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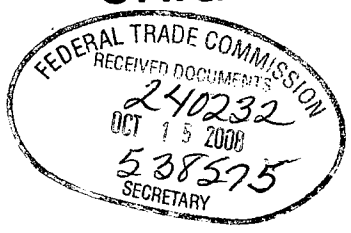


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

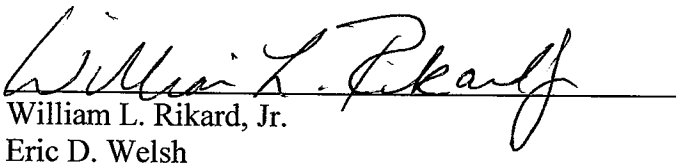
RESPONDENT'S MOTION TO DISMISS
COUNTS II AND III OF THE COMPLAINT
FOR FAILURE TO STATE A CLAIM

Respondent Polypore International, Inc. ("Polypore"), pursuant to Rule 3.22(e) of the Rules of Practice of the Federal Trade Commission ("Commission" or "FTC"), 16 C.F.R. § 3.22(e), respectfully moves to dismiss for failure to state a claim, Counts II and III of the Complaint with respect to any monopolization and attempted monopolization claims regarding the alleged automotive, uninterruptible power supply stationary ("UPS") and PE separator markets. Polypore also moves to dismiss, for failure to state a claim, Counts II and III to the extent that they purport to apply to the alleged deep-cycle and motive battery separator markets based upon an undefined monopolization or attempted monopolization offense under Section 5 of the FTC Act.

In support, Respondent Polypore respectfully refers the Court to, and incorporates herein, the contemporaneously-filed memorandum.

Dated: October 15, 2008

Respectfully Submitted,



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Attorneys for Respondent

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

PROPOSED ORDER

Upon consideration of Respondent's Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim and complaint counsel's response thereto, and the Court being fully informed, it is this _____ day of _____, 2008, hereby

ORDERED, that the Motion is **GRANTED**; and it is further

ORDERED, that Counts II and III of the complaint are dismissed with prejudice to the extent that they allege monopolization and/or attempted monopolization claims regarding the automotive, uninterruptible power supply stationary ("UPS") and PE separator markets and to the extent that they alleged monopolization and/or attempted monopolization claims regarding the deep-cycle and motive battery separator markets based on Section 5 of the FTC Act.

_____
The Honorable D. Michael Chappell
Chief Administrative Law Judge

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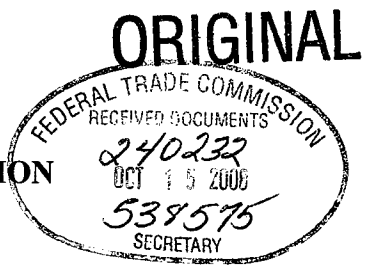

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS II AND III OF THE COMPLAINT FOR FAILURE TO STATE A CLAIM

Respondent Polypore International, Inc. ("Polypore" or "Daramic"), pursuant to Rule 3.22(e) of the Rules of Practice of the Federal Trade Commission ("Commission" or "FTC"), 16 C.F.R. § 3.22(e), respectfully moves to dismiss for failure to state a claim, Counts II and III of the Complaint with respect to all monopolization and attempted monopolization claims regarding the alleged automotive, uninterruptible power supply stationary ("UPS") and PE separator markets. Polypore also moves to dismiss, for failure to state a claim, Counts II and III to the extent that they purport to apply to the alleged deep-cycle and motive battery separator markets based upon an undefined monopolization or attempted monopolization claim under Section 5 of the FTC Act.

INTRODUCTION

The FTC seeks to assert monopolization and attempted monopolization claims under Section 5 of the FTC Act without making allegations that satisfy the standards for offenses under the Sherman Act. In their response to Polypore's Motion for a More Definite Statement, Complaint Counsel states that "[t]here is no claim under the Sherman Act in this complaint" and that Polypore "faces . . . monopolization and attempted monopolization claims under the FTC

Act."[1] The Complaint, however, does not plead the elements of monopolization and attempted monopolization claims that are required by Sherman Act authorities.

