two deep-cycle separators-- Flex-Sil and Cellforce, and Daramic made HD. (IDF-143-145).

The ALJ found that deep-cycle separators were uniquely suited to their intended application and could not be substituted for by non-rubberized separators. (ID-214). Both Daramic and Microporous documents refer to a unique deep-cycle market consisting of golf carts

and floor scrubbers. (IDF-181, 183; *see also* PX0316 at 002 (Tucker Roe email describing the deep-cycle market as "golf cart, marine and floor scrubber")); IDF-182 (Microporous identifying a deep-cycle market). The specialized requirements for deep-cycle applications are recognized in the industry, and due to these requirements only rubberized separators are suitable for this application. (IDF-150-156). The effect of rubber and rubber blended separators is profound. Using a PE, non-rubberized separator would result in reducing the life of a golf cart battery by at least 50 percent. (IDF-153). Even Daramic's General Manager, Pierre Hauswald, admitted that separators without rubber do not perform as well as those that contain rubber. (IDF-150).

Even in the face of significant price increase, customers would not switch to another type of separator for deep-cycle applications. Complaint Counsel's expert Dr. Simpson testified, and the ALJ found, that not only *could* a 5% price increase be successful but it *actually was*. (IDF-170-71, 174-75, 179). The ALJ noted Daramic's deep-cycle customers' refusal to switch to an alternate technology in the face of a reduction in supply of HD during the labor interruption at Daramic's Owensboro Kentucky plant. (IDF-172-73). This HD supply interruption caused Exide to pay a premium (and forgo a credit) for Flex-Sil separators rather than resort to another type of separator. (IDF-173).

Thus, the ALJ correctly determined "[d]eep-cycle battery separators" are "a relevant product market." (ID-216).

b. Motive Separators

Motive or "traction" batteries are typically used in fork lifts to provide power and serve as counterweight.[16] (ID-216; IDF-190, 193, 204; PX2110 at 035). These batteries provide a low steady stream of power over a longer period of time than a standard deep-cycle battery.

[16] "Traction" is synonymous with "motive." (IDF-34).

(IDF-204). These batteries are huge and as a result, require much larger separators. (IDF-195; ID-216). In North America motive separators are made of PE or a blend of rubber and PE. (IDF-197-203).

The motive market is delineated by "practical indicia" and a lack of reasonable substitutes. (ID-218). Motive separators have distinctive characteristics that make them conducive to the particular demands of the motive application. (IDF-215). Motive separators are much thicker than those used for SLI or deep-cycle applications. (ID-216; IDF-195, PX1450 *in camera*). Compared to SLI separators, motive separators have higher requirements with respect to their mechanical and chemical properties as described in a Daramic's own marketing materials. (IDF-196; PX1790-001). Kevin Whear, Daramic's VP of Technology, testified that not only are Daramic's separators tailored for specific end-uses, but that interchanging one type of separator for another would change the way the battery functioned. (IDF-94, 97; Whear Tr. 4681-85).

The industry is consistent in its recognition of a discrete motive market. Daramic's internal documents refer to a specific motive market within, a broader "industrial" market. (IDF-216). In its testimony and documents, Daramic repeatedly refers to the "motive power traction market" (Roe, Tr. 1202; PX0316 at 002), or the "traction market" in which Daramic and Microporous competed head-to-head. (IDF-577-581).

Similarly, Microporous recognized a motive market. For example in its presentations to its Board, Microporous separately analyzed a US motive market, including listing customers and assigning shares to Microporous and Daramic, and also separately analyzed the motive market for Europe. (PX1100 at 40, 33).

Given the unique characteristics of separators sold into the motive market, the ultimate question is whether customers, given a SSNIP would switch to an alternate separator for use in their motive batteries. *Merger Guidelines* § 1.11. The ALJ correctly analyzed the motive market and agreed with Dr. Simpson's conclusion that the demand for motive separators was sufficiently inelastic to prevent customers from switching to alternative separators for a SSNIP. (ID-218-219; IDF-206, 214).

c. Uninterruptable Power Supply ("UPS") is a Product Market

UPS batteries are used to supply a quick burst of power to data centers, telecommunications networks, and large computer networks in a power outage. (ID-219; IDF-224). These batteries are designed to last 15 to 20 years, thus long-term dependability is crucial to purchasers of these batteries. (ID-219; IDF-225). UPS separators are generally made of PE but with altered chemistry from the PE of a SLI separator. (ID-219; IDF-227, 231).

To ensure the proper function and life of UPS batteries, regular maintenance is required.[17] (Brilmyer Tr. 1854-1855). The battery must be free of "black scum," a residue that forms inside UPS batteries caused by oil in the separator. (IDF-227-230; Brilmyer Tr. 1834-1835, 1854-1855). This scum obscures level indicators or interferes with automatic watering systems. (IDF-228, 229; Brilmyer Tr. 1852-1855).

Daramic created a special separator, Daramic CL, using "clean oil," to address this problem. (IDF-230-232). Microporous was in the late stages of developing a competing "white PE" separator (project LENO) which also addressed scumming. (IDF-244, 417-420; Brilmyer Tr. 1836). The LENO project was a replacement effort targeting Daramic's "Darak" gel battery separator in Europe and a "white PE" separator targeting flooded UPS batteries in North

[17] The cases of UPS batteries are clear to facilitate visual monitoring of the active materials and water levels. (IDF-225-228).

America. (IDF-618-620, 622-628). For UPS customers there is no alternative separator to Daramic's "CL" that addresses scumming. (Brilmyer Tr. 1850-1851; *see also* IDF-239 (citing Enersys testimony identifying a complete lack of alternative sources for UPS). Microporous expected its white PE separator to be selling within the year. (IDF-628). Other PE separators will not work for UPS. (IDF-631, 633-635).

The UPS market is well recognized in the industry among both separator manufacturers and customers. (ID-220). Microporous documents reflect a plan to enter the UPS market with LENO/white PE project, demonstrating its belief that such a market existed and was worth penetrating. (ID-220; IDF-244). Daramic also recognized a UPS market within a broader reserve power segment. (ID-220; IDF-245).

The ALJ correctly determined that UPS separators constitute a product market: 1) UPS separators meet a unique need in the marketplace; 2) customers would pay a SSNIP due to lack of alternatives; and 3) contemporaneous documents reflect that the parties recognized and analyzed competition within a distinct UPS market. (ID-220-221; IDF-242). Moreover, the ALJ also found that customers would absorb a significant price increase on Daramic's UPS separators because there is no alternative in North America.[18] (ID-220; IDF-236-241).

d. SLI is a Product Market

SLI batteries are primarily used in automotive applications and the term "automotive" has become synonymous with SLI. (ID-221; IDF-259). In North America, SLI separators are made from PE. (*See* CCFOF ¶¶ 293-294). SLI batteries contain little or no antimony and, therefore, do not require a rubberized separator. SLI separators must also have a very low electrical resistance ("ER") to allow a quick surge in current. (IDF-249; PX0913 at 004, *in camera*).

[18] Enersys, one of the largest producers of UPS batteries, searched worldwide for an alternative supplier in 2006 after Daramic declared *force majeure* and could not find anyone. (ID-220; IDF-238).

SLI separators are far thinner than any other type of separator. Roughly 99% of all Daramic's SLI separators sold in North America have a backweb thickness between six and ten mils.[19] (IDF-250). The most common thickness in North America is six mils. (IDF-250). In comparison, { } percent of deep-cycle separators are between 13 and 15 mils, while over { } percent of motive separators are greater than 18 mils. (PX1450, *in camera*; Roe Tr. 1312-13; Hauswald Tr. 680).

There is industry recognition of a SLI separator market. Respondent's documents analyze competition in a market for SLI separators. (IDF-268; *See also, e.g.,* PX0088 at 001; PX0131 at 032-035; PX0402 at 012, *in camera*; PX0506 at 001-002, 006-007). Similarly a presentation by Microporous's management to its Board shows {

} (PX0080 at 060, *in camera*).

SLI customers also recognize a distinct SLI market. For instance, Exide Battery recognized SLI separators as unique. Gillespie of Exide Battery testified that he had issued an RFP after conducting a worldwide search for alternative SLI suppliers. (Gillespie Tr. 2962). That search uncovered only three firms able to bid on Exide's SLI business: Daramic, Entek, and Microporous. (IDF-264; Gillespie Tr. 2962).

The ALJ correctly found that SLI is a product market. This finding is supported by the testimony of Dr. Simpson. (IDF-265). Dr. Simpson found the following: 1) both customers and producers indicate that PE SLI separators, for which there are no foreseeable substitutes, "meet a unique need;" 2) customers state that they would not switch to other separators in response to a SSNIP; and 3) company documents analyze competition in the context of a separate SLI market. (IDF-265).

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[19] Six mils is .15 millimeters.

2. Respondent's Alternative Markets are Unpersuasive

In response to the ALJ's finding of four relevant markets, Respondent argues for just two: all-PE and Flex-Sil. (RAB at 16). After a thorough examination, the ALJ found these proposed markets, and the arguments in support, unpersuasive. (ID-224-232).

In accordance to the Supreme Court's decision in *Brown Shoe*, the ALJ looked at both of Respondent's proposed markets, and determined that Respondent had drawn the boundaries too narrowly in one and too broadly in the other. (ID-224-225). As the Court in *Brown Shoe* held, "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." 370 U.S. at 326.

a. Flex-Sil Alone is not a Product Market

> ***"HD is for deep-cycle application[s]. This is golf cart, marine and floor scrubber. This is the market for Amerace's Flex-Sil." (PX0316 at 2).***

The competition between Microporous' Flex-Sil and Daramic's HD in deep-cycle demonstrates that they are competitive substitutes. Industry participants testified to the interchangeability of the two separators and the constraining effect HD had on Flex-Sil prices. Indeed, Exide and US Battery both benefitted from the development of HD as an alternative to Flex-Sil. (IDF-502-505, 508-509, 513).

In response to Daramic's success with HD, Microporous began offering CellForce to deep-cycle customers to stem the loss of sales to the cheaper HD. (IDF-543-548). Respondent's expert testified that HD, Flex-Sil and CellForce are { }. (Kahwaty, Tr. 5328-29, *in camera*). Customers confirmed that they were also economic substitutes. (IDF-464-466, 468-469, 473, 497, 508)

The three largest deep-cycle customers were successful in using HD to obtain lower prices or other concessions from Microporous. (ID-228; IDF-521, 522, 529). In some cases, HD totally replaced Flex-Sil in entire battery lines. (IDF-513-515; *see also* IDF-517-518 (noting Daramic's efforts to win more business from Microporous in deep-cycle at Exide just prior to the merger).

Just as cellophane, even given its unique attributes and premium price, did not represent its own market outside of the flexible packaging market,[20] neither does Flex-Sil's higher price or unique composition serve to separate it as its own market. (ID-228). As noted by the Supreme Court in *Continental Can*, "[t]hat there are price differentials between the two products" is "not determinative of the product market." *United States v. Continental Can Company*, 378 U.S. 441, 455 (1964). Here, the evidence shows that HD constrained the prices for Flex-Sil and that they were substitutes for each other. In *Arch Coal* the Court ruled that the interchangeability between two products can be best determined by looking at "the degree to which *buyers* treat the products as interchangeable." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 122 (D.D.C. 2004) (emphasis added). The fact that some customers reserve a portion of their requirements for one product over another is not fatal to the determination of interchangeability. Even customers with this preference benefit from competition from the alternative. *Id.*

Moreover, "[c]ustomer preference towards one product over another does not negate interchangeability." *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1130-31 (N.D. Cal. 2004). Trojan successfully used the threat of switching to HD as leverage in negotiations with Microporous. (Godber, Tr. 258, *in camera* (confirmed by the former president of Microporous, at Gilchrist, Tr. 371-72, 379, 406); PX0428 at 3 and 1). At trial, the top executive at Trojan, the

[20] *DuPont*, 351 U.S. at 398, 401, 403.

largest deep-cycle battery manufacturer, testified that Daramic's "HD competes with Flex-Sil for use in deep-cycle applications." (Godber, Tr. 152-154)

The evidence thus does not support Respondent's Flex-Sil market, and the ALJ correctly rejected it.

b. An All PE Market is not supported by the Evidence.

Respondent proposes an all-PE product market encompassing the motive, SLI, and UPS markets established by Complaint Counsel. (ID-225). Respondent claims, incorrectly, that because some separators for different applications are polyethylene or PE based and may be of similar thicknesses, they must be in the same market. (*See* RAB at 16-17). The ALJ properly rejected this argument.

Among the overlaps claimed by Respondent is the claim that "[s]eparators with a 12 mil backweb are used in Automobiles (SLI), golf carts (deep-cycle) and telecom batteries (Stationary)." (RAB at 17). The ALJ accurately found that any 'overlap' between separators of that thickness for automobiles and for golf carts would be slight" – approximately { }. (ID at 231; Hauswald, Tr. 678-679; PX1450, *in camera*).

But similar thickness does not tell the whole story. (ID-231). Separators are also distinguished by chemical and material differences. (*See* IDF-85-87, 89-91). If a separator intended for one application were used in a different application, it would change the way the battery was intended to work and even change [reduce] the life of the battery.[21] (Whear, Tr. 4683). In short, Respondent's argument regarding overlaps grossly oversimplifies the profound differences between various types of separators.

[21] Similarly, swapping SLI for deep-cycle those separators would "devalue [the] product...basically cut the life" and would not be attempted. (IDF-90-91).

