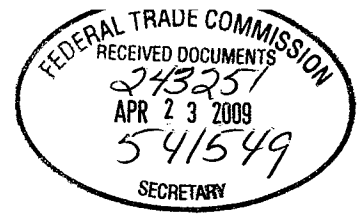


ORIGINAL



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of )  
 )  
Polypore International, Inc., )  
a corporation. )

PUBLIC

Docket No. 9327

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## INTRODUCTION

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PX0803. There are good reasons that Daramic would have trouble convincing its customers that it is not a monopolist: its acquisition of Microporous, its closest and only competitor, gave it a monopoly in the deep-cycle and motive separator markets, and preserved its monopoly in the UPS separator market. The acquisition also eliminated a third competitor in the market for automotive battery separators (“SLI”), leaving only Daramic, the dominant supplier, and Entek in North America.

It is also no wonder that customers have had trouble with Polypore’s oppressive discovery demands in this case when this monopolist: (i) sued Microporous to keep it from competing; (ii) bought Microporous to keep it from competing; (iii) eliminated other competition; (iv) held back supply and service from customers; (v) raised prices immediately after the acquisition of Microporous; (vi) sued one customer for not agreeing to the higher prices; and (viii) threatened another customer with a lawsuit if it did not agree to higher prices. In short, Daramic’s unrestrained exertion of market power is shocking.

Yet, as your Honor has explained, to prove a Section 7 violation, Complaint Counsel needs to prove far less than what is alleged in this case. Complaint Counsel need show only that “the effect of [the] acquisition may be substantially to lessen competition, or tend to create a monopoly.” *In re Chicago Bridge & Iron Co., N.V., et al.*, 2003 WL 21525006, Dkt. No. 9300 (Initial Decision, June 18, 2003) [hereinafter, “CB&I Initial Decision”] at 84-85, *aff’d*, 2003 WL 22217293 (F.T.C.

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<sup>1</sup> Daramic LLC (“Daramic”) is Respondent Polypore International, Inc.’s (“Polypore”) operating subsidiary that manufactures and sells the types of battery separators at issue in this case. Microporous Products Limited Partners (“Microporous”) was synonymous with Amerace, and industry documents refer to them synonymously.

Sep. 10, 2003), *aff'd Chicago Bridge & Iron Co., N.V., et al. v. FTC*, 534 F.3d 410 (5th Cir. 2008), (citing 15 U.S.C. § 18 and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963)). To show that competition “may be substantially” lessened, all that Complaint Counsel must show is that the acquisition would produce “a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of the firms in that market.” *CB&I Initial Decision*, at 88 (Citations omitted).

Daramic’s market share in North America for deep-cycle, motive and UPS battery separators is now 100%. For SLI, it is just under 50%, with only one remaining supplier, Entek. Prior to the acquisition, Microporous had been the maverick. It was the largest supplier of deep-cycle separators and was rapidly expanding in the other markets. The elimination of Microporous, a strong viable competitor in all of these markets, significantly lessened competition.

Daramic has asserted only two factual defenses to this strong prima facie case: potential entry and efficiencies. But there are no entrants anywhere in the world for deep-cycle, motive, or UPS battery separators. And in SLI, there are none even preparing to enter North America. Elsewhere in the world, the few fringe players in SLI cannot possibly compete against Daramic or Entek in North America; nor is there any evidence that any will do so.

Daramic has not even attempted to offer any evidence of the elements of an efficiencies defense, and thus it cannot possibly reach the level of extraordinary efficiencies required to offset Complaint Counsel’s prima facie case. Nor has Daramic offered any evidence to counter Complaint Counsel’s evidence of monopolistic behavior, except to say that it is simply raising prices and suing or threatening to sue its customers to recover cost increases. This behavior proves that Daramic’s market power is now uncontested.

In short, we respectfully suggest that this illegal acquisition and Daramic’s conduct have harmed competition significantly and that only a full divestiture and a cease and desist order will



eliminate the anti-competitive effects caused by Daramic.