A comparison of the complaint here with the FTC's pleading in *In the Matter of Rambus*[2] -- a case in which monopolization and attempted monopolization claims were based on Section 5 -- shows the inadequacy of the pleading here. In *Rambus*, for the "First Violation," the FTC alleged that Rambus "engaged in a pattern of anticompetitive and exclusionary acts and practices" whereby it "obtained monopoly power."[3] For the "Second Violation," the same "pattern" was alleged along with a claim that Rambus had "a specific intent to monopolize" and that there was a "dangerous probability of monopolization."[4] These are the well-known Sherman Act elements and their use in *Rambus* evidences an understanding by the FTC that it must meet these standards in a Section 5 case.

In this case, however, the Complaint fails to make proper allegations of monopolization with respect to each of the five alleged markets (*see infra* at 14-15), fails to allege maintenance of monopoly power for each of these alleged markets (*see infra* at 15-16), and fails to allege the elements of an attempt to monopolize, including the element of specific intent (*see infra* at 16).

- Complaint Counsel alleges five product markets (*see* Complaint ¶¶ 5, 6). Yet, while the Complaint alleges a monopoly with respect to two of the five alleged markets (*see* Complaint ¶¶ 21, 22, 38 (b), (c)), the FTC fails to allege a monopoly with respect to the remaining three (the alleged automotive, UPS or PE separator markets).

- In paragraphs 39-45, the FTC alleges "market/monopoly power" and maintenance of "market power," terminology that falls short of the Sherman Act standard, and significantly does not identify the product markets to which it refers.

- Similarly, for the same three alleged markets, the Complaint fails to allege either that Polypore obtained or maintained monopoly power, but claims instead that it

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[1] Complaint Counsel's Response to Respondent's Motion for a More Definite Statement at 3 (No. 9327).

[2] File No. 011-0017, Compl. ¶¶ 122-123 (June 18, 2002), a copy of which is attached hereto as Exhibit 1.

[3] *Id.* at ¶ 122.

[4] *Id.* at ¶ 123.

"*attempted* . . . to maintain monopoly power." Complaint ¶ 39 (emphasis added). As for attempted monopolization, the complaint contains no allegation of specific intent, and alleges that only one of the alleged product markets (PE seperators) has a "dangerous probability [of] lessen[ing] or destroy[ing] competition," not a "dangerous probability of achieving monopoly power."

These allegations fall short of widely accepted Sherman Act standards and confirm that the FTC plans to present its "monopolization and attempted monopolization claims under the FTC Act"[5] using uncertain sub-Sherman Act standards. For the reasons stated below, Complaint Counsel's failure to plead the requisite elements of a Section 5 claim involving claims of monopolization or attempted monopolization renders Counts II and III deficient as a matter of law.

ARGUMENT

The standard used in Commission proceedings for motions to dismiss under Rule 3.22(e) of the Rules of Practice mirrors the standard used for evaluating motions to dismiss in federal district courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[6] Under that standard, a motion to dismiss for failure to state a claim must be granted where the complaint reveals that the allegations, even if proved, are insufficient to establish an antitrust claim.[7] And while well-pled factual allegations of the complaint are to be presumed true and all reasonable inferences are to be made in favor of complaint counsel for purposes of this motion, "conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted."[8]

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[5] Complaint Counsel, *supra* note 1, at 3.

[6] *In the Matter of Union Oil Co. of Cal.*, File No. 051-0125, Initial Decision 6 (Nov. 25, 2003), a copy of which is attached hereto as Exhibit 2, *citing In re Times Mirror Co.*, 92 F.T.C. 203 (1978) and *In re Fla. Citrus Mutual*, 50 F.T.C. 959 (1954). *See also* FTC Operating Manual § 10.7 (2004) ("[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists.").

[7] *Union Oil* at 7; *Cavalier Telephone, LLC v. Verizon Virginia Inc.*, 330 F.3d 176, 183 (4th Cir. 2003) ("*Cavalier Telephone*").

[8] *Union Oil* at 8 (citations omitted); *TV Comm'ns Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992) ("[A] plaintiff must do more than cite relevant antitrust language to state a claim for relief . . . A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws.").

Moreover, the complaint's allegations must "advance a legal theory on which antitrust relief can be granted" to survive dismissal.[9] Here, the Complaint, in Counts II and III, fails to plead the allegations required to effect cognizable claims of monopolization or attempted monopolization.

1. Counts II and III of the Complaint fail to Meet the Required Pleading Standard as to the Monopolization and Attempt to Monopolize Claims.