In addition, Respondent's supposed PE market ignores the competition between HD (Daramic's PE and Rubber, deep-cycle separator) and Flex-Sil, Microporous' separator, which has no PE in it. (*See* p. 24-26 *supra*) Thus, the all PE market makes no sense.

3. The Geographic Market is North America

The Supreme Court has defined the geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The leading case on geographic market definition is *Philadelphia National Bank*, in which the Court held that the "proper question" to ask about the geographic market definition is "not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357 (1963). More recently, the Eighth Circuit elaborated on the analysis, determining that the geographic market is the area "to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition." *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *followed by Staples*, 970 F. Supp. at 1073; *see United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) (approving of geographic markets where the merging parties competed the most). "Nonetheless, the relevant geographic market must be sufficiently defined so that the Court understands in which part of the country competition is threatened." *FTC v. Cardinal Health, Inc.*, et al., 12 F. Supp. 2d 34, 49 (D.D.C. 1998). The geographic market may also be proven by demonstrating that it is the smallest region within which a hypothetical monopolist could "profitably impose at least a 'small but significant and nontransitory' increase in price." *Merger Guidelines* § 1.21.

The ALJ found Dr. Simpson's expert opinion regarding the presence of price discrimination based on geography compelling. (ID-242; IDF-271-274). In determining the proper geographic market the ALJ correctly considered the unique commercial realities that consumers that purchase the relevant products face, within the framework provided by the Merger Guidelines. *See Brown Shoe,* 370 U.S. at 336-37; *Flegel v. Christian Hosp. Northeast-Northwest,* 4 F.3d 682, 690 (8th Cir. 1993) ("The proper market definition" requires a "factual inquiry into the commercial realities' faced by consumers." (Citations omitted). Here, Daramic *does* charge different prices to customers in different parts of the world. (IDF-275-280; Roe, Tr. 1317). The record of price increases in these markets in North America shows that a SSNIP would be (and has been) profitable. (IDF-272, 273).

In deep-cycle, UPS and motive, the transaction created a monopoly; while in SLI, only Entek provides an alternative to Daramic in North America. North American customers buy deep-cycle, motive and UPS separators only from Daramic and, with respect to SLI separators, Daramic and Entek. (IDF-371, 385-386, 410, 422, 439, 442).

Respondent argues that Asian manufacturers were the closest competitors to Daramic and Entek, yet neither Microporous nor Entek considered Asian manufacturers a threat. (IDF-359, 348, 349). In fact Entek had no knowledge of an Asian separator ever being imported into North America. (IDF-349). Daramic itself conceded that it did not consider Asian manufacturers a competitive concern in North America. (IDF-346, 451). No customer in North America has ever sourced a separator from outside of North America.[22] (*See* CCFOF ¶¶ 247-252). In short, there are no viable alternatives outside of North America for North American customers to turn

[22] The exception proves the rule: In the only example on record EnerSys paid a 20% premium during a supply disruption to ship separators from Daramic's Feistritz plant to Mexico. (IDF-119).

to for a SSNIP. (*See* IDF-271, 374 (deep-cycle), 386 (motive), 422 (UPS), IDF-425, 437, ID-284-285 (SLI)).

Even if there were viable suppliers outside of North America, customers would be unlikely to turn to them due to their overwhelming preference for local supply. (*See* IDF-286-294). From reduced supply chain disruption and speedier delivery, to minimized shipping, inventory and other costs, customers depend on the close proximity of their suppliers. (*See* IDF-287-92, 296-298, 300, 309). Daramic admitted that "[l]ocal supply from a global company" was important to customers. (PX0582 at 018-30; Roe, Tr. 1322-24; IDF-293).

Respondent argues that customer arbitrage might deter the local exercise of market power. (RAB at 21). But a SSNIP would neither entice imports nor spur arbitrage. Arbitrage is unlikely due to the products' high level of differentiation,[23] the need for direct shipment to customer plant locations, freight, and other costs of import. (IDF-274). As the ALJ correctly found "arbitrage of separators ... is unlikely because separators are for the most part differentiated products, manufactured with customer-specific designs." (IDF-117). Indeed, there is no evidence that arbitrage has ever happened, even in the face of price increases in North America.

For example, in 2007. Daramic/Microporous and Entek all { } in North America. (PX0263 at 003, 005, *in camera*; PX0911 at 031-032, *in camera*). Prices to { } in 2007 (PX0044-001–006, *in camera*), yet not one customer began importing separators for any of the relevant products from outside of North America. (IDF-360). Similarly EnerSys Mexico got a { } price increase on industrial separators in 2008, while EnerSys China received { }. (PX0044 at 002, 007, *in camera*). In

[23] Even Dr. Kahwaty concedes that separators are highly differentiated. (IDF-638).

2006, when Daramic declared force majeure and stopped significant sales in North America, customers were unable to import any of the relevant products. Again in October 2008 when Daramic declared force majeure because of a strike at its Owensboro, KY plant: customers were unable to ship in any products from any other producer around the world.[24]

Despite the testimony of Polypore's CEO that Asians suppliers do not compete in North America because their profit margins would not be high enough (Toth, Tr. 1404), Respondent argues that Asian manufacturers would find it profitable to enter the North American markets in response to a SSNIP. (RAB at 24). Respondent points to Dr. Kahwaty's calculation of production costs for a { } PE separator. (RAB at 24). However, Dr. Kahwaty took the cost figures of ***Daramic's own*** RAMA III plant, not an independent rival's. (ID-243; IDF-361). This plant is Daramic's state-of-the-art, lowest-cost facility in Thailand. (IDF-361). Dr. Kahwaty's analysis was rightly rejected because (1) there is no reason for Daramic to undercut its own North American prices; (2) Dr. Kahwaty failed to analyze costs for any non-Daramic Asian companies.; (IDF-366) and, (3) he was unable to identify a single instance of international separator arbitrage (despite recent history of post-acquisition price increases). (IDF-360).

For the foregoing reasons the ALJ correctly found that North America is the relevant geographic market.

IV. The Acquisition Harmed Competition

Daramic's liability under Section 7 of the Clayton Act is not a close call. The ALJ found the acquisition "presumptively illegal" in the deep-cycle and motive markets because it created a monopoly in each market. (ID-246, *quoting United States v. Franklin Elec. Co.,* 130 F. Supp. 2d

[24] EnerSys shipped a container from Daramic from Feistritz at a significantly higher cost. (IDF-119, PX1285).

1025 (W.D. Wis. 2000)). The acquisition also led to a monopoly in the UPS market and returned the SLI market to a duopoly. (ID-246, 252-259). While these market conditions alone are sufficient to establish liability, given Daramic's failure to rebut "the strong presumption" of anticompetitive effects (ID-251 (*citing cases*), 266), the evidence goes well beyond the mere "incipiency" standard of proof of likely harm. Indeed, Daramic's anticompetitive intent, coupled with evidence that Respondent implemented its anticompetitive schemes, makes clear that the probable and actual effects of the acquisition surpass the standard for Section 7 liability. (ID-244, 270; *see also Whole Foods,* 543 F.3d at 1047 (discussing intent evidence).

1. Complaint Counsel Has Shown a High Probability of Anticompetitive Effects as a Result of This Transaction

After proving product and geographic markets, Complaint Counsel presented evidence showing an undue increase in concentration caused by the transaction in each market. "By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." *United States v. Baker Hughes, Inc*, 908 F.2d 981, 982 (D.C. Cir. 1990); *see Philadelphia Nat'l Bank*, 374 U.S. at 363. The burden then switches to the respondent to show why, given the presumptively anticompetitive outcome of the transaction, particular facts and circumstances in each market clearly show that the transaction is unlikely to have such effects. *See Philadelphia Nat'l Bank*, 374 U.S. at 363. In each market the ALJ correctly found "undue concentration" as evidenced by the structure of the four markets and the resulting HHI calculations.

a. The Transaction Created a Monopoly in Deep-cycle and Motive

The ALJ correctly found that, as a result of the transaction, Daramic has a monopoly in the deep-cycle and motive markets. (ID-246). The acquisition is therefore presumptively illegal. *Franklin Elec. Co.*, 130 F. Supp. 2d 1025 at 1032.

Daramic and Microporous were the only competitors in the deep-cycle market in North America. (ID-246). Microporous and Daramic had 90% and 10% of the market respectively, with Daramic increasing its share every year since the introduction of its HD separator in 2005. (IDF-384-385, 477). In this market the acquisition increased the HHI by 1,891 to 10,000.

In motive the transaction likewise created a monopoly. (IDF-386, 577, 580). Not only were Microporous and Daramic the only sources of supply for motive separators in North America, but the burgeoning presence of Microporous constrained Daramic's ability to raise prices at multiple customers. (IDF-582-595). Even more vigorous competition was imminent had Microporous not been acquired. (IDF-390, 404-405, 596).

In the motive market the acquisition raised the HHI by 1663 to 10,000. (IDF-410). The increase in HHI to 10,000 more than satisfies the presumption of anticompetitive effects resulting from the transaction. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); see also *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000) (elimination of one of two "primary direct competitors" created likelihood of unilateral price increase); *see also Staples*, 970 F. Supp. at 1082. Due to the acquisition, deep-cycle and motive customers have no alternative to Daramic; thus, the ALJ rightly found the transaction presumptively illegal. (ID-251).

b. The Transaction Maintained a Monopoly in UPS

Prior to the acquisition Daramic held 100% of the UPS market in North America. (IDF-422-423, 616). Today, Daramic still holds a monopoly in UPS. (ID-252). In this market, the transaction eliminated competition from Microporous with its Project LENO separator. (IDF-417-420). This project was conceived when Enersys requested that Microporous develop a separator to compete with Daramic's offerings and address the "black scum" problem inherent in flooded UPS batteries. (IDF-617-624).

c. The Transaction Has Substantially Reduced Competition and Unduly Increased Concentration in SLI

Prior to the acquisition, the SLI market consisted of just three suppliers, Daramic, Entek, and Microporous. Entek accounted for 51.6 percent and Daramic 48.4 percent of the market, while Microporous had not yet begun supplying separators. (IDF-439). The HHI for this market was highly concentrated at 5005. (IDF-439). It was in this environment that Microporous disrupted the incumbents' stranglehold on the marketplace. (IDF-435-436).

Microporous had firm expansion plans in SLI and in 2007 was bidding for SLI business at the three largest customers in North America – JCI, Exide, and East Penn. (IDF-642, 684-690, 697-699, 706-710, 717-719).

These actions did not go unnoticed. Daramic developed its MP Plan as a response to Microporous' bids. (ID-257; IDF-820-821). This plan entailed { } to select customers in order to obtain long-term contracts { }. (*See e.g.* IDF-820-822, 849-851). The MP Plan demonstrates the competitive constraint provided by Microporous in the SLI market. (ID-257).

Respondent contends that since Microporous did not obtain commercial sales of SLI separators in 2007, it should not be viewed as a market participant. (RAB at 25-27). This is incorrect as a matter of fact and law. The ALJ correctly cites *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1962) for the proposition that a firm that competes for sales in a market is indeed a market participant even if it does not win the sales. *Id.* at 661; *see also* IV Phillip E. Areeda and Herbert Hovenkamp Antitrust Law ¶ 912a (3d ed. 2006) ("The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly."). "Unsuccessful bidders are no less competitors than the successful one." *El Paso*, 376 U.S. at 661. But here, Microporous actually sold SLI separators, told customers it was in the market to sell SLI separators, competed for SLI separator sales, and even told customers that it had a 2% market share in SLI separator sales, and would have had a 6% share in 2010, based on SLI business Microporous had already won from Exide. (*See, e.g.*, PX0078 at 07, 16, *in camera*, Microporous' customer sales pitch, one week before the acquisition; ID-429-436, 441).

Respondent's believed that Microporous had already entered the market and caused "aggressive rivalry" between Polypore and Entek for SLI business. (ID435-36; PX0482 at 02). Microporous had begun expansion to sell SLI separators, which was "discontinued because of the acquisition." (IDF-770; Trevathan Tr. 3722-23). There is ample evidence that Microporous would have continued to expand into the SLI market, and increased competition along the way. (*See, e.g.*, IDF-642, 697-714, 717-719, 803-804). The ALJ rightly concluded that Microporous was an actual competitor in the North American SLI market because it was bidding for

business.[25] IV Phillip E. Areeda and Herbert Hovenkamp Antitrust Law ¶ 912a (3d ed. 2006); ID-259).

2. Entek was Not an Uncommitted Entrant in UPS, Deep-Cycle, or Motive

An uncommitted entrant must have the "technological capability to achieve" the proper supply response and it must be likely to do so. Guidelines §1.32. Such entry must be *likely* to occur within one year in response to a SSNIP and without the expenditure of significant sunk costs. *Id.* (emphasis added).

In the markets for non-SLI separators, Entek does not meet the criteria for an uncommitted entrant. Due to significant barriers to entry and Entek's own warnings that {

}, there is ample evidence that Entek fails to meet the requirements of an uncommitted entrant. (IDF-1034-1037).

Over the years, Entek has had the opportunity to provide non-SLI separators to Exide, Bulldog, Crown, Douglas, and EnerSys. Yet, Entek was unable or unwilling to actively pursue any of those opportunities. (IDF-394-397, 1031-1034, 1041). Indeed, Entek has articulated a strategy which {

}. (IDF-1027, 1029-30).

