

ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

Polypore International, Inc.)
a corporation.)

Docket No. 9327

PUBLIC

**COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT'S MOTION FOR A MORE DEFINITE STATEMENT**

Respondent's ("Polypore's") motion for a more definite statement lacks merit. The complaint plainly sets forth Polypore's unlawful conduct. *Cf. Fruehauf Trailer Co.*, 53 F.T.C. 1269, 1270 (1956). The facts are straightforward and the law is well established.

Polypore's acquisition of Microporous Products, L.P. ("Microporous") in February 2008 gave its operating subsidiary ("Daramic") a world-wide monopoly in sales of separators for deep-cycle batteries, which are used primarily in golf carts and floor scrubbers. Microporous was the only other supplier of deep-cycle separators on Earth. Compl. ¶¶ 2, 8, 15, 22.

In addition, Daramic gained monopolies in North America in sales of separators for motive (heavy-duty industrial) batteries, *id.* ¶¶ 9, 16-17, 23, *and* separators for uninterrupted power supply batteries. *Id.* ¶¶ 11, 16, 25. Microporous was Daramic's sole competitive threat in those markets. *Id.* ¶¶ 15-19.

Daramic also acquired or maintained a North American duopoly (with Entek International LLC) in sales of separators for automotive batteries. Microporous was marketing and testing a new separator to compete directly with Daramic and Entek, and but for the acquisition, Microporous would have been a significant competitor in that market. *Id.* ¶¶ 10, 23, 28-29.

(Alternatively, if the relevant market is defined as polyethylene-based separators sold in North America, the merger likewise reduces the number of sellers from three to two. *Id.* ¶ 25.)

Other anticompetitive conduct predates the merger. In 2001, Daramic and Hollingsworth & Vose, which makes glass battery separators, formed a classic horizontal agreement in restraint of trade. The two firms agreed not to enter one another's product markets for a period that extends, at present, through 2014. *Id.* ¶ 41. And in 2006 and 2007, when customers sought to buy separators from Microporous, which was expanding its capacity, Daramic successfully excluded Microporous by threatening to stop supplying those customers entirely. *Id.* ¶¶ 40, 46.

The harm to competition is apparent. Moreover, Commissioner's and Commission Staff discussed these issues *repeatedly* with Polypore's counsel during the pre-complaint investigation. There can be nothing more definite than these simple allegations.

Polypore asserts, nonetheless, that it "cannot determine from the pleading either the statutes it is accused of violating or the elements" of the offenses. Resp. Br. 6. Counts I, II, and III, however, each invoke Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Count I also invokes Section 7 of the Clayton Act, *id.* § 18. Compl. ¶¶ 48-53. Respondents' motion makes no sense. The complaint follows traditional Section 5 and Section 7 law. No more is required. The contours of the law are well established. *E.g.*, *FTC v. Cement Inst.*, 333 U.S. 683, 690-95 (1948) ("[S]oon after its creation the Commission began to interpret . . . §5 as including those restraints of trade which also were outlawed by the Sherman Act, and . . . this Court has consistently approved that interpretation of the Act."); *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423-26 (5th Cir. 2008); *North Tex. Spec. Phys. v. FTC*, 528 F.3d 346, 354-55 (5th Cir. 2008); *Polygram Holding Co. v. FTC*, 416 F.3d 29, 36-37 (D.C. Cir. 2005); *FTC v. H.J.*

Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906-07 (7th Cir. 1989) (“[A]n acquisition which reduces the number of significant sellers in a market already highly concentrated and prone to collusion by reason of its history and circumstances is unlawful [under Section 7] in the absence of special circumstances.”). This complaint is quite clear that the acquisition violated Sections 5 and 7 and thus can be answered.

Polypore’s arguments about whether paragraphs 42 or 45 of the complaint state a claim for a “Sherman Act Section 2 monopolization offense” are simply irrelevant. Resp. Br. 2. There is no claim under the Sherman Act in this complaint, which is brought solely under Sections 5 (FTCA) and 7 (Clayton Act). There is simply *no express or implied* attempt here to create new law. The law here is plain, simple and well established.

Polypore’s motion itself confirms that Polypore understands that it faces restraint of trade, monopolization, and attempted monopolization claims under the FTC Act, and illegal acquisition claims under the Clayton and FTC Acts. The complaint need only state the “legal authority and jurisdiction” for the claims, which must only be sufficiently clear so that the respondent can “frame a responsive answer based on the allegations contained in the complaint.” 16 C.F.R. § 3.11(b)(1) and (c); *In re Fruehauf Trailer Corp.*, 53 F.T.C. at 1269 (1956) (“Unless additional particulars concerning matters of fact and law relied upon in support of a complaint are necessary to enable the party to prepare his responsive pleading, request for that information ordinarily should be denied.”); *In re Rambus, Inc.*, dkt. 9302, Order Denying Motion For A More Definite Statement (July 9, 2002) (Timony, J.). There are no allegations that Polypore cannot

follows established law. The addition of a new lead trial counsel, which both sides have now done, should not, in our view, delay any discovery or a hearing in this matter.

Dated: September 30, 2008

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2008, I filed *via* hand and electronic mail delivery an original and two copies of the foregoing Response to Respondent's Motion to Extend Respondent's Time to Respond to Complaint and To Set Date for Initial Scheduling Conference with:

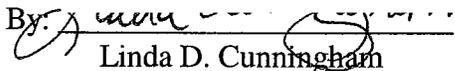
Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580

I hereby certify that on September 30, 2008, I filed *via* hand delivery two copies of the foregoing Response to Respondent's Motion to Extend Respondent's Time to Respond to Complaint and To Set Date for Initial Scheduling Conference with:

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

I hereby certify that on September 30, 2008, I filed *via* electronic mail delivery a copy of the foregoing Response to Respondent's Motion to Extend Respondent's Time to Respond to Complaint and To Set Date for Initial Scheduling Conference with:

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