In identical allegations in Counts II and III of its Complaint, Complaint Counsel purports to bring claims under Section 5 of the FTC Act, 15 U.S.C. § 45. According to Complaint Counsel, the Complaint "follows traditional Section 5 and Section 7 law" and is grounded on alleged "monopolization, and attempted monopolization claims . . ."[10] While Complaint Counsel disavows any express or implied attempt to create new law,[11] that is exactly what is attempted here. This Complaint fails to meet the standard long recognized by the Commission for a monopolization or attempted monopolization claim under Section 5. As such, Counts II and III of the Complaint must be dismissed as to claims of monopolization or attempted monopolization.

(a) There is no respectable authority that supports application of Section 5 of the FTC Act in this case without adherence to Sherman Act requirements.

The required elements for pleading a proper claim of monopolization or attempted monopolization are well known.[12] Under Section 2 of the Sherman Act[13] a plaintiff must allege (1) "possession of monopoly power in the relevant market" and (2) "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[14] And, "to demonstrate attempted

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[9] *Cavalier Telephone*, 330 F.3d at 183.

[10] Complaint Counsel, *supra* note 1, at 2-3.

[11] Complaint Counsel, *supra* note 1, at 3.

[12] *Cavalier Telephone*, 330 F.3d at 183

[13] 15 U.S.C. § 2.

[14] *Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 407 (2004) (*quoting United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[15]

In a major decision involving the issue of the standard to be applied under Section 5 of the FTC Act, the Commission, in affirmed the ALJ's dismissal of the complaint and rejected an attempt by complaint counsel to expand Section 5 to reach conduct that did not violate Section 2 of the Sherman Act. In *In the Matter of General Foods Corp.*,[16] the FTC alleged that General Foods attempted to monopolize the packaged ground coffee market by engaging in predatory pricing and related practices. Affirming the dismissal of the complaint, including the attempted monopolization claim under Section 5, the Commission reviewed the claim under traditional Section 2 standards. After carefully identifying and describing the three elements of the attempted monopolization offense,[17] the Commission followed its earlier practice of looking first to the dangerous probability of success element.[18] Finding that element not supported by the evidence, it agreed with the ALJ's dismissal of the case and held that no Section 2 Sherman Act violation had been proved.[19]

Having found no violation of Section 2 of the Sherman Act, the Commission then turned to complaint counsel's argument that even if no violation of Section 2 had been found, General Foods had nevertheless violated Section 5 of the FTC Act through the same conduct.[20] The Commission rejected this argument, refusing "to expand the reach of the prohibition against attempted monopolization in the Sherman Act by condemning less offensive conduct under the

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[15] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1984).

[16] 103 F.T.C. 204 (1984).

[17] *Id.* at 341-46.

[18] *Id.* at 346.

[19] *Id.* at 364.

[20] *Id.* at 364-65.

purview of the [FTC] Act."[21] The Commission rejected complaint counsel's attempt to expand Section 5 in an attempted monopolization case beyond Section 2 standards, saying, "[t]he record in this case does not offer a rationale for using the [FTC] Act to grant an extension onto Section 2 of the Sherman Act," and "[w]e do not believe this [Sherman Act Section 2] standard should be changed when a case is brought under Section 5."[22] While aware of earlier Supreme Court decisions that allowed it "to supplement the more specific terms of the antitrust laws,"[23] the FTC declined to expand Section 5 to areas proscribed by the Sherman Act, stating "we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed."[24]

Similarly, three appellate courts, in cases decided roughly contemporaneously with *General Foods*, "rejected Commission decisions challenging conduct as unfair methods of competition under Section 5"[25] where there was no underlying antitrust violation.[26] In both *Boise Cascade v. FTC* and *E.I. duPont Nemours & Co. v. FTC* ("*Ethyl*") the Commission failed to show that the joint action resulted from actual collusion. In *Boise Cascade*, the court rejected the FTC's efforts to rely on the incipiency doctrine, articulated in *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966), and said that its decision would "blur the distinction between guilty and

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[21] *Id.* at 365-66.

[22] *Id.* at 366.

[23] *Id.* at 353 (*citing FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966)).

[24] *General Foods*, 103 F.T.C. at 365.

[25] Commissioner J. Thomas Rosch, *Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief* ("Rosch Valassis Speech"), Address at the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar (July 6, 2006), a copy of which is attached hereto as Exhibit 3 and *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf, at 8. The three cases are *Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides v. FTC* ("*OAG*"), 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC* (the "*Ethyl*" case), 729 F.2d 128 (2d Cir. 1984).