The ALJ properly accounted for these factors in analyzing, not only the ability of Entek to offer a sufficient supply response, but also the likelihood that such a response would occur in time. Ultimately, the ALJ agreed with Dr. Simpson that Entek was not an uncommitted entrant. (IDF-383, 403, 421).

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[25] Dr. Kahwahty acknowledged that Microporous was at least an uncommitted entrant in SLI and therefore must be included in the market. (IDF-638).

3. Evidence of Anticompetitive Intent

Daramic's purpose in acquiring Microporous and its plans to increase prices post-merger are evidence of likely anticompetitive effects. Courts consider the respondent's intent helpful in evaluating "the probable future conduct of the parties and the probable effects of the merger." (ID-244, *citing Whole Foods,* 548 F.3d at 1047; *see also* ID-266-269; Areeda, ¶964a. ("[E]vidence of anticompetitive intent cannot be disregarded, as it is clearly pertinent to the basic issue in any horizontal merger case."); *Brown Shoe v. United States,* 370 U.S. 294, 329 and n48 ("A most important such factor to examine is the very nature and purpose" of the acquisition).

First, historical and contemporaneous evidence shows that Daramic viewed Microporous as a competitive threat and that its primary purpose in buying Microporous was to eliminate price competition. (IDF-750-759, 809, 854-859). Daramic anticipated that the competition would continue to reduce Daramic's revenues by { } over a five year period absent an acquisition due to "[c]ompetitive pricing to block additional expansion [of Microporous]." (IDF-879).

Second, the evidence shows that Daramic formulated "Project Titan" to eliminate the competitive threat. (ID-268-269; IDF-869-878). Daramic's executives informed Polypore's Board that absent an acquisition Daramic would lower prices and predicted that one of the "[a]cquisition benefits" would be an increase in prices. (ID-269; IDF-856). Absent the acquisition, Daramic budgeted significant business losses to Microporous and future price decreases from the competition. (IDF-865-868).

V. Finding of Actual Anticompetitive Effects Requires Finding of Liability

The law does not require Complaint Counsel to demonstrate that the acquisition led to actual anticompetitive effects. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986). However, where evidence exists that Respondent has increased price or otherwise exercised market power, it "cements" Complaint Counsel's case. Von Kalinowski J. ANTITRUST LAW & TRADE REGULATION (2d ed. 1996) at § 4.03[4] (citations omitted). Indeed, proof of actual anticompetitive effects is sufficient even without detailed market analysis to establish that the acquisition is likely to lessen competition. *United States v. General Dynamics*, 415 U.S. 486 at 505, n. 13 (1975); *FTC v. Libbey, Inc.* , 211 F. Supp. 2d 34 at 49 (D.D.C 2002) ("'Proof of actual detrimental effects'" can "'obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'") (citations omitted).

1. Acquisition Led to Actual Anticompetitive Effects in Deep-Cycle

Due to the acquisition, Daramic has been able to increase prices in the deep-cycle market.[26] Prior to the acquisition, Exide managed to avoid paying a Microporous rubber surcharge by threatening to switch to HD. (IDF-562). As a result of the acquisition, Exide was forced to accept Daramic's imposition of the same rubber surcharge -- a { } price increase - on all Flex-Sil purchases. Daramic's success in imposing this increase was a direct result of the fact that Exide no longer had any alternate supply options and the fact that Daramic threatened to cut of supply if Exide did not pay the price increase. (IDF-562-563; Gillespie, Tr. 2953-2954).

[26] Respondent's citation to Steve McDonald that he did not consider HD a threat to Flex-Sil is contradicted by his testimony that Microporous lowered prices on Flex-Sil to protect against losses to HD. (McDonald, Tr. 3943). Trojan, Exide, and US Battery all used HD as a competitive threat to Flex-Sil. (Gilchrist, Tr. 379-380, 406; Godber, Tr. 152-54 (HD "competes with Flex-Sil" and there are no other competitors, "and we've looked.").

Similarly, price increases that Daramic imposed on Trojan are a direct result of the acquisition. Trojan successfully used the threat of HD to come to a contractual agreement with Microporous { } any price increases and lock in Trojan's prices until at least { }. (IDF-540-542). This contract was specifically intended to protect Trojan from { }. (IDF-556). Post merger, Daramic disregarded Trojan's contractual agreement with Microporous, demanding unprecedented price increases in { }. (IDF-556-559). As with Exide, Trojan's ability to prevent the post-acquisition price increases was eliminated by Daramic's acquisition of Microporous. (IDF-555). [27]

Respondent argues that since customers have not actually switched all their deep-cycle purchases to HD, that HD was never actually a constraint, and therefore that the post-acquisition price increases are not anticompetitive. This is nonsense. The fact that some customers may reserve a portion of their requirements for one product does not mean that those same customers are not benefiting from the competition that the recognized alternative poses. *Arch Coal*, 329 F. Supp. 2d at 122.[28]

2. Acquisition Led to Actual Anticompetitive Effects in Motive

The ALJ correctly found that Daramic has exerted unilateral market power in the motive market. (ID-262-264). Daramic's own documents and testimony verify that Microporous acted as a competitive constraint in the motive market with multiple motive customers (IDF-582-583) including EnerSys (IDF-592-599), East Penn (IDF-584, 591), and C&D (IDF-585-590).

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[27] This was the second price increase that Daramic has imposed on Trojan, even though it breached its 2007 agreement with Microporous not to do so. (Godber Tr. 223-224).

[28] Contrary to Respondents' claim that HD was not qualified for original equipment, US Battery had in fact qualified and is using, HD in original equipment batteries. (Wallace Tr. 1934-35). Moreover, { } Exide would also do so. (IDF-164, 517).

As a result of the acquisition, Daramic exerted its market power by raising prices in the motive market. Daramic announced price increases of { } for motive customers. (ID-263; IDF-611). These price increases were unprecedented and "pretty exorbitant." (IDF-613). Bulldog Battery was forced to accept a 10% price increase after the acquisition because "there was no place to go." (IDF-614). Contrasting Daramic's treatment of motive customers such as Bulldog with the treatment of the customers identified in the MP Plan ({ }) (IDF-849-851), demonstrates that Daramic's post-acquisition price increases were a direct result of the elimination of Microporous as a competitive constraint.

Respondent alleges that Microporous had no competitive influence with Crown or Douglas Battery. This is nonsense. Daramic put together the MP Plan in the fall of 2007 specifically because it feared losing these customers to Microporous. (IDF-602). Respondent also claims that East Penn had not qualified Microporous separators and therefore could not switch to Microporous. This claim is directly contradicted by East Penn testimony that it was { } Microporous separators for motive batteries (Leister Tr. 4004-4005, *in camera*, 4026-4027), and by Daramic's history of lowering prices to East Penn in the face of competition from Microporous. (IDF-584, 591).

A further anticompetitive effect in the motive market was the elimination of Microporous' expansions. (IDF-788-797). Prior to the acquisition, Microporous contracted with EnerSys to build a new manufacturing line in their existing Tennessee facility to supply motive separators to EnerSys. (IDF-788-790). This additional line was never installed and is currently sitting in boxes. (IDF-813).

3. Acquisition Led to Actual Anticompetitive Effects in UPS

Daramic's acquisition of the only company entering the UPS market eliminated innovation competition that would likely have led to lower prices. (ID-259, 264). For some time prior to the acquisition, Microporous' R&D group had been working on a new product for the UPS market. (IDF-617-627). New separators were developed, samples of these separators were undergoing product testing, (IDF-620-624), Microporous made capital expenditures in anticipation of the sale of these separators (IDF-625-627), and revenues were expected from this project as early as 2008. (IDF-628). Following the acquisition, Daramic halted work on this project, for fear of cannibalizing its own higher margin sales, despite the harm to customers. (IDF-629-632; ID-264).

4. Acquisition Led to Actual Anticompetitive Effects in SLI

The ALJ correctly found that Daramic has exerted unilateral market power in the SLI market. (ID-264-265). Exide decided to buy SLI separators from Microporous in order to obtain lower prices, better quality and to mitigate supply risk. (Gillespie, Tr. 2977-2978; IDF-696, 710, 723).[29] At the time of the acquisition, Exide and Microporous were on the cusp of finalizing an agreement for Microporous to add manufacturing lines in its facilities in the United States and Europe to supply Exide with SLI separators. (IDF-697-700, 707-711, 713, 716, 803).[30]

When Daramic acquired Microporous, "the carpet was pulled out from" Exide's long term strategy to inject competition into SLI. (Gillespie, Tr. 2979; IDF-812) {

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[29] Exide spent months developing and negotiating a detailed MOU with Microporous (IDF-694-706), tested SLI separators (IDF-707-709), spent money on the project (Gillespie, Tr. 2980), and actually decided to buy from Microporous (IDF-710; Gillespie Tr. 2968-69, 2976).

[30] The elimination of Microporous' planned addition of manufacturing lines is another anticompetitive effect of the acquisition. (IDF-810-813).

} (IDF-743). Without Microporous as an independent entity, Exide has been forced to pay higher prices. After the acquisition, Daramic {

}. (IDF-902-903).

Respondent argues that Microporous, with no current sales, was not one of the top two choices for any customer seeking SLI supply.[31] Yet Microporous was one of Exide's top two choices for supply. Similarly, Microporous was Daramic's closest competitor for SLI supply to East Penn at the time of the acquisition. That is because East Penn was seeking a second supplier on the East Coast, and East Penn believed that Entek was unwilling to make such an accommodation. (IDF-717-719).

The ALJ correctly found that the acquisition has had unilateral anticompetitive effects on other smaller customers who can no longer turn to Microporous as a supply option. (ID-264-265). {

.} (PX0950 at 015, *in camera*).

5. Entek will not constrain Daramic in SLI:

Respondent argues that Entek will constrain Daramic from exertion of unilateral market power. Yet Entek's { } has not constrained Daramic from raising prices on multiple occasions. (IDF-737). In fact, Daramic's post-acquisition price increases were {

.} (Weerts, Tr. 4511, *in camera*; CCFOF 645). Additionally,

[31] Microporous had previously made commercial sales of SLI separators. (IDF-640).

{

.} (IDF-738-739).

Entek's lack of constraining effect on Daramic can also be seen by comparing Daramic's response to { } with Daramic's response to Microporous' expansion plans. (IDF-741-742). While Daramic took no steps in response to {

,} Daramic took multiple steps in response to capacity expansions at Microporous, including: (1) developing the MP Plan (IDF-742, 820-823); (2) plans to cut prices in the future (IDF-856, 858, 866); and (3) plans to build low cost lines to compete on price. (ID-269; IDF-876).

6. Coordination in SLI is more likely

The ALJ found that without Microporous' presence in the SLI market, there is a strong presumption of coordinated effects. "The combination of a concentrated market and barriers to entry is a recipe for price coordination" or the coordination of markets or customers. (ID-265 (quoting *Heinz*, 246 F.3d at 725). In SLI separators, where only Entek and Daramic remain, it is axiomatic that two competitors are more likely to coordinate than three. *Heinz,* 246 F.3d at 716; *CCC Holdings,* 605 F. Supp. 2d at 66-67 . Respondent failed to establish the existence of any "structural barriers" to coordination in this market, as the law requires. (ID-265; *Heinz*, 246 F.3d at 724-25). Indeed, Daramic cannot escape the simple fact that "[w]ithout Microporous as a competitor, there are fewer incentives [for the duopoly] to engage in healthy competition." (ID-266; *see also CCC Holdings,* 605 F. Supp. 2d at 66).

"In a highly concentrated market, with stable market shares, low growth rates and significant barriers to entry, there are few incentives to engage in healthy competition." *CCC Holdings,* 605 F. Supp. 2d at 66. The competitive dynamics described in *CCC Holdings* mirror

those in the SLI market prior to Microporous' entry. A duopoly existed in the SLI market prior to Microporous' entry. (IDF-636). Daramic and Entek were "'lazy' and unresponsive"; they did "not appear to compete and d[id] not have to, given the absence of market forces." (IDF-660). Indeed, Daramic's VP of Sales recognized that "there has not been an aggressive rivalry among competitors" until Microporous' entry into the SLI market. (IDF-435).

When Microporous entered the SLI market the competitive dynamic changed. Daramic understood Microporous to be a "real threat" to the comfortable duopoly. (IDF-435-436, 755-56). With Microporous aggressively competing for SLI business, Daramic expected 2008 to "be the most challenging year ever faced" in part because "unlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes." (IDF-809). Entek similarly feared that Microporous' entry would change the competitive landscape of the SLI market. (IDF-436). Signaling and coordination between Daramic and Entek is not difficult, considering the widespread knowledge of customers sourcing decisions, sales data, prices and other competitive information (IDF-729-733). Moreover, actual evidence from the marketplace that Daramic and Entek were involved in coordinated interaction prior to Microporous' entry is evidence that the two can again coordinate now that Microporous is gone. (IDF-435, 636, 655, 660).

Signally, no court has ever approved a Section 7 case of a merger to duopoly. *Heinz Co.*, 246 F.3d at 716 Yet, Respondent seeks just such approval based on the unsubstantiated assertion that following the acquisition Daramic {

}.[32] What is actually in evidence is that prices before the acquisition were more competitive when Microporous was bidding on SLI contracts than they are today.

For example, compare the price of SLI separators that {

}.[33] (RX00072 at 56, in camera). In contrast, the best price offered to {

}. (RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*).

