

ORIGINAL



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of )  
)  
)

POLYPORE INTERNATIONAL, INC., )  
Respondent. )  
)  
)

Docket No. 9327

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

**I.**

On October 15, 2008, Respondent Polypore International, Inc. ("Polypore," "Daramic" or "Respondent"), filed a Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim and a Memorandum in Support Thereof ("Motion"). Complaint Counsel filed its Response ("Opposition") on October 27, 2008.

For the reasons set forth below, the motion to dismiss is DENIED.

**II.**

Respondent 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. Motion at 1. Respondent also moves to dismiss, for failure to state a claim, Counts II and III to the extent that they apply to the alleged deep cycle and motive battery separator marked based upon what Respondent characterizes as an undefined monopolization or attempted monopolization offense under Section 5 of the FTC Act. *Id.* Respondent argues that Complaint Counsel seeks to assert monopolization or attempted monopolization claims under Section 5 of the FTC Act without making allegations that satisfy the standards for offenses under the Sherman Act. *Id.* Respondent further argues that the Complaint does not plead the elements of monopolization and attempted monopolization claims that are required by Sherman Act authorities. *Id.* at 2.

Complaint Counsel responds by asserting that the Complaint properly alleges claims consistent with Sherman Act liability standards that entitle Complaint Counsel to relief under Section 5. Opposition at 2. With respect to Count II of the Complaint, Complaint Counsel states that it challenges: (i) an agreement between competitors to allocate markets, and (ii) Polypore's acquisition of Microporous Products, L.P., ("Microporous") and that each of these transactions constitutes an unreasonable restraint of trade. *Id.* Complaint Counsel further asserts that all of the elements of a standard Sherman Act Section 1 violation are adequately alleged. *Id.* With respect to Count III of the Complaint, Complaint Counsel states that it challenges conduct "amounting to monopolization and attempted monopolization." *Id.* Complaint Counsel further asserts that "each and all of the elements of a standard Sherman Act Section 2 violation are adequately alleged." *Id.*

### III.

#### A. Motion to Dismiss Standard

Rule 3.22(e) of the Commission's Rules of Practice authorizes the filing of a motion to dismiss a complaint. 16 C.F.R. § 3.22(e). Although the Commission's Rules of Practice do not have a rule identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission has acknowledged a party's right to file, and the Administrative Law Judge's authority to rule on, a motion to dismiss for failure to state a claim upon which relief could be granted. *E.g., In re Times Mirror Co.*, 92 F.T.C. 230 (1978); *In re Florida Citrus Mutual*, 50 F.T.C. 959, 961 (1954) (ALJ may "dismiss a complaint if in his opinion the facts alleged do not state a cause of action.").

Section 3.11(b)(2) of the Commission's Rules of Practice sets forth that the Commission's complaint shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires only that the complaint contain "a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer." *New England Motor Rate Bureau, Inc.*, 1986 FTC LEXIS 5, \*114 (Dec. 12, 1986). "Commission complaints, like those in the federal courts, are designed only to give a respondent 'fair notice of what . . . the claim is and the grounds upon which it rests.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

#### B. Analysis

As correctly stated by Complaint Counsel, the FTC does not and cannot directly enforce the Sherman Act; however, conduct that violates the Sherman Act is generally deemed to constitute an unfair method of competition and hence a violation of Section 5 of the FTC Act as well. Opposition at 1; 15 U.S.C. §§ 1-7. Complaint Counsel urges that if the Commission's

Complaint against Polypore states a cause of action under Sherman Act standards, then the Complaint necessarily states a cause of action under Section 5 of the FTC Act. Opposition at 1.

Complaint Counsel further states that because the Commission's Complaint alleges claims consistent with Sherman Act liability standards that entitle Complaint Counsel to relief under Section 5, it is not necessary to explore or delineate the outer bounds of Section 5. *Id.* at 2. Indeed, according to Complaint Counsel, "whether Section 5 reaches beyond the Sherman Act . . . is irrelevant because each claim in the Commission's Complaint states a cause of action under traditional Sherman Act standards." *Id.* at 4.

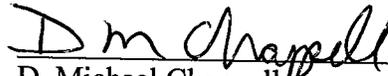
Count II of the Complaint, titled "Unfair Method of Competition," charges: "Daramic has, through the acquisition of Microporous, and the other conduct alleged herein, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the [FTC] Act." Complaint Counsel asserts that Count II is patterned after Sherman Act Section 1, not Sherman Act Section 2. Opposition at 6. Specifically, Count II of the Complaint challenges: (i) an agreement between competitors Daramic and Hollingsworth & Vose to allocate markets, and (ii) Polypore's acquisition of Microporous Products, L.P. *Id.* Respondent does not argue that the Complaint is deficient in regard to the allegations modeled after Sherman Act Section 1. Instead, Respondent urges dismissal only with respect to monopolization or attempted monopolization claims – claims patterned after Sherman Act Section 2. Complaint Counsel has asserted that Count II does not allege Sherman Act Section 2 claims. *Id.* Accordingly, Respondent's motion to dismiss Count II with respect to monopolization or attempted monopolization claims patterned after Sherman Act Section 2 is without merit and fails.

Count III of the Complaint, titled "Monopolization," like Count II, also charges: "Daramic has, through the acquisition of Microporous, and the other conduct alleged herein, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the [FTC] Act." According to Complaint Counsel, Count III alleges the elements of monopolization and/or attempted monopolization in five relevant markets, patterned after Sherman Act Section 2. *Id.* at 2, 7. Elements of a Sherman Act Section 2 monopolization case are: (1) the possession of monopoly power in the relevant markets; and (2) the willful acquisition or maintenance of that power through predatory or anticompetitive conduct. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Elements of a Sherman Act Section 2 attempted monopolization case are: (1) that the defendant possesses monopoly power, and (2) has engaged in predatory or anticompetitive conduct with (3) a specific intent to monopolize, and (4) a dangerous probability of maintaining monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951). The Complaint in this case makes allegations consistent with Sherman Act Section 2 liability standards. Complaint ¶¶ 2, 4, 19-31, 38-43, 46, 47. These allegations are sufficient to inform Respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of the law. 16 C.F.R. § 3.11(b)(2).

IV.

The Commission's Complaint against Respondent states a cause of action under Sherman Act standards, thus, the Complaint necessarily states a cause of action under Section 5 of the FTC Act. The allegations in the Complaint sufficiently inform Respondent of practices alleged to be in violation of the law consistent with Sherman Act liability standards. Accordingly, Respondent's motion to dismiss is DENIED.

ORDERED:



D. Michael Chappell  
Administrative Law Judge

Date: December 4, 2008