[26] Referring to these cases in its 1989 report, the ABA Antitrust Section committee to study the FTC pointed out that "recent court decisions have rebuffed the FTC when it interpreted Section 5 expansively." *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 115 (1989).

innocent commercial behavior."[27] In *Ethyl*, the court expressed concern about "arbitrary or capricious administration of § 5" by the FTC and said that its standard did not "discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."[28]

In *Official Airline Guides v. FTC* ("*OAG*"), the respondent was the monopolist publisher of the "Official Airline Guide," the "bible" of the industry.[29] By not publishing certain commuter airline flight information in the Guide, OAG's action harmed the ability of those commuter airlines to compete; however, OAG's actions were not directed at an OAG competitor and it did not enhance OAG's market position or power.[30] The court there said that "enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[31]

The circumstances in this case are the same as those found in *General Foods* and in the appellate decisions of *Boise Cascade, Ethyl* and *OAG* appellate decisions. According to Complaint Counsel here, the Complaint presents "monopolization and attempted monopolization claims under the FTC Act."[32] For these alleged offenses, however, the Commission's reach, in the words of the Commission itself in *General Foods*, has "been clearly expressed and circumscribed" by Sherman Act law. Having no better or subsequent authority as a guide, the Commission here should follow the sound precedent of its *General Foods* decision and, based on Complaint Counsel's admission of having failed to plead a viable Section 2 claim ("There is no

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[27] 637 F.2d at 581-82.

[28] 739 F.2d at 138-39.

[29] 630 F.2d at 921-22.

[30] *Id.* at 921.

[31] *Id.* at 927.

[32] Complaint Counsel, *supra* note 1, at 3.

claim under the Sherman Act in this complaint"[33]), dismiss the monopolization and attempted monopolization claims that are the subject of this motion.

While it can be expected that Complaint Counsel will try to save Counts II and III by using the *FTC v. Sperry & Hutchinson Co.* and *Brown Shoe* decisions, this effort would be misguided. Neither opinion addresses the specific situation involved here: where Complaint Counsel attempts to bring antitrust claims of monopolization and attempted monopolization (although even that, as discussed below, is not pled) under Section 5 of the FTC Act without pleading the requisite elements of a claim under Section 2 of the Sherman Act. This distinguishing fact was noted by the Commission itself in the *General Foods* case.[34]

Although the Court in *S&H* said, in oft cited language, that the Commission could use Section 5 to challenge conduct that does "not infringe either the letter or the spirit of the antitrust laws,"[35] that statement has no relevance to the pending case since it related to non-antitrust type conduct and ultimately served to refute the Fifth Circuit's holding that Section 5 only covered antitrust violations but not conduct harmful to consumer interests.[36] The Court, nevertheless, affirmed the Fifth Circuit's refusal to enforce the FTC's order on the ground that the FTC did not argue that S&H engaged in any conduct harmful to consumer interests and failed to show that S&H's conduct violated either the letter or the spirit of the antitrust laws.[37] As a result, the *S&H*

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[33] Complaint Counsel, *supra* note 1, at 3.

[34] *See* note 17 *supra.*

[35] 405 U.S. at 239.

[36] *Id.* at 245.

[37] The Court was forced to affirm the Fifth Circuit to this extent since the FTC failed to argue the Fifth Circuit erred in ruling that S&H's conduct did not violate the letter or spirit of the antitrust laws. 405 U.S. at 249. As a result, the Supreme Court declared that the Fifth Circuit's ruling on the antitrust point "remains undisturbed here." *S&H*, 405 U.S. at 250. Of the view that Section 5 applied only to anititrust-type conduct (and not conduct merely threatening harm to consumers) the Fifth Circuit made no determination whether the FTC's findings showed consumer harm. The Supreme Court held that the FTC order was not supported by findings relating to consumer harm but remanded the case for further proceedings relating to that issue. *Id.* at 249-50.

case did not uphold an order applying Section 5 to antitrust-type conduct that would not have been reached by the Sherman or Clayton Acts.[38]