{

} (RX01668 at 002, *in camera*; Seibert, Tr. 5656, *in camera*; CCRF 1510). Competition is clearly deteriorating, post-acquisition.

Daramic and Entek "were not aggressively competing against each other for business" prior to Microporous' decision to enter the SLI market, and the ALJ correctly found that Respondent has done nothing to show that there are any structural barriers to coordination returning to the SLI market now that there are only two competitors. (ID-265-266; IDF-435, 655, 660).

VI. The ALJ Correctly Assessed That Entry Will Not Counteract the Anticompetitive Effects of The Acquisition

[32] There is actually no evidence that in fact { }. The only evidence on the record is that Exide and Daramic entered a new evergreen supply contract on January 19, 2010. (IDF-749).

[33] Respondent claims that JCI's decision to buy from Entek shows post-acquisition competition, but that decision occurred in 2007, long before the acquisition and when Microporous, Entek and Daramic were competing for that same business. (IDF-734).

There is no evidence that entry into any of the markets has occurred or will occur in North America. To prevent a reduction in competition, entry must be timely, likely, and sufficient, meaning it "must restore the competition lost from the merger." *Chicago Bridge*, 534 F.3d at 429; *Merger Guidelines* § 3. The ALJ correctly held that there would not be entry that would be timely, likely, and sufficient to allay the anticompetitive harm. (ID-272).

It is Respondent's burden to provide evidence of ease of entry. *Chicago Bridge*, 534 F.3d at 423 "The more concentrated the market and the greater the threat posed by the challenged practice, the more convincing must be the evidence of likely, timely, and effective entry." 2A Areeda, Hovenkamp & Solow, Antitrust Law ¶ 422 (2d ed. 2002). The ALJ found that based on the extremely high levels of concentration in these markets, Respondent did not meet its burden of providing evidence of ease of entry. (ID-277-274). Moreover, the ALJ found that entry barriers existed in all four markets. (ID-272-274). "[E]vidence of high entry barriers . . . strengthens the conclusions to be drawn from Complaint Counsel's showing of high concentration levels." *In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1065-1066 (2005), *aff'd* 534 F.3d 410 (5th Cir. 2008). The ALJ also found that Asian separator manufacturers would not enter into any of the product markets and replace Microporous' competitive presence. (ID-283-287). Thus, the ALJ correctly concluded that Respondent did not rebut Complaint Counsel's *prima facie* case. ID-272.

1. Entry Barriers are High

The evidence demonstrates high barriers to entry in the four product markets. Barriers to entry are any condition that necessarily delays entry into a market for a significant period of time and, thus, allows market power to be exercised in the interim. *In re B.F. Goodrich Co.*, 110 F.T.C. 207, 297 (1988). In *Chicago Bridge,* the ALJ found entry barriers were categorized as

expertise in the industry, a fair amount of capital, a positive reputation, and possession of specialized equipment. *In re Chicago Bridge & Iron Co.*, 2003 FTC LEXIS 96, at **242-43 (2003), *aff'd,* 138 F.T.C. 1024 (2005), *aff'd,* 534 F.3d 410 (5th Cir. 2008). Those are the same kinds of barriers existing in this case. (ID-272). For example, Respondent's documents and testimony display numerous high entry barriers, including scale, experience and learning effects, capital requirements, reputation, brand, access to distribution, and know-how. (IDF-928-930).

A de novo entrant in any of the markets would require considerable capital to build a separator plant of sufficient size and scale to sustain profitability and service large customers. (ID-274; IDF-925, 928-929). The costs of doing so are not insignificant and would require a team of engineers with specialized technological experience to build the manufacturing lines. (ID-275-277; IDF-927, 933-945).

Finding and employing a skilled workforce is another barrier to entry. (IDF-959-963). Microporous illustrated this point by building a plant in Feistritz where a pool of experienced workers already existed. (IDF-950). A new entrant would also have to work around proprietary specifications for production lines (IDF-933-934), design around existing patents (IDF-924, 931-934), and develop a good reputation with North American customers (IDF-969-972). Other barriers include product development (IDF-993-1000), global supply capabilities (IDF-928; PX0611 at 011, 028), and product testing. (IDF-1001-1026).

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.

2. No Evidence of Entry

"The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future." *Cardinal Health*, 12 F. Supp. 2d. at 56; *Chicago Bridge*, 138

F.T.C. at 1037 n.45 (quoting 2A Areeda, Hovenkamp & Solow, Antitrust Law ¶ 420b at 60 (2d ed. 2002) ("The only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions."); *B.F. Goodrich Co.,* 110 F.T.C. at 299-300 (noting that history of lack of de novo entry supported conclusion that entry barriers were high)). With the exception of Microporous' and Daramic's own long term efforts, there has been no de novo entry in any of the markets in North America.

Additionally, it is proper to consider post-acquisition evidence when determining whether entry is likely to negate anticompetitive effects. *See Chicago Bridge,* 138 F.T.C. 1024, 1036-1037. Since the acquisition, Respondent has increased prices on its separators. (IDF-897-916). Yet no entrant has entered the market and no existing separator producer has added capacity. Battery manufacturers have searched the world for alternative suppliers and found no viable candidates. (IDF-1079-1107, 1110-1112).

There ***is no*** evidence of Respondent's assertion that foreign firms like Anpei and BFR are in the process of entering any of the four markets in North America. There had never been a single sale by an Asian separator manufacturer in any of the markets in North America. (IDF-346-349, 448-449). Although customers have spoken to Asian separator producers, no customer actually believes that they will enter in a manner that restores the competition lost from the acquisition. (IDF-1079-1107). As noted in *Chicago Bridge*, mere evidence of customers inquiring about suppliers willingness in the future to provide separators for any of the four markets "falls short of proving ... that entry [will be] sufficient to replace competition lost from the acquisition." *Chicago Bridge, & Iron Co.*, 138 F.T.C. at 1102. Instead, as the Commission explained in *Chicago Bridge*, such efforts show "little more than a refusal to throw themselves on [a supplier's] mercy." *Id.*

3. New Entry Would Not Be Timely

After analyzing the testimony and documents, Judge Chappell correctly held that "[t]he experiences of Daramic and Microporous show that developing a profitable, competitive separator product takes several years, even for established and experienced manufacturers." (ID-279). Thus, Judge Chappell correctly concluded that entry would not be timely.

Judge Chappell found that "[o]n average, it takes an experienced PE line builder approximately 18 to 20 months to design, equip, install and 'de-bug' a PE battery separator line," not including the time to evaluate and purchase the land and obtain the necessary permitting. (ID-278; IDF-974-975, 988-990, 992). Moreover, it would take longer than 20 months for a de novo entrant to obtain commercial sales. (ID-279).

Testing requirements also make it impossible to enter any of the markets within a timely manner. Customers test both the separator itself and how the separator works within the battery before the separator can be qualified. (IDF-1001-1008). Product testing lasts 18 to 24 months for deep-cycle separators (IDF-1015-1017, 1019-1023), two to three years for motive and UPS separators (IDF-1011-1014), and one year or longer for SLI separators. (IDF-1025).

Moreover, these events must happen in sequence. (IDF-923). Thus, adding just the elapsed time for building a plant and obtaining qualification on a SLI separator, the separator with the shortest testing period, would be well over two years. (IDF-974-975, 1025). *See United States v. United Tote,* 768 F. Supp. 1064, 1074-75 (D.Del 1991) (holding that the two year time assessment includes the time for study, development, and debugging to achieve a "truly competitive" product). And, yet, two years after the acquisition, there is no evidence of anyone actually attempting to do so.

4. Entry Would not Be Likely

In order to demonstrate that entry is likely, Respondent must demonstrate that entry would be profitable at pre-merger prices, and such prices could be secured by the entrant. *Merger Guidelines* § 3.3; *Cardinal Health*, 12 F. Supp 2d at 56. Asian manufacturers { } believe that they cannot be price competitive as entrants. (IDF-320, 322, 332, 335-337, 347, 1035). Industry participants do not believe that Asian producers will enter the North American geographic market. (IDF-1079-1107, 1110-1112). Moreover customers have uniformly concluded that these alternatives are significantly more expensive and of a lesser quality. (IDF-1079-1107, 1110-1112, 1035, 1061).

Judge Chappell correctly held that the "evidence demonstrates that Entek is unlikely to enter the deep-cycle, motive, and UPS separator markets within the next two years." (ID-283-284). { } would need to develop a reliable product, modify its production line, get qualified by customers, and then gain the learning by doing necessary to be efficient. (IDF-973, 1028, 1047). This is unlikely because Entek has made a strategic decision to { }. (IDF-1029-1030). Since that time, Entek has repeatedly refused to supply non-SLI separators for reasons such as { } (IDF-395-398, 400, 1029-1031-1039, 1041; PX1806 at 001, *in camera*) { } (RX00114 at 008, *in camera*).

5. No Evidence that Entry Would Be Sufficient

To be sufficient, entry must be of "sufficient scale" to "be able to restore competitive pricing" by permitting the new entrant to "compete on the same playing field" as Daramic. *In re Coca-Cola Co.*, 117 F.T.C. 795, 953, 960 (1994); *Chicago Bridge,* 534 F.3d at 429-430. To

replace Microporous an entrant must possess multiple manufacturing lines in plants located in North America and elsewhere in the world producing separators in all four product markets, a reputation for quality separators, and technical expertise.

Dr. Simpson testified and Judge Chappell found that a new entrant would have to possess tangible assets like production facilities similar to Microporous qualified separators, a technical workforce that could troubleshoot and innovate, and an effective sales force, as well as intangible assets like a positive reputation and "know-how." (IDF-923, 973). Judge Chappell correctly found that no Asian separator suppliers "presently possess such assets for the relevant markets" and are unlikely to acquire them in two years.[34] (ID-287). In short, no potential entrants have demonstrated that they have the technology, product quality, supply capability, reputation, and comparable pricing for entry at a sufficient level to counter the anticompetitive effects of the acquisition. *Cardinal Health,* 12 F. Supp. 2d at 58 (quoting *Merger Guidelines* § 3.0) ("[E]ntry must also 'be sufficient' to return market prices to their premerger levels.").

Respondent failed to show that entry by Asian separator manufacturers would be profitable at pre-merger prices. Merger Guidelines § 3.3; *Chicago Bridge*, 534 F.3d at 430. Judge Chappell correctly found that an Asian separator manufacturer could not operate profitably in North America. (ID-284).

Respondent failed to produce evidence that Asian separator manufacturers can price competitively in North America. Asian producers have never acted as a price constraint in North America. (IDF-346, 349; CCFOF 249-252). The evidence demonstrates that pricing for Asian separators would be substantially higher than separators manufactured in North America due to

[34] Notably, the Asian producers Respondent mentions are very small. (IDF-1057).

higher manufacturing costs, import charges, shipping costs, and additional warehousing costs. (IDF-314-337, 341-342, 1060, 1084, 1094, 1096, 1100, 1102, 1104, 1110).

Although some North American customers have conducted testing of Asian separators, the testing { } . (IDF-1061, 1081-1082). Customer testimony demonstrated that customers consider Asian separator manufacturers quality[35] to be poor compared to North American suppliers (IDF-1061, 1082, 1088-1089, 1101), and no Asian separator manufacturer has even been qualified for use in North America in any market. (ID-242).

In non-SLI separators, Entek is also not a timely, likely, or sufficient entrant. It does not even have such products designed, much less tested, and it has stated that if it did produce industrial separators, {

} IDF-1035; *see also* Weerts, Tr. 4509, *in camera*; Gillespie, Tr. 3040, *in camera*

{(

.} Thus, Entek would not replace the competition lost by the elimination of Microporous. *Chicago Bridge*, 534 F.3d at 430. Thus, there is no evidence of sufficient entry in this case.

6. Customers Are Not "Power Buyers" Capable of Counteracting the Anticompetitive Effects of the Acquisition

In order for customers to be power buyers, they must have alternative suppliers to have any real bargaining power. *Chicago Bridge,* 138 F.T.C. at 1151. Choosing among alternative suppliers "depend[s] in the first instance on the existence of those alternatives." *In re American*

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[35] Daramic's Strategy Audit identified { "} for service and support, product portfolio, technology performance, technology processibility, technology quality and proximity to all markets. (IDF-1065; PX0265 at 016, *in camera*). Additionally,

} (IDF--1075-1077).

General Ins. Co, 89 F.T.C. 557, 643 (1977), *rev'd on other grounds, American General Ins. Co.* v. *FTC,* 589 F.2d 462 (9th Cir. 1979) This is not the case in three of the markets. Judge Chappell correctly held that "[i]n the deep-cycle, motive, and UPS markets, as a result of the acquisition of Microporous, customers have no alternative suppliers to Daramic." (ID-289). Just as in *Chicago Bridge*, North American customers have no real alternatives to Daramic in these three markets and therefore, do not have "any real ability to thwart price increases post-merger." *Chicago Bridge,* 138 F.T.C. at 1152.

In SLI, with only one alternative to Daramic, the evidence does not support a power buyer argument either.[36] (ID-291). Neither Exide nor East Penn have any plans to vertically integrate, sponsor entry of a separator manufacturer, or enter a joint venture with a separator manufacturer. (IDF-1116, 1125, 1126). Notwithstanding discussions various customers have held with Asian suppliers, customers are not likely to be able to use Asian separators as a meaningful alternative to Daramic in the SLI market. (ID-292). The evidence is that neither sponsored entry nor vertical integration by any so-called power buyer is likely at all. (ID-287, 292).