In *Brown Shoe*, an opinion written by Justice Black over forty two years ago, the Court articulated the "incipiency doctrine," a concept that the Commission itself rejected in *General Foods* and that has not fared well in subsequent cases.[39] Justice Black, moreover, appears to have improperly lifted the doctrine from his earlier opinion in *FTC v. Motion Picture Adver. Serv. Co.*[40] -- improperly because the Court in that case did not deal with an incipient violation but found that the exclusive dealing arrangements there ran afoul of Section 5 because they violated the Sherman Act.[41] In any event, the "incipiency" concept is inherently inapplicable in this consummated merger case. And while the Court there rejected Brown's argument that the FTC needed to have found Section 3's substantial lessening of competition or tendency to monopoly, saying that the FTC may "arrest trade restraints in their incipiency," it proceeded to characterize the facts as showing that a Sherman/Clayton violation had occurred, concluding that the arrangement produced an adverse effect on competition ("anticompetitive practice") and that it "effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe

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[38] The Court in *S&H* first dealt with four earlier decisions that had refused to support FTC orders. *FTC v. Gratz*, 253 U.S. 421 (1920); *FTC v. Curtis Publ'g Co.*, 260 U.S. 568 (1923); *FTC v. Sinclair Ref. Co.*, 261 U.S. 463 (1923); and *FTC v. Raladam Co.*, 283 U.S. 643 (1931). *S&H*, 405 U.S. at 241. The Court then turned to *FTC v. R. F. Keppel & Bros., Inc.*, 291 U.S. 304 (1934) and *Brown Shoe*. *S&H*, 405 U.S. at 242. *Keppel*, however, is not relevant here since it was a consumer protection, non-antitrust case.

[39] In rejecting the FTC's claims of a Section 5 violation involving an industry-wide pricing practice but with no evidence of collusion, the Ninth Circuit said: "In this setting at least, where the parties agree that the practice was a natural and competitive development in the emergence of the southern plywood industry, and where there is a complete absence of evidence implying overt conspiracy, to allow a finding of a section 5 violation on the theory that the mere widespread use of the practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior." *Boise Cascade*, 637 F.2d at 582.

[40] 344 U.S. 392 (1953)

[41] "The vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly in violation of the Sherman Act." 344 U.S. at 397.

dealers."[42] In short, *Brown Shoe*, a case from a bygone era with its discredited incipiency doctrine, is certainly not persuasive authority here.[43]

Rather than straying from Sherman Act standards, courts generally have affirmed FTC findings of Section 5 violations only after finding Sherman Act violations. *E.g.*, *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447 (1986); *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957); *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).[44]

As a result, there is no authority authorizing Complaint Counsel to press Section 5 charges while failing to comply with Sherman Act standards, in a case like this where the FTC Complaint brandishes a "monopolization" claim. The proper standards for challenging unilateral conduct are now the subject of great debate, both nationally and internationally.[45] But that debate is keyed at the level of familiar Sherman Act standards and concepts. There has been no suggestion in this debate that sub-Sherman Act standards should apply in this situation. Scholarly comment has strongly supported the proposition that the FTC should not use Section 5 to bring antitrust cases that do not violate the Sherman and Clayton Acts. *E.g.*, 2 Areeda & Hovenkamp ¶ 302(h) (3d ed. 2007) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-

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[42] 384 U.S. at 320, 321.

[43] As one commentator has noted, "[t]he real problem with the *Brown Shoe* reasoning [was] that the Supreme Court was willing to condemn exclusive dealing when no injury to competition was apparent." 2 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ("Areeda & Hovenkamp") ¶ 302h3 (3d ed. 2007). Surely it is not a rush of excessive optimism to say that the FTC would never today bring an exclusive dealing case in which it would try to cheat on established Sherman or Clayton standards. Accordingly, *Brown Shoe* is no authority for any attempt by the FTC to use sub-Sherman Act standards in the instant case.

[44] In both *Atlantic Ref. Co v. FTC* , 381 U.S. 357 (1965) and *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968) the Court again effectively applied Sherman Act standards in approving the FTC's findings of adverse effects on market competition resulting from the arrangements. The Fifth Circuit made a similar decision in *Shell Oil Co. v. FTC*, 360 F.2d 470 (5th Cir. 1966).

[45] *E.g.*, U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), *available at* www.usdoj.gov/atr/public/reports/236681.htm, and Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (September 8, 2008), a copy of which is attached hereto as Exhibit 4 and *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf .

competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'" Areeda and Hovenkamp also state that: "[A] substantive antitrust rule that governs direct enforcement of the Sherman and Clayton Acts should also govern the Commission under § 5 as well."); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."); Bob Pitofsky, *More Than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 Antitrust L. J. 773, 847-48 (2005) ("I have never been comfortable with the idea that practices that are legal under the Sherman and Clayton Acts become illegal under Section 5 of the FTC Act because they fall in the 'penumbra' of some competition policy. Among other problems, it means that certain behavior would be legal or illegal depending on whether the suit was brought by the DOJ Antitrust Division under the Sherman Act or the FTC under Section 5. I have therefore believed that the unfairness jurisdiction, especially in antitrust matters, should be used very cautiously.").

In accord with this authority, Commissioner Rosch in July 2006 took the position that Section 5 should not be used to challenge conduct that is "plainly governed by the Sherman Act."[46] Unlike the monopolization and attempted monopolization claims in the instant proceeding, Commissioner Rosch pointed out that the conduct in *Valassis* was not "squarely

[46] Rosch Valassis Speech, *supra* note 25, at 11.

covered by the Sherman Act," because it involved an invitation to collude. That statement cannot be made about the conduct in the instant case.[47]

Unilateral conduct cannot and should not be subject to low-grade and uncertain antitrust standards lest vigorous competitive effort be inhibited or penalized. As the Supreme Court said in *Spectrum Sports*:

> Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this matter reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.[48]

Several years earlier, the Court had made the same point in its *Copperweld* decision.[49] There the Court observed that the Sherman Act leaves a "gap" since a single firm will not be liable for conduct "in restraint of trade" even though it accomplishes the same effect on competition that two firms acting together could accomplish for which they could be in violation.[50] But the Court said:

> Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote.[51]

It may be one thing for the FTC to challenge "invitations to collude" under Section 5 where the action is but one small step away from creating serious criminal exposure and efficiency claims are elusive or non-existent.[52] But it is indeed difficult to understand how the

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[47] *Id.*

[48] *Spectrum Sports*, 506 U.S. at 456 (*quoting Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)).

[49] *Copperweld*, 467 U.S. 752 (1984).

[50] *Id.* at 774-75.

[51] *Id.* at 775.

[52] Even so it should be noted that the FTC's recent consent decree program with "invitations to collude" has yet to be blessed by any reviewing judicial authority. Historical attempts to use Section 5 to challenge "conscious parallelism" were rebuked and caused the FTC to back down. The FTC adventure in *Triangle Conduit & Cable Co. v. FTC* is described in *Boise*

FTC could justify the application of sub-Sherman Act standards in a monopolization claim in a merger case, given the common wisdom that mergers have the capacity to achieve substantial efficiencies. Policy considerations and precedent both demonstrate that the Commission lacks the legal authority to make such expanded Section 5 claims.

(b) Under the standard set by Section 2 of the Sherman Act, Counts II and III fail to Allege a Valid Claim under Section 5 of the FTC Act.

Section 2 of the Sherman Act condemns monopolization and attempts to monopolize. 15 U.S.C. § 2. As stated *supra* at pp. 5-6, monopolization requires a showing of (1) "possession of monopoly power in the relevant market" and (2) a "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[53] Moreover, to demonstrate an attempt to monopolize, a plaintiff must prove, among other things, a specific intent to monopolize and a dangerous probability of achieving monopoly power.[54] Here, Counts II and III fail to allege a monopoly in three purported markets, fail to allege acquisition, enhancement or maintenance of a monopoly in those three purported markets, and fail to allege an attempt to monopolize, instead alleging an "attempt to maintain a monopoly." Counts II and III must be dismissed in relevant part.

(i) Failure to Allege Monopoly

The Complaint fails to allege a monopoly with respect to the purported automotive, UPS and PE separator markets.[55]

Cascade, where it is also noted that as recently as 1974, the Commission dismissed *In re Crouse-Hinds* where the facts failed to show concerted action. 637 F.2d at 576 *citing Triangle Conduit*, 168 F.2d 175 (7th Cir. 1948) and *Crouse-Hinds*, 46 F.T.C. 1114 (1950). As is described in text, its more recent efforts to mount such cases were rejected in *Boise Cascade* and *Ethyl*.

[53] *Verizon Commc'n*, 540 U.S. at 407 (*quoting Grinnell*, 384 U.S. at 570-71).

[54] *Spectrum Sports*, 506 U.S. at 456.