Moreover, the assertion that any customer has buying power is contradicted by evidence from Daramic's own strategic audit that found that "battery manufacturers lack purchasing power despite their scale due to limited number of suppliers." (IDF-435). According to Daramic, the separator suppliers {"

(PX0265 at 004, 007-008, *in camera*). Moreover, Daramic believes that the large

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[36] Exide's purpose {

}"

not to gain leverage with Daramic. (ID-291). Daramic's {

} demonstrates that Daramic wields the power in the relationship. (*See* CCFOF 1283).

separator suppliers will have { }. (PX0265 at 011, *in camera*). Finally, Respondent's unsubstantiated assertions about Enersys or Exide fail to account for all the customers in the markets, all of which have no other choice but to deal with Polypore. (ID-288-92).

VII. Complete Divestiture is Necessary to Restore the Competition Eliminated by the Illegal Acquisition

The ALJ appropriately ordered complete divestiture as the best means of restoring competition to the state in which it existed prior to, and would have continued to exist but for the unlawful acquisition. Respondent concedes the propriety of virtually all of the ALJ's Order, but nonetheless argues that divestiture of Microporous' Feistritz, Austria manufacturing plant is inappropriate because it is located in Europe and, according to Respondent, had no effect on competition in North America. Neither argument is correct on the law or the facts. It is well established that complete divestiture can properly include assets outside the relevant market in which an antitrust violation is found, including foreign assets, especially where complete divestiture is necessary to restore effective competition. *In re Chicago Bridge & Iron Co.,* 140 F.T.C. 1152, 1169-1170 (2005); *Yamaha Motor Co. Ltd. v. FTC*, 657 F.2d 971, 982 (8th Cir. 1981) (upholding the FTC's authority to order a U.S. company to divest its stockholdings in a foreign company); *Ford Motor Co.,* 405 U.S. at 573 ("[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.") (Citations omitted). Accordingly, the ALJ's Order should be affirmed and adopted by the Commission.

1. The Commission Has the Legal Authority to Order Divestiture of the Feistritz Plant

As the Commission has explained, "in Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.'" *B.F. Goodrich Co.*, 110 F.T.C. 207, 345 (1988), (quoting *In re RSR*

Corp., 88 F.T.C. 800, 893 (1976)). Indeed, the Clayton Act requires that upon a finding of a Section 7 violation, "the Commission . . . shall . . . order . . . such person to cease and desist from such violations, and divest itself of the . . . assets, held." 15 U.S.C. § 21(b). Moreover, "[o]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (footnote omitted); *see also Ford Motor Co*, 405 U.S. at 573; *Chicago Bridge*, 534 F.3d at 441. "Ordinarily, a presumption should favor total divestiture of the acquired assets as the best means of accomplishing this result." *In re RSR Corp.*, 88 F.T.C. 800, 893 (citation omitted), *aff'd* 602 F.2d 1317 (9th Cir. 1979). Consistent with these established principles, complete divestiture is the presumptive relief for the unlawful acquisition. *Id. at* p. 328.

Restoring competition means returning the new "Microporous" to the competitive position it would have been in but for the illegal acquisition, and assuring its viability. Establishing "a mere shadow of [Microporous's] former self is not acceptable." *See* Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. Law & Econ. 43, 45 (1969). As the Supreme Court observed, "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." *United States v. E. I. du Pont de Nemours and Co.*, 366 U.S. 316, 323-24 (1961) (citations omitted).

Consistent with appropriate remedial standards, the Commission 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 and sold other products worldwide – together with ancillary provisions crucial to establishing a viable new entity that could restore the lost competition. As the Commission

stated: "no evidence [suggests] 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*, 534 F.3d 410 (2008).

The ALJ correctly concluded that the Commission's authority to order complete divestiture under both Section 5(a) of the FTC Act, 15 U.S.C.§ 45(a), and Section 11(b) of the Clayton Act, 15 U.S.C.§ 21(b), including divestiture of the Feistritz Plant, is properly based on the Commission's jurisdiction over the Respondent, the acquisition, and Respondent's activities in or affecting interstate commerce, all of which Respondent admits. (ID-198-199, 333-334; IDF-1-11, 43-46; Answer ¶3). *See also* CCRB-56-61. Divestiture orders against domestic corporations have included requirements to divest foreign assets where, as here, this is appropriate to restore competition lost through an illegal acquisition. *See Yamaha Motor Co. Ltd. v. FTC*, 657 F.2d 971, 982 (8th Cir. 1981) (affirming FTC order requiring a U.S. company to divest foreign stock acquired in illegal acquisition); *Chicago Bridge & Iron Co.,* 140 F.T.C. 1152, 1169-1170 (modifying final order to specify divestiture of foreign assets if necessary to restore competition in relevant markets).

Thus, under the Clayton Act and the FTC Act, the Commission has ample authority to order effective relief, including not only divestiture of foreign assets but also additional assets if needed to reconstitute Microporous to the competitive strength it would have possessed absent the Acquisition.[37] For example, in the related *Cascade* and *El Paso* cases, the Supreme Court

[37] The extraterritorial application of the Commission's authority under § 5, is irrelevant to this case that challenges Polypore's combining two U.S. firms operating in the U.S., with direct, substantial, and reasonably foreseeable effect on domestic or export commerce with effects on U.S. commerce. Section 5(a)(3)(A) of the FTC Act actually extends FTC authority to cases like this one. *F. Hoffmann-La Roche*

ordered that gas reserves be given by the defendant to the newly-divested company "no less in relation to present existing reserves than Pacific Northwest had when it was independent; and the new gas reserves developed since the merger must be equitably divided between El Paso and the New Company." *Cascade Natural Gas Corporation v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-37 (1967). The Court explained: "The purpose of our mandate was to restore competition" by placing the "New Company in the same relative competitive position [it] ... enjoyed immediately prior to the illegal merger." *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464, 470 (1969); *see also Chicago Bridge & Iron,* 534 F.3d 441-42 (Remedy created a Newco "equally capable" of competing as the acquired company would have been).

Thus, Respondent cannot properly object to divestiture of the Feistritz plant merely because it is in Europe. Total divestiture can appropriately include assets outside the relevant market in which an antitrust violation is found, "especially where, as here, total divestiture is necessary to restore effective competition." *Chicago Bridge*, 534 F.3d at 441 (citing *OKC Corp. v. FTC*, 455 F.2d 1159, 1163 (10th Cir. 1972)); *see also RSR Corp. v. FTC,* 602 F.2d 1317, 1326 n.5 (9th Cir. 1979) (divestiture of a plant that was outside the product market); *In re Diamond Alkali*, 72 F.T.C. 700, 742 (1967) (divestiture of acquiring company's plant, when it had already shut down the acquired company's factory).

2. Divestiture of Feistritz Plant is necessary to restore competition in North America

> *"In order for Microporous to continue to grow, it needs to position itself with an international manufacturing base in the same fashion as its competitors."* (PX0611 at 010).

At the time of the acquisition, Microporous had ***already built and begun manufacturing*** separators in the Feistritz Plant in order to be a more competitive supplier and to gain more

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Ltd. v. Empagran S.A., 542 U.S. 155, 168 (2004) explains that the "government" is not precluded from "challenging worldwide conduct that has an effect on U.S. commerce."

business in North America and abroad. (IDF-1275; Gilchrist, Tr. 309; PX0078 at 012, *in camera*). Within one week of the acquisition, Feistritz was in full operation. (ID-335) Microporous built the plant because it had determined that if it wanted to be a "major supplier" to world-wide companies like Enersys, it needed to "become a global player." (Gilchrist, Tr. 309-311). Microporous' owners understood that the company had been disadvantaged by not having an international manufacturing base with multiple manufacturing facilities, like those of Daramic and Entek. (PX0611 at 009-010, 028).[38] Customers agreed. (IDF-1276-1279). In fact, Microporous was ***only*** able to secure an increase in business from EnerSys in North America by agreeing to add a plant in Europe, and if it did that, Microporous would shift production to Europe and expand additional production in Tennessee. (IDF-786-790, 1277; RX0207, *in camera*; PX1200, *in camera*). For Trojan, the Microporous expansion in Austria meant that it could switch more Flex-Sil to CellForce in the U.S., giving it a "cost advantage" and a backup source if anything happened to the Piney Flats Plant. (IDF-1280; *see also* CCFOF ¶¶ 1213-1215). These two examples of expansion in Austria directly causing additional expansion for Microporous in North America both involved the patented product, CellForce, which includes as its key ingredient, Ace-Sil rubber, made and exported from Tennessee. (Gilchrist, Tr. 311-312, 331-332, 337-338; Trevathan, Tr. 3712-3713). In short, without the plant in Feistritz and the additional equipment that was destined for Tennessee, Microporous would not have been able to expand in North America and grown its role as a maverick. It makes no sense to force Microporous to give up its only foreign plant, which would force it to lose its additional North American business with EnerSys and Trojan, and then allow Daramic to

[38] Daramic also recognized this as a competitive advantage. (IDF-1274).

sell Microporous' patented CellForce in Europe. That would harm Microporous' ability to compete in North America.

a. The Feistritz Facility Freed Up Significant Capacity at Microporous' U.S. Piney Flats Plant and Benefitted Competition in North America

Microporous' new facility in Feistritz freed up significant capacity in North America, so that Microporous could obtain major worldwide accounts and take on smaller accounts in North America, like East Penn. (IDF-795-797, 1271). Because of the impending completion of the Feistritz facility, Microporous was competing vigorously in North America to "backfill" or replace the expected extra capacity freed up by the new factory in Europe. (IDF-796-797, 1271).

Similarly, complete divestiture including the Feistritz Plant will permit Newco to compete more effectively with Daramic (with its worldwide plants) in North America and would benefit customers. (*See, e.g.,* Godber, Tr. 224-225, 226-227 (with more CellForce products available in the U.S., Trojan Battery planned to switch an additional five to ten percent of its purchases from Flex-Sil to the less expensive CellForce, saving roughly 10 percent). Prior to the acquisition, Microporous' new European capacity created more available capacity in North America, rendering it more competitive against Daramic in North America. As the ALJ found, "[i]n these circumstances, and given the fact that Microporous planned the Feistritz plant in order to be more competitive in the relevant markets, [IDF]-768-72, there is no valid basis for concluding that the Feistritz plant should not be divested." (ID-335).

b. Divestiture of the Feistritz Facility and Production Lines is Necessary to Return Microporous to its Pre-Acquisition Position of Having the "Global Footprint" Needed to Compete in North America

The ALJ correctly found that the ability to supply a battery manufacturer's needs on a global basis is important to customers in North America. (ID-334). The Feistritz Plant is critical to give the acquirer a "global footprint" to locally supply the *worldwide* demand of customers

who purchase separators in the North America market. (IDF-1272; Gilchrist, Tr. 309-310 (testifying to importance of a global footprint); Hauswald, Tr. 713-714). As Microporous' former CEO testified, it is {

} (Gilchrist, Tr. 524-525). He explained how important it was for Microporous to have a global footprint to compete for large customers. (Gilchrist, Tr. 593-601 (world-wide expansion was a "key element")).

Daramic's Hauswald also admitted that having worldwide facilities gives a competitor in these markets a "competitive advantage" and reduces the supply-chain risks to customers. (IDF-1274; Hauswald, Tr. 722, 726-727, 807, *in camera* {(

)}; PX0206 at 004; PX0923 at 012 (Hauswald, IH at 68, *in camera*); *see also* CCFOF ¶ 1202). Daramic advertises that it provides local supply on a global basis, and considers this to be a market advantage. (Hauswald, Tr. 711, 722, 1318-1319; PX0582 at 018). The Feistritz Plant is thus a necessary part of the divestiture because it will allow Newco to serve North American customers' global demand as a viable competitor.

c. Customers Want Suppliers with Multiple Plants to Provide Security of Supply Should there be an Outage

Having multiple locations gives customers security of supply should one plant stop operating. (IDF-1273; Gillespie, Tr. 2993 (lessons from the Daramic strike); Gaugl, Tr. 4602 ("continuity of supply" important)). Customers state they prefer a supplier with multiple plants so that an outage in one facility will not result in a complete disruption of supply. (Godber, Tr. 225-226; Toth, Tr. 1440-1441). For Enersys, it was critical that its suppliers have more than one plant, because half of its revenue depended on the source of separator supply. (IDF-1277; Axt, Tr. 2129; *see also* CCFOF ¶ 1209). An effective divestiture must restore a competitor that can

provide customers with the security of supply they demand. The Feistritz Plant is thus needed to provide the acquirer with backup capacity in case of a supply disruption at the Piney Flats Plant. Indeed, Feistritz has also been the only other alternative for customers when Daramic has shut off supply of products. (IDF-119).

d. The Feistritz Plant Will Give Newco the Scale it Needs to Compete Effectively

The Feistritz Plant will also give the acquirer the scale necessary to compete with Daramic. Scale to supply entire plants is important to the large battery-manufacturer customers. (IDF-1272; Hauswald, Tr. 806-807, *in camera*). Scale is important for a new company because it will need the scale to be "sustainable in the long run." (Gillespie, Tr. 3053, *in camera*). Finally, scale provides a cost advantage due to the significant economies it provides. (Simpson, Tr. 3225-3226, 3229, 3233, *in camera* (citing PX0241, *in camera*); Gillespie, Tr. 3052-3053; Hauswald, Tr. 821-825, *in camera*; Toth, Tr. 1443 (citing PX0476)). Even Daramic {

} (Hauswald, Tr. 726-727; PX0194 at 036, *in camera* {(

}; Toth, Tr. 1433-1434 (referring to PX0483 at 013)).