[55] Polypore disputes the designations of the markets as alleged by the FTC and will assert its defenses to the market claims as necessary at the hearing before the ALJ.

- Paragraph 21 of the Complaint alleges that after the acquisition, Polypore had a monopoly in the alleged deep-cycle market and paragraph 22 alleges that Daramic and Microporous "were the only competitors in motive separators." However, the Complaint contains no such allegations for the alleged automotive, UPS or PE separator markets. Similarly, paragraphs 38(b) and (c) allege monopolies in the deep-cycle and motive markets but not in automotive, UPS or PE separator markets.

- Paragraph 23 alleges that Daramic and Entek are "direct competitors" in the alleged automotive market but makes no allegation that Daramic had a monopoly.

- Paragraph 24 (and Paragraph 38(b)) allege that Microporous and Daramic were the "only" companies selling separators in the alleged UPS market, but that they were selling "in different segments" of that market. As to this market, the word "monopoly," or any derivation thereof, does not appear in the Complaint.

- As for the PE separator market, no allegations of monopoly are set forth in paragraph 25, which states instead that Daramic, Microporous and Entek are the "only manufacturers of" the product in North America.

- While paragraph 45 alleges "market/monopoly power" and maintenance of "market power," (1) the careful distinctions made in paragraphs 21-25 and 38(b) undermine these allegations; (2) the phrase "market/monopoly power" and the reference to maintenance of "market power" fail to allege a monopoly since a monopolist must have not just some market power but *substantial* market power;[56] and (3) the allegations of paragraph 45 are, in any event, of no consequence since they fail to identify any alleged relevant market to which they apply.

In short, the Complaint fails to allege that Polypore has a monopoly in the alleged automotive, UPS and PE separator markets.

(ii) Failure to Allege Acquisition, Enhancement or Maintenance of Monopoly Power

Nowhere does the Complaint allege that Polypore "maintained" monopoly power in the automotive, UPS and PE separator markets. This omission is highlighted by paragraph 39 where

[56] *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 481 (1991) ("Monopoly power under §2 requires, of course, something greater than market power under §1."); 3B Areeda & Hovenkamp at ¶802(a) (3d ed. 2008) ("The monopolization offense requires both 'substantial' market power and exclusionary conduct."); Phillip Areeda & Louis Kaplow, *Antitrust Analysis: Problems, Text, Cases* 554 (5th ed. 1997) ("Under §2, only substantial market power will be deemed monopoly power"), a copy of which is attached hereto as Exhibit 5.

the Complaint alleges instead that Polypore "*attempted* through anticompetitive means to maintain monopoly power" (emphasis added) in the five alleged markets. Maintenance of monopoly power, however, is the necessary element of monopolization; a mere *attempt* to maintain monopoly power is insufficient. The standard as stated by *Verizon, supra*, is quite clear: monopolization requires "willful acquisition or maintenance of that [monopoly] power," not "willful acquisition or *attempted* maintenance" of monopoly power.[57] Indeed, monopolization requires monopoly power that is durable, not monopoly power that the firm has merely "attempted to maintain" or that has existed only temporarily.[58]

The Complaint attempts to cure this defect by alleging in Paragraph 42 that "[i]n automotive, motive, UPS and all PE markets Daramic has historically maintained monopoly power." This claim, however, is inadequate since it is keyed to some undefined historical period antedating the events of the Complaint and it fails to identify or allege any anticompetitive actions that produced this "historical maintenance." [59]

Moreover, the monopolization allegations are not saved by paragraph 45, because, as discussed above, (1) its broad brush allegation of "maintenance" is inconsistent with paragraph 39's allegation of "attempt to maintain;" (2) it fails to allege, as required, "maintenance of that [monopoly] power" but, instead, alleges maintenance of "market power;" and (3) it fails to allege the markets to which it applies.

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[57] *Verizon,* 540 U.S. at 407. *See also Endsley v. Chicago*, 230 F.3d 276, 283 (7th Cir. 2000) (affirming dismissal of Section 2 claim for failure to allege monopoly power over "the relevant market.").

[58] ABA Section of Antitrust Law, *Antitrust Law Developments* 226, n.8 (6th ed 2007) (*citing Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 968 (10th Cir. 1990) ("market power, to be meaningful for antitrust purposes, must be durable")).

[59] Even if the Complaint were not so fatally deficient, Count III would still be subject to dismissal since, as set forth above, the Complaint fails to allege a monopoly as to the alleged automotive, UPS and PE separators purported product markets.