In addition, the operations of both the Tennessee and Feistritz plants are intertwined because the key ingredient in half of the products (*e.g.*, the patented Cell-Force) sold in both plants (Ace-Sil (rubber) dust) is made in the Tennessee plant and, in the case of Feistritz is exported there from Tennessee. There is no other source for this key ingredient, and its export to Europe makes Microporous' Tennessee plant more efficient. (Gilchrist, Tr. 311-312, 331-332, 337-338; Trevathan, Tr. 3712-13, 3728-29)

e. Microporous' Pre-Acquisition Financial Condition Does Not Weigh Against a Complete Divestiture

The ALJ appropriately rejected Respondent's contention that Microporous was financially unstable, finding that the record does not support such a claim. (ID-331). Microporous invested in Feistritz and purchased equipment to build an additional line in Piney Flats. Like in *Chicago Bridge*, there is "no evidence to suggest that a smaller set of assets than those illegally acquired by [respondent] 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).

The undisputed facts are that Microporous was "profitable" and had "more offers for business than" Microporous was "going to be able to handle". (Gilchrist, Tr. 344, 403, 507, *in camera*; Trevathan, Tr. 3652, 3659, 3750 (If the Daramic deal had not happened, Microporous was "on track to improve ... profitability")). A new Microporous should have the same competitive clout to be able to compete profitably, and that includes its Austrian plant.

3. Additional Provisions Challenged by Respondent are Necessary to Enable a Viable Divestiture

Respondent objects to certain provisions in the Order that would prevent it from shifting all production out of the divestiture plants, undoing improvements, and firing all the employees before the Order becomes final. As the ALJ correctly observed, these provisions are common in Commission relief and are needed to restore the competition lost through the acquisition and to protect the viability of the business pending divestiture. (ID-339-341). In similar circumstances the Commission has ordered respondents: (1) to assign current contracts, as well as customer records and files, to the acquirer to restore competition (*Chicago Bridge*, 138 F.T.C. at 1165, 1186; *Goodrich*, 110 F.T.C. at 364; *In re Occidental Petroleum Corp.*, 115 F.T.C. 1010, 1292

(1992); *In re Hospital Corp. of America*, 106 F.T.C. 361, 521 (1985)); (2) to divest post-merger improvements (*Chicago Bridge*, 138 F.T.C. at 1181-82, 1185-87; *Goodrich*, 110 F.T.C. at 363; *In re Olin Corp.*, 113 F.T.C. 400, 620 (1990); *Occidental*, 115 F.T.C. at 1291; *HCA*, 106 F.T.C. at 521; *In re American Medical International, Inc.*, 104 F.T.C. 1, 239 (1984); and (3) to divest or license respondents' technology (*Chicago Bridge*, 138 F.T.C. at 1179, 1187; *Goodrich*, 110 F.T.C. at 363; *Occidental*, 115 F.T.C. at 1292). These requirements are remedial, not punitive. Such ancillary relief is necessary to undo the competitive harm that Daramic deliberately caused.

With respect to contracts entered into by Daramic prior to the acquisition of Microporous, Complaint Counsel agrees that it is appropriate that they not be included as "Terminable Contract(s)" so long as post-acquisition changes and modifications to any pre-acquisition Polypore contracts remain terminable. The proposed language effectuating this result – adding "Respondent or" to the definition of "Terminable Contract" -- is appended to this brief.

Respondent also objects to the requirement regarding NewCo's access to shared intellectual property. "Shared Intellectual Property License" is defined in the Order to mean only Polypore's intellectual property "that was also used by respondent in connection with . . . Microporous battery separators or otherwise used in connection with Microporous . . ." (emphasis added). Accordingly, this requirement only applies to intellectual property that Respondent *voluntarily* chose to use in and commingle with Microporous' operations in the face of a pending FTC investigation and adjudication. This provision is to ensure that those plants can continue to operate post-divestiture without fear of litigation from Daramic, which had a history of suing Microporous. As noted in the Initial Decision, "this requirement is necessary since there would be no effective way to purge 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." (ID-338).

In a footnote, Respondent contends that the Order's requirement that Respondent maintain a Microporous work force equal to the force in place as of the acquisition is out of "sync" with the facts since it has already eliminated some of that work force. The evidence demonstrates that it takes a specially skilled workforce to run a separator plant and training such a work force to operate efficiently takes six months. (Gaugl Tr. at 4606; CCFOF 817). The Commission has the authority to order respondents to take affirmative actions to facilitate the acquirer's ability to hire employees of the now-merged entity and to induce them to accept such employment. *(See, e.g., Chicago Bridge*, 138 F.T.C. at 1186-89, 1195-96). Thus the Order is perfectly in "sync" with the divestiture of a viable new Microporous that will be as competitive as it would have been but for the acquisition.

V. Conclusion

For the reasons stated above, as is fully supported by the evidence at trial, Daramic's acquisition of Microporous and its anticompetitive conduct are illegal. The public deserves a complete remedy to restore competition and prevent further harm to competition. The ALJ's proposed Order is appropriate with the small word change suggested in Section I.WW. Complaint Counsel respectfully requests that this Order, attached in Tab A, be issued.

Dated: May 24, 2010

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, I filed via hand delivery an original, twelve copies and electronic and electronic mail delivery of the foregoing public version of the Answering Brief of Counsel Supporting the Complaint with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580

I hereby certify that on May 24, 2010, I served via hand and electronic mail delivery two copies of the foregoing public version of the Answering Brief of Counsel Supporting the Complaint with:

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

I hereby certify that on May 24, 2010, I filed via electronic and first class mail delivery a copy of the foregoing public version of the Answering Brief of Counsel Supporting the Complaint with:

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By: Linda Cunningham

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Federal Trade Commission
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Washington, DC 20580
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TAB A

TO

ANSWERING BRIEF OF

COUNSEL SUPPORTING THE COMPLAINT

In the Matter of

POLYPORE INTERNATIONAL, INC.,

a corporation.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

PROPOSED ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

A. "Acquirer" means any Person approved by the Commission pursuant to this Order to acquire Microporous.

B. "Acquisition" means the acquisition of all of the outstanding shares of Microporous by Respondent Polypore pursuant to a Stock Purchase Agreement dated February 29, 2008.

C. "Acquisition Date" means February 29, 2008.

D. "Battery Separator(s)" means porous electronic insulators placed between positively and negatively charged lead plates in flooded lead-acid batteries to prevent electrical short circuits while allowing ionic current to flow through the separator.

E. "Books and Records" means all originals and all copies of any operating, financial or other books, records, documents, data and files relating to Microporous, including, without limitation: customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, Customer Approvals and Information; accounting records; credit records and information; correspondence; research and development data and files; production records; distributor files; vendor files, vendor lists; advertising, promotional and marketing materials, including website

content; sales materials; records relating to any employee who accepts employment with the Acquirer; educational materials; technical information, data bases, and other documents, information, and files of any kind, regardless whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media; *provided, however,* that where documents or other materials included in the Books and Records to be divested with Microporous contain information: (1) that relates both to Microporous and to Polypore's Retained Assets or its other products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to Microporous; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Polypore provides the Acquirer with the above described information without requiring Polypore to divest itself completely of information that, in content, also relates to its Retained Assets or its other products or businesses.

F. "Commission" means the Federal Trade Commission.

G. "Confidential Business Information" means any non-public information relating to Microporous either prior to or after the Effective Date of Divestiture, including, but not limited to, all customer lists, price lists, distribution or marketing methods, or Intellectual Property relating to Microporous and:

1. Obtained by Respondent prior to the Effective Date of Divestiture; or,

2. Obtained by Respondent after the Effective Date of Divestiture, in the course of performing Respondent's obligations under any Divestiture Agreement;

Provided, however, that Confidential Business Information shall not include:

1. Information that Respondent can demonstrate it obtained prior to the Acquisition Date, other than information it obtained from Microporous during due diligence pursuant to any confidentiality or non-disclosure agreement;

2. Information that is in the public domain when received by Respondent;

3. Information that is not in the public domain when received by Respondent and thereafter becomes public through no act or failure to act by Respondent;

4. Information that Respondent develops or obtains independently, without violating any applicable law or this Order; and
5. Information that becomes known to Respondent from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

H. "Contracts" means all contracts or agreements of any kind related to Microporous, and all rights under such contracts or agreements, including: Microporous Customer Contracts, leases, software licenses, Intellectual Property licenses, warranties, guaranties, insurance agreements, employment contracts, distribution agreements, product swap agreements, sales contracts, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, and non-disclosure agreements.

I. "Customer" means any Person that is a direct or indirect purchaser of any Battery Separator.

J. "Customer Approvals and Information" means, with respect to any Microporous Battery Separator(s):

1. All consents, authorizations and other approvals, and pending applications and requests therefor, required by any Customer applicable or related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any Battery Separator; and,

2. All underlying information, data, filings, reports, correspondence or other materials used to obtain or apply for any of the foregoing, including, without limitation, all data submitted to and all correspondence with the Customer or any other Person.

K. "Daramic Battery Separator(s)" means any Battery Separators manufactured or sold by Respondent as of the day before the Acquisition Date, and any Battery Separators manufactured or sold by Respondent after the Acquisition Date that do not utilize any Microporous Intellectual Property other than Shared Intellectual Property.

L. "Direct Cost" means the cost of direct material and direct labor used to provide the relevant assistance or service.

M. "Divestiture Agreement" means any agreement(s) between Respondent (or between a Divestiture Trustee appointed under this Order) and the Acquirer approved by the Commission, that effectuate the divestiture of Microporous required by Paragraphs II. or IV. of this Order, to accomplish the purpose and requirements of this Order, as well as all amendments, exhibits, attachments,

agreements and schedules thereto, including, but not limited to, any Technical Assistance Agreement or Transition Services Agreement.

N. "Divestiture Trustee" means a Person appointed pursuant to Paragraph IV. Of this Order to accomplish the divestiture of Microporous.

O. "Effective Date of Divestiture" means the date on which the divestiture of Microporous to an Acquirer pursuant to the requirements of Paragraph II. or IV. of this Order is completed.

P. "Employee Information" means the following, to the full extent permitted by applicable law:

1. A complete and accurate list containing the name of each Microporous Employee;

2. With respect to each such employee, the following information:

a. The date of hire and effective service date;

b. Job title or position held;

c. A specific description of the employee's responsibilities related to Microporous Battery Separators; *provided, however,* in lieu of this description, Respondent may provide the employee's most recent performance appraisal;

d. The base salary or current wages;

e. The most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year and current target or guaranteed bonus, if any;

f. Employment status (i.e., active or on leave or disability; full-time or part-time); and

g. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

3. At the proposed Acquirer's option, copies of all employee benefit plan descriptions (if any) applicable to the relevant employees.

Q. "Feistritz Plant" means all property and assets, tangible and intangible, owned, leased, or operated by Respondent and located or used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing

or sale of anyone or more of the Microporous Battery Separators at the former Microporous facility in Feistritz, Austria, at any time between the Acquisition Date and the Effective Date of Divestiture, including, but not limited to:

1. All real property interests (including fee simple and leasehold interests), including all rights, easements and appurtenances, together with all buildings, structures, facilities (including R&D and testing facilities), improvements, and fixtures, including, but not limited to, all Battery Separator production lines (including the two (2) production lines for polyethylene (PE) and/or CellForce Battery Separators);

2. All Tangible Personal Property;

3. All governmental approvals, consents, licenses, permits, waivers, or other authorizations, to the extent assignable; and

4. Inventories existing as of the Effective Date of Divestiture.

Provided, however, that the definition of "Feistritz Plant" shall not include any assets used solely to manufacture Daramic Battery Separators.

R. "Force Majeure Event" means whatever events, actions, occurrences or circumstances have been identified or specified as constituting "force majeure" or a "force majeure event" in a contract or agreement between the Respondent and a Customer for the supply of Battery Separators.

S. "Governmental Entity(ies)" means any federal, provincial, state, county, local, or other political subdivision of the United States or any other country, or any department or agency thereof.

T. "H&V Agreement" means the Cross Agency Agreement dated March 23, 2001, between Daramic, Inc. and Hollingsworth & Vose Company, and all amendments (including, but not limited to, the Renewal dated March 23, 2006), exhibits, attachments, agreements, and schedules thereto.

U. "Intellectual Property" means Patents, Manufacturing Technology, KnowHow, and Trade Names and Marks.

V. "Inventories" means:

1. All inventories, stores and supplies of finished Battery Separators and work in progress; and,
2. All inventories, stores and supplies of raw materials and other supplies related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any Battery Separators.

W. "Jungfer Technology" means all Intellectual Property owned or licensed by Respondent as a result of its acquisition of Separatorenerzeungung GmbH ("Jungfer") on November 16,2001.

X. "Know-How" means all know-how, trade secrets, techniques, systems, software, data (including data contained in software), formulae, designs, research and test procedures and information, inventions, processes, practices, protocols, standards, methods (including, but not limited to, test methods and results), customer service and support materials, and other confidential or proprietary technical, technological, business, research, development and other materials and information related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of Battery Separators, and all rights in any jurisdiction to limit the use or disclosure thereof, anywhere in the world.