(iii) Failure to Allege Attempt to Monopolize

The Complaint fails to state an attempt to monopolize claim as to all alleged markets. With respect to the alleged PE separator market, paragraph 44 does allege a "dangerous probability that, if successful, [the conduct alleged] would give Daramic the ability to lessen or destroy competition." "Dangerous probability," of course, is the third element of the attempt to monopolize offense.[60] The paragraph 44 allegations, however, are in conflict with those of paragraph 39, which alleges an "attempt[] to maintain *monopoly* power" (emphasis added) and paragraph 45, which alleges "[maintenance of] *market* power." (emphasis added)

In any event, paragraph 44 fails to make the necessary allegation of a dangerous probability of success in achieving a monopoly. Instead of meeting this standard, the Complaint inadequately contends that a "dangerous probability" exists that the conduct would convey "the ability to lessen or destroy competition." Even if this defect were corrected, the Complaint is still wanting due to the FTC's failure to allege specific intent to monopolize the PE separator market. *Endsley,* 230 F.3d at 283-84 (affirming dismissal of Sherman Act Section 2 claim for failure to allege facts demonstrating alleged anti-competitive use of power to control prices).

(c) Counts II and III Fail Even if the Claims are not Viewed Under Section 2 Standards.

Under the weight of judicial authority, and scholarly commentary that consistently cautions against an interpretation of Section 5 in antitrust matters beyond the parameters of Section 2 of the Sherman Act, Counts II and III of this Complaint should be dismissed. Even if this Court were to consider some broader and undefined standard for a claim under Section 5 of the FTC Act than under Section 2 of the Sherman Act, Counts II and III, which it should not, would still be deficient and require dismissal.

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[60] *See supra Spectrum Sports*, 506 U.S. at 456.

In a departure from the principles set out in *General Foods*, the Commission in a 3-2 vote announced in the *Negotiated Data Solutions* case ("*N-Data*") that it considers itself authorized to bring antitrust-type cases under Section 5 as unfair methods of competition where the conduct does not violate either the Sherman or Clayton Acts.[61] In its *N-Data* commentary, the Commission, while evidencing an intent to avoid Sherman Act standards, at the same time acknowledged that some "limiting principles" should be in place under Section 5. Yet, the FTC provides no clear and concise articulation of those "limiting principles," and the Complaint lacks any meaningful allegations in this regard.

Of course, problematic for Complaint Counsel in attempting to avoid dismissal through some reliance on *N-Data* is the fact that the Commission has not defined such "limiting principles" and the general comments in *N-Data* lack precision. For example, the Analysis to Aid Public Comment in *N-Data* referred to the first of two limiting principles that supposedly could be derived from the *OAG* and *Ethyl* cases, discussed above. It noted that the court in *OAG* said that a free-standing Section 5 violation could not be found where the respondent "does not act coercively,"[62] and *Ethyl* said there must be "at least some indicia of oppressiveness."[63] In his concurring opinion in *Rambus*, Commissioner Leibowitz provided a slightly fuller statement of this limiting principle when he said that conduct must be "'collusive, coercive, predatory, restrictive, or deceitful,' or otherwise oppressive."[64] And, in his July 2006 speech, Commissioner Rosch also quoted *Ethyl* and *OAG* as requiring "some indicia of oppressiveness, such as

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[61] *In the Matter of Negotiated Data Solutions LLC*, File No. 051-0094, Analysis of Proposed Consent Order to Aid Public Comment ("Analysis to Aid Public Comment") 3-4 (January 23, 2008), a copy of which is attached hereto as Exhibit 6, and Statement of the Federal Trade Commission 1-2, n. 5 (January 23, 2008), a copy of which is attached hereto as Exhibit 7.

[62] 630 F.2d at 927.

[63] 729 F.2d at 139-40. However, Chairman Majoras, in her dissenting statement, noted that "[t]he majority has not identified a meaningful limiting principle that indicates when an action . . . will be considered an 'unfair method of competition." *N-Data*, File No. 051-0094, Dissenting Statement of Chairman Majoras 4 (January 23, 2008), a copy of which is attached hereto as Exhibit 8.

[64] *Rambus,* File No. 011-0017, Concurring Opinion of Commissioner Jon Liebowitz 15-16 (August 2, 2006), a copy of which is attached hereto as Exhibit 9.