Y. "Line in Boxes" means all property and assets, tangible and intangible, related to any capacity expansions proposed, planned or under consideration by Microporous as of the Acquisition Date, including, but not limited to, all engineering plans, equipment, machinery, tooling, spare parts, and other tangible property, wherever located, relating to a proposed, planned or contemplated capacity expansion to be accomplished through installation of an additional Battery Separator production line at the Piney Flats Plant.

Z. "Manufacturing Technology" means all technology, technical information, data, trade secrets, Know-How, and proprietary information, anywhere in the world, related to the research, development, manufacture, finishing, packaging or distribution of Battery Separators, including, but not limited to, all recipes, formulas, formulations, blend specifications, customer specifications, equipment (including repair and maintenance information), tooling, spare parts, processes, procedures, product development records, trade secrets, manuals, quality assurance and quality control information and documentation, regulatory communications, and all other information relating to the above-described processes.

AA. "Microporous" means Microporous Holding Corporation, a corporation organized, existing and doing business utider and by virtue of the laws of the State ofDelaware, with its offices and principal place of business as of the Acquisition Date located at 100 Spear Street, Suite 100, San Francisco, CA 94111, and its joint ventures, subsidiaries, divisions, groups, and affiliates (including, but not limited to, Microporous Products, L.P. and Microporous Products, GmbH) controlled by Microporous Holding Corporation, and all assets of Microporous Holding Corporation acquired by Respondent in connection with the Acquisition, including, but not limited to:

1. All of Respondent's rights, title and interest in and to the following property and assets, tangible and intangible, wherever located, and any improvements, replacements or additions thereto that have been created,

developed, leased, purchased, or otherwise acquired by Respondent after the Acquisition Date, relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators:

a. the Piney Flats Plant;

b. the Feistritz Plant;

c. the Line in Boxes;

d. Microporous Intellectual Property;

e. Contracts; and

f. Books and Records; and

2. All rights to use Shared Intellectual Property pursuant to a Shared Intellectual Property License;

BB. "Microporous Battery Separator(s)" means all Battery Separators in which Microporous was engaged in research, development, manufacture, finishing, packaging, distribution, marketing or sale as of the Acquisition Date, and all Battery Separators distributed, marketed or sold after the Acquisition Date using any Microporous Trade Names and Marks.

CC. "Microporous Copyrights" means all rights to all original works of authorship of any kind, both published and unpublished, relating to Microporous Battery Separators and any registrations and applications for registrations thereof and all rights to obtain and file for copyrights and registrations thereof.

DD. "Microporous Customer Contracts" means all open purchase orders, contracts or agreements or Terminable Contracts for Microporous Battery Separators or for Battery Separators being supplied from the Piney Flats Plant or the Feistritz Plant at any time between the Acquisition Date and the Effective Date of Divestiture except for Daramic Battery Separators.

EE. "Microporous Employee(s)" means any Person:

1. Employed by Microporous as of the Acquisition Date;

2. Employed at the Piney Flats Plant at any time between the Acquisition Date and the Effective Date of Divestiture; or

3. Employed at the Feistritz Plant at any time between the Acquisition Date and the Effective Date of Divestiture.

FF. "Microporous Intellectual Property" means all rights, title and interest in and to all:

1. Microporous Patents;
2. Microporous Manufacturing Technology;
3. Microporous Know-How;
4. Microporous Trade Names and Marks;
5. Microporous Copyrights; and
6. All rights in any jurisdiction anywhere in the world to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach, or otherwise to limit the use or disclosure of any of the foregoing.

GG. "Microporous Know-How" means all Know-How relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

HH. "Microporous Manufacturing Technology" means all Manufacturing Technology relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

II. "Microporous Patents" means all Patents relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

JJ. "Microporous Trade Names and Marks" means all Trade Names and Marks relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous, including, but not limited to, all rights to commercial names, "doing business as" (d/b/a/) names, service marks and applications for or using the words: "Microporous," "Amerace," "CellForce," "FLEX-SIL,""ACE-SIL;" and all rights in internet web sites and internet domain names using any of the above.

KK. "Monitor Trustee" means a Person appointed with the Commission's approval to oversee the divestiture requirements of this Order, including Respondent's compliance with the Order's requirements.

LL. "Patent(s)" means all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, substitutions, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and

conventions, and all rights to obtain and file for patents and registrations thereto, anywhere in the world.

MM. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.

NN. "Piney Flats Plant" means all property and assets, tangible and intangible, owned, leased, or operated by Respondent and located or used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing or sale of anyone or more of the Microporous Battery Separators at the former Microporous facility in Piney Flats, Tennessee, at any time between the Acquisition Date and the Effective Date of Divestiture, including, but not limited to:

1. All real property interests (including fee simple and leasehold interests), including all rights, easements and appurtenances, together with all buildings, structures, facilities (including R&D and testing facilities), improvements, and fixtures, including, but not limited to, all Battery Separator production lines (including the three (3) production lines for Ace-Sil, Flex-Sil, and polyethylene (PE) and/or CellForce Battery Separators), pilot lines and test lines;
2. All Tangible Personal Property;
3. All governmental approvals, consents, licenses, permits, waivers, or other authorizations, to the extent assignable; and
4. Inventories existing as of the Effective Date of Divestiture.

Provided, however, that the definition of "Piney Flats Plant" shall not include any assets used solely to manufacture Daramic Battery Separators.

OO. "Polypore" or "Respondent" means Polypore International, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Polypore International, Inc. (including, but not limited to, Daramic, LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

PP. "Releasee(s)" means the Acquirer, any entity controlled by or under common control with the Acquirer, and any licensees, sublicensees, manufacturers, suppliers, and distributors of the Acquirer ("affiliates"); and any Customers of the Acquirer or of affiliates of the Acquirer.

QQ. "Retained Asset(s)" means:

1. Any property(ies) or asset(s), tangible or intangible:

a. That were owned, created, developed, leased, or operated by Polypore prior to the Acquisition; or

b. That relate(s) solely to any Polypore product, service or business except what is included in the definition of Microporous under this Order; and

2. Polypore's right to use, exploit, and improve Shared Intellectual Property; *provided, however,* that Polypore shall have no right to hinder, prevent, or enjoin the Acquirer's use, exploitation, or improvement of Shared Intellectual Property, or to use without the Acquirer's consent any improvements after the Effective Date of Divestiture to the Shared Intellectual Property by the Acquirer.

RR. "Retention Bonus" means the compensation provided for each of the Microporous Employees.

SS. "Shared Intellectual Property" means any Intellectual Property that is a Retained Asset or that has been used by Respondent in connection with a Retained Asset that was also used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous at any time between the Acquisition Date and the Effective Date of Divestiture.

TT. "Shared Intellectual Property License" means: (i) a worldwide, royalty free, perpetual, irrevocable, transferrable, sub licensable, non-exclusive license to all Shared Intellectual Property owned by or licensed to Respondent for any use, and (ii) such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary to enable the Acquirer to utilize the licensed rights.

UU. "Tangible Personal Property" means all machinery, equipment, spare parts, tools, and tooling (whether customer specific or otherwise); furniture, office equipment, computer hardware, supplies and materials; vehicles and rolling stock; and other items of tangible personal property of every kind whether owned or leased, together with any express or implied warranty by the manufacturers, sellers or lessors of any item or component part thereof, and all maintenance records and other documents relating thereto.

VV. "Technical Services Agreement" means the provision by Respondent Polypore at Direct Cost of all advice, consultation, and assistance reasonably necessary for any Acquirer to receive and use, in any manner related to achieving the purposes of this Order, any asset, right, or interest relating to Microporous.

WW. "Terminable Contract(s)" means all contracts or agreements and rights under contracts or agreements between the Respondent and any Customer(s) for the supply of any Battery Separator in or to North America (including the entirety of

any contract or agreement that includes in the same contract or agreement the supply of Battery Separators both inside and outside North America) in effect at any time between the date the Order becomes final and the Effective Date of Divestiture; *provided, however,* that "Terminable Contracts" does not include any contracts or agreements between **Respondent or** Microporous and any Customer(s) for the supply of any Battery Separator that was entered into prior to the Acquisition Date, except to the extent such contract or agreement was amended or modified, including changes to the pricing terms, after the Acquisition Date; *provided further, however,* that such amended or modified portion of such contract or agreement shall be considered a "Terminable Contract."

XX. "Trade Names and Marks" means all trade names, commercial names and brand names, all registered and unregistered trademarks, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), trade dress, logos, service marks and applications, geographical indications or designations, and all rights related thereto under common law and otherwise, and the goodwill symbolized by and associated therewith, anywhere in the world.

YY. "Transition Services Agreement" means an agreement requiring Respondent Polypore to provide at Direct Cost all services reasonably necessary to transfer administrative support services to the Acquirer of Microporous, including, but not limited to, such services related to payroll, employee benefits, accounts receivable, accounts payable, and other administrative and logistical support.

II.

IT IS FURTHER ORDERED that:

A. Not later than six (6) months after the date the divestiture provisions of this Order become final, Respondent shall divest Microporous, absolutely and in good faith, and at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner, including pursuant to a Divestiture Agreement, that receives the prior approval of the Commission.

B. Respondent shall comply with all terms of the Divestiture Agreement approved by the Commission pursuant to this Order, which agreement shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement shall not reduce, limit or contradict, or be construed to reduce, limit or contradict, the terms of this Order; *provided, however,* that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondent under such agreement; *provided further, however,* that if any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to

the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

C. Prior to the Effective Date of Divestiture, Respondent shall:

1. Restore to Microporous any assets of Microporous as of the Acquisition Date that were removed from Microporous at any time between the Acquisition Date and the Effective Date of Divestiture, other than Battery Separators sold in the ordinary course of business and Inventories consumed in the ordinary course of business;

2. To the extent any fixtures or Tangible Personal Property have been removed from the Feistritz Plant, the Piney Flats Plant or the Line in Boxes after the Acquisition Date and not returned or replaced with equivalent assets, such fixtures or Tangible Personal Property shall be returned and restored to good working order suitable for use under normal operating conditions or replaced with equivalent assets;

3. Secure at its sole expense all consents and waivers from Persons that are necessary to divest any property or assets, tangible or intangible (including, but not limited to, any Contract), of Microporous to the Acquirer; *provided, however,* that in instances where (i) Microporous Battery Separators are sold together with Daramic Battery Separators under the same Terminable Contract, Respondent shall only be required to obtain such consents and waivers from the Customer as necessary to divest that portion of the Terminable Contract pertaining to Microporous Battery Separators; or (ii) any Contracts (including, but not limited to, supply agreements) are utilized in connection with the manufacture ofMicro porous Battery Separators and Daramic Battery Separators under the same Contract, Respondent shall only be required to obtain such consents and waivers from the other contracting party as necessary to divest that portion of the Contract pertaining to Microporous Battery Separators; *provided further, however,* that if for any reason Respondent is unable to accomplish such an assignment or transfer of Contracts, it shall enter into such agreements, contracts, or licenses as are necessary to realize the same effect as such transfer or assignment; and

4. Grant to the Acquirer a Shared Intellectual Property License for use in connection with Microporous as divested pursuant to this Order.

D. Respondent shall take all actions reasonably necessary to assist the Acquirer in evaluating, recruiting and employing any Microporous Employees, including (at

the Acquirer's option), but not limited to, the following:

1. Not later than thirty (30) days before the execution of a Divestiture Agreement, Respondent shall: (i) provide the Acquirer with a list of all Microporous Employees, and Employee Information for each Person on the list; (ii) provide any available contact information, including last known address for any Person formerly employed as a Microporous Employee whose employment terminated prior to execution of a Divestiture Agreement; (iii) allow the Acquirer an opportunity to interview any Microporous Employees personally, and outside the presence or hearing of any employee or agent of Respondent; and, (iv) allow the Acquirer to inspect the personnel files and other documentation relating to such Microporous Employees, to the extent permitted under applicable laws;
2. Respondent shall: (i) not directly or indirectly impede or interfere with the Acquirer's offer of employment to any Microporous Employee(s); (ii) not directly or indirectly attempt to persuade, or offer any incentive to, any Microporous Employee(s) to decline employment with the Acquirer; (iii) remove any contractual impediments and irrevocably waive any legal or equitable rights it may have that may deter any Microporous Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent; *provided, however,* that Respondent may enforce confidentiality provisions related to Daramic Battery Separators; and,

3. Respondent shall: (i) continue to extend to any Microporous Employees, during their employment prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits; (ii) pay a Retention Bonus to any Microporous Employee(s) to whom the Acquirer has made a written offer of employment who accepts a position with the Acquirer at the time of divestiture of Microporous.

E. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not:

1. directly or indirectly solicit or induce, or attempt to solicit or induce, any Microporous Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer; or

2. hire or enter into any arrangement for the services of any Microporous Employee who has accepted an offer of employment with, or who is

employed by, the Acquirer;

provided, however, Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at anyone or more of the employees of the Acquirer; (ii) hire any Microporous Employee whose employment has been terminated by the Acquirer; or (iii) hire a Microporous Employee who has applied for employment with Respondent, provided that such application was not solicited or induced in violation of this Order.

F. Respondent shall include in any Divestiture Agreement related to Microporous the following provisions:

1. Respondent shall covenant to the Acquirer that Respondent shall not join, file, prosecute or maintain any suit, in law or equity, either directly or indirectly through a third party, against the Acquirer or any Releasees under Intellectual Property that is owned or licensed by Respondent as of the Effective Date of Divestiture, including, but not limited to, the Jungfer Technology, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution, offer to sell or sale ofMicro porous Battery Separators;

2. Upon reasonable notice and request from the Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondent to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Microporous Intellectual Property or Shared Intellectual Property; and

3. At the option of the Acquirer:

   a. A Technical Services Agreement, *provided, however,* the term of any Technical Services Agreement shall be at the option of the Acquirer, but not longer than two (2) years from the Effective Date of Divestiture.

   b. A Transition Services Agreement, *provided, however,* the term of the Transition Services Agreement shall be at the option of the Acquirer, but not longer than two (2) years from the Effective Date of Divestiture;

Provided, however, that Respondent shall not (i) require the Acquirer to pay compensation for services under such agreements that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation(s) under such agreements because of a material breach by the

Acquirer of any such agreement in the absence of a final order by a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which any Acquirer would be entitled to receive in the event of Respondent's breach of any such agreement.

G. Respondent shall:

1. submit to the Acquirer, at Respondent's expense, all Confidential Business Information;

2. deliver such Confidential Business Information as follows: (i) in good faith; (ii) as soon as practicable, avoiding any delays in transmission of the respective information; and (iii) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor Trustee (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information (other than as necessary to comply with the following: (i) the requirements of this Order; (ii) the Respondent's obligations to the Acquirer under the terms of any Divestiture Agreement; or (iii) applicable Law);

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer, the Monitor Trustee, or the Commission;

6. Respondent shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not expressly permitted by this Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondent's computers or computer networks; and

7. Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order; or, (ii) to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to provide accounting, information technology and credit-underwriting services, to provide legal services associated with actual or potential litigation and transactions; and to monitor and ensure

compliance with financial, tax reporting, governmental environmental, health, and safety requirements.

H. The purpose of the divestiture of Microporous is to create an independent, viable and effective competitor in the markets in which Microporous was engaged at the time of the Acquisition Date, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after this Order becomes final, Respondent shall retain a Monitor Trustee, acceptable to the Commission, to monitor Respondent's compliance with its obligations and responsibilities under this Order, consult with Commission staff, and report to the Commission regarding Respondent's compliance with its obligations and responsibilities under this Order.

B. If Respondent fails to retain a Monitor Trustee as provided in Paragraph III.A. of this Order, a Monitor Trustee, acceptable to the Commission, shall be identified and selected by the Commission's staff within forty-five (45) days after this Order is final.

C. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee selected under Paragraph III.A or III.B. of this Order:

1. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee pursuant to the terms of this Order in a manner consistent with the purposes of the Order and in consultation with Commission's staff.

2. Within ten (10) days after the Commission's approval of the Monitor Trustee, Respondent shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondent's compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by Respondent, the Monitor Trustee shall sign a confidentiality agreement prohibiting the use, or the disclosure to anyone other than the Commission (or any Person retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order), of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee, for any purpose other than performance of the Monitor Trustee's duties under this Order.

3. The Monitor Trustee shall serve until the expiration of the period for Customers to seek reopening and renegotiation or termination of Terminable Contracts as provided in Paragraph VI. of this Order; *provided, however,* that the Commission may modify this period as may be necessary or appropriate to accomplish the purposes of the Order.

4. Subject to any demonstrated legally recognized privilege, the Monitor Trustee shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor Trustee may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to Microporous assets. Respondent shall cooperate with any reasonable request of the Monitor Trustee and shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent's compliance with the Order.

5. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor Trustee's gross negligence or willful misconduct. For purposes of this Paragraph III.C.6., the term "Monitor Trustee" shall include all Persons retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order.

7. Respondent shall provide copies of reports to the Monitor Trustee in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission.

8. The Monitor Trustee shall report in writing to the Commission (i) every sixty (60) days from the date the Monitor Trustee is appointed, (ii) at the time a divestiture package is presented to the Commission for its approval,

and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this order.

D. The Commission may, among other things, require the Monitor Trustee and each of the Monitor Trustee's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor Trustee's duties.

E. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee in the same manner as provided in this Paragraph.

F. The Commission may on its own initiative, or at the request of the Monitor Trustee, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

G. Respondent shall cooperate with the Monitor Trustee appointed pursuant to this Paragraph in the performance any duties and responsibilities under this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested, absolutely and in good faith, Microporous within the time period or in the manner required by Paragraph II. of this Order, then the Commission may at any time appoint a Divestiture Trustee to divest Microporous to an Acquirer and in a manner, including pursuant to a Divestiture Agreement, that satisfies the purposes and requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order, Respondent shall consent to the appointment of a Divestiture Trustee in such action. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures and may be the same Person as the Monitor Trustee appointed under

Paragraph III. of this Order. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust. agreement ("Divestiture Trustee Agreement") that, subject to the prior approval of the Commission transfers to the Divestiture Trustee all rights and powers necessary to effect the relevant divestiture, and to enter into any relevant agreements, required by this Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph IV. of this Order, Respondent shall consent to, and the Divestiture Trustee Agreement shall include, the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest relevant assets or enter into relevant agreements pursuant to the terms of this Order and in a manner consistent with the purposes of this Order.

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the Divestiture Trustee Agreement described in this Paragraph IV. of this Order to divest relevant assets pursuant to the terms of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture, or believes that divestiture can be achieved within a reasonable time, such period may be extended by the Commission, or, in the case of a courtappointed trustee, by the court.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to Microporous or related to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities. At the option of the Commission, any delays in divestiture or entering into any agreement caused by Respondent shall extend the time for divestiture under this Paragraph IV. in an amount equal to the delay, as determined by the Commission or, for a court appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee Agreement shall prohibit the Divestiture Trustee, and each of the Divestiture Trustee's consultants, accountants, attorneys,

and other representatives and assistants from disclosing, except to the Commission (and in the case of a court-appointed trustee, to the court) Confidential Business Information; *provided, however,* Confidential Business Information may be disclosed to potential acquirers and to the Acquirer as may be reasonably necessary to achieve the divestiture required by this Order. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.

5. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to, and a Divestiture Agreement executed with, an Acquirer in the manner set forth in Paragraph II. of this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with this Order. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required by this Order is consummated, and the Divestiture Trustee has provided an accounting for all monies derived from the divestiture and all expenses occurred.

7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the

performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.6. of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain Microporous.

9. The Divestiture Trustee shall report in writing to the Commission every two (2) months concerning his or her efforts to divest and enter into agreements related to Microporous, and Respondent's compliance with the terms of this Order.

F. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV. of this Order.

G. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.

H. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Divestiture Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that:

A. From the date this Order becomes final until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of Microporous, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of Microporous and assets related thereto except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining Intellectual Property, Contracts, Trade Names and Marks, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture.

B. Respondent shall maintain the operations of Microporous in the ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets included within Microporous). Among other things as may be necessary, Respondent shall:

1. Maintain a work force at least as equivalent in size, training, and expertise to what was associated with Microporous prior to the Acquisition Date;

2. Assure that Respondent's employees with primary responsibility for managing and operating Microporous are not transferred or reassigned to other areas within Respondent's organizations except for transfer bids initiated by employees pursuant to Respondent's regular, established job posting policy;

3. Provide sufficient working capital to operate Microporous at least at current rates of operation, to meet all capital calls with respect to Microporous and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;

4. Make available for use by Microporous funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets of Microporous;

5. Use best efforts to preserve and maintain the existing relationships with Customers, suppliers, vendors, private and Governmental Entities, and other Persons having business relations with Microporous; and

6. Except as part of a divestiture approved by the Commission pursuant to this Order, not remove, sell, lease, assign, transfer, license, pledge for collateral, or otherwise dispose of Microporous, *provided however,* that nothing in this provision shall prohibit Respondent from such activities in the ordinary course of business consistent with past practices.

VI.

IT IS FURTHER ORDERED that:

A. Respondent shall allow all Customers with Terminable Contracts the right and option unilaterally to reopen and renegotiate or to terminate their contracts, solely at the Customer's option, without penalty, forfeiture or other charge to the customer, and consistent with the requirements of this Order including the following:

1. No later than ten (10) days from the date this Order becomes final, Respondent shall notify all Customers with Terminable Contracts of their rights under this Order and, for each such Terminable Contract, offer the

Customer the opportunity to reopen and renegotiate or to terminate their contract(s). Respondent shall send written notification of this requirement and a copy of this Order and the Complaint, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

2. No later that ten (10) days from the Effective Date of Divestiture, Respondent shall send written notification of the Effective Date of Divestiture to all Customers with Terminable Contracts, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

3. A Customer may exercise its option to reopen and renegotiate or terminate any Terminable Contract by sending by certified mail, return receipt requested, a written notice to Respondent either to: (i) the address for notice stated in the Contract; or, (ii) Respondent's principal place of business at any time prior to five (5) years after the Effective Date of Divestiture. The written notice shall identify the Terminable Contract that will be reopened or terminated, and the date upon which any termination shall be effective; *provided, however,* that: (a) a Customer with more than one Terminable Contract who sends written notice with regard to less than all of its Terminable Contracts shall not lose its opportunity to reopen and renegotiate or terminate any remaining Terminable Contracts; (b) any Customer who reopens and renegotiates a Terminable Contract prior to the Effective Date of Divestiture shall have a further opportunity to reopen and renegotiate or terminate such Terminable Contract after the Effective Date of Divestiture at any time prior to five (5) years after the Effective Date of Divestiture; (c) Respondent shall not be obligated to reopen and renegotiate or terminate, as the case may be, a Terminable Contract on less than thirty (30) days' notice; and (d) any request by a Customer to reopen and renegotiate or terminate a Terminable Contract on less than thirty (30) days' notice shall be treated by Respondent as a request to reopen and renegotiate or terminate, as the case may be, effective thirty (30) days from the date of the request.

4. Respondent shall not directly or indirectly:

   a. Require any Customer to make or pay any payment, penalty, or charge for, or provide any consideration relating to, or otherwise deter, the exercise of the option to reopen and renegotiate or

terminate or the reopening and renegotiation or termination of any Terminable Contract; or

b. Retaliate against, or take any action adverse to the economic interests of, any Customer that exercises its right under the Order to reopen and renegotiate or terminate any Terminable Contract;

provided, however, that Respondent may enforce Contracts, or seek judicial remedies for breaches of Contracts, based upon rights or causes of action that accrued prior to the exercise by a Customer of an option to terminate a Contract.

5. Respondent shall include in the Divestiture Agreement a requirement that the Acquirer shall allow all Customers with Terminable Contracts for Microporous Battery Separators the right and option unilaterally to reopen and renegotiate or to terminate their contracts, solely at the Customer's option, without penalty, forfeiture or other charge to the Customer, and consistent with the requirements of this Paragraph of the Order as ifthe Terminable Contract remained with Respondent. Respondent shall include in the Divestiture Agreement a requirement that all Customers with Terminable Contracts for Microporous Battery Separators shall be third party beneficiaries of this provision of the Divestiture Agreement, with the right to enforce this provision independent of, and apart from, Respondent.

provided, however, that nothing in this Order will affect the rights and responsibilities under any Terminable Contract for any Customer who fails to notify Respondent or the Acquirer, as the case may be, within the time allotted in this Paragraph.

VII.

IT IS FURTHER ORDERED that:

A. Respondent shall:

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

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

VII.A.1, it being understood that nothing in the H&V Agreement, currently or as amended in the future, or the Amendment shall be construed to reduce any obligations of the Respondent under this Order. The Amendment shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Amendment shall constitute a failure to comply with this Order. The Amendment shall not be modified, directly or indirectly, without the prior approval of the Commission.

B. Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Person currently engaged, or that might potentially become engaged, in the development, production, marketing or sale of any Battery Separator, to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with Battery Separators, or otherwise to restrict the scope or level of competition related to Battery Separators.

Provided, however, that it shall not, of itself, constitute a violation of this Paragraph for Respondent to enter into a *bona fide* and written joint venture agreement with any Person to manufacture, develop, market or sell a new Battery Separator, technology or service, or any material improvement to an existing Battery Separator, technology or service, in which both Respondent and the other Person contribute significant personnel, equipment, technology, investment capital or other resources, that prohibits such Person from selling products or services in competition with the joint venture in geographic markets in which the joint venture does business or competes for a reasonable period of time. *Provided further, however,* that Respondent shall, within ten (10) days after execution, file a true and correct copy of such joint venture agreement with the Commission.

VIII.

IT IS FURTHER ORDERED that, for a period of two (2) years from the Effective Date of Divestiture, Respondent shall not advertise, market or sell any Battery Separator utilizing cross linked rubber anywhere in the world.

IX.

IT IS FURTHER ORDERED that, no later than ten (10) days from the date on which this Order becomes final, Respondent shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibilities for any of

Respondent's obligations under this Order. **X.**

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger or consolidation of Respondent; or

C. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Effective Date of Divestiture, and thereafter every sixty (60) days until the Respondent has fully complied with the provisions of Paragraphs II., III., IV., V., and VI. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Monitor Trustee and Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with the relevant provisions of this Order.

B. Respondent shall include in its compliance reports, among other things required by the Commission, a description of all substantive contacts or negotiations for the divestiture required by this Order, the identity of all parties contacted, copies of all material written communications to and from such parties, and all reports and recommendations concerning the divestiture, the Effective Date of Divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

C. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and annually until expiration or termination of Respondent's obligations under the Order, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall deliver a copy of each such report to the Monitor Trustee.

XII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without

restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to any matter contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

B. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

/