## **I. Factual Background**

A battery separator is a porous electronic insulator placed between two plates of opposing polarity in flooded lead-acid batteries (“flooded batteries”) that prevents electrical short circuits while allowing ionic current to flow through the separator. Separators are the most highly engineered component of a battery and even small chemical and physical differences in separators have a large impact on the quality and function of the battery.

As a result of Daramic’s acquisition of Microporous on February 29, 2008, there is only one manufacturer of deep-cycle, motive, and UPS separators in North America today, and only two manufacturers of SLI separators. The merger is a final step in a long history of exclusionary conduct by Daramic intended either to monopolize or to protect its existing monopoly power in flooded battery separator markets.

Daramic’s exclusionary behavior began almost 10 years ago, soon after Microporous acquired its polyethylene (“PE”) battery separator technology from a company called Jungfer. Jungfer built the PE separator line located in Piney Flats, Tennessee for Microporous in 2001. Daramic acquired Jungfer almost immediately thereafter and shut it down

**REDACTED** and then sued Microporous to prevent it from selling SLI in Europe. PX2124-002; PX2241.

While much of the exclusionary conduct at issue in this case revolves around Respondent’s efforts to prevent Microporous from expanding its presence in Daramic’s PE markets, Daramic also entered into illegal market division agreements. When Daramic learned that an Absorbent Glass Mat (“AGM”) separator manufacturer, Hollingsworth & Vose (“H&V”), might enter one or more of the markets for PE separators, it entered into an agreement with H&V,

PX0169-001; PX0035-005. This market division agreement took effect March 23, 2001,

**REDACTED**

PX0094; PX0158. This agreement is an unreasonable, horizontal restraint of trade and is illegal.

Daramic's actions had the intended consequences of eliminating the possibility of future competition, but only by acquiring Microporous did Daramic fully succeed in its efforts. Daramic documents demonstrate that as early as 2003 Daramic understood that Microporous was planning to expand.

**REDACTED**

Shortly thereafter, Daramic began a campaign of exclusionary conduct. After Daramic learned in 2003 that Microporous

**REDACTED**

PX0744-001. The President of Daramic then put an acquisition of Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic simply as **REDACTED** PX0932.

In 2005, when Daramic learned that Microporous planned to build a line to support business, it concluded that Microporous

**REDACTED**

PX0168-002. Daramic decided that it should fight this threat because

**REDACTED**

PX0694-001. Indeed, when it became clear that intended to switch to Microporous in 2006, Daramic used the threat of cutting off supply to force to extend its contract

*Id.* at -001; PX1211-001; PX0456. **REDACTED**

When Daramic learned that another customer, intended to shift a portion of its separator purchases to Microporous it took steps to prevent from moving its

business. In response to an **REDACTED** Daramic would only quote for what was effectively 100% of **REDACTED** needs. Because of capacity restraints at Microporous and Entek, Daramic knew its capacity was essential to **REDACTED** and its response prevented **REDACTED** from switching any of its business to Microporous.

The last steps taken by Daramic to exclude Microporous occurred in 2007, just prior to the merger. In 2007, Daramic devised the **REDACTED** Pursuant to this plan, Daramic entered into long-term, exclusionary contracts with key customers to prevent Microporous from contracting with them. Daramic believed that by contracting with these customers, Microporous' expansion could be slowed. Daramic's conduct prevented Microporous from acquiring sales opportunities needed for its expansion. Despite Daramic's continued efforts, Microporous finally managed to build a new facility in Feistritz, Austria in 2008. Polypore bought Microporous just weeks before the new factory was set to begin full commercial production. Microporous' European expansion would have freed up significant capacity for the North American markets and Microporous had marketed this capacity in North America for months before it was acquired.

Daramic thus believed that it needed to **REDACTED**  
PX0168-002; PX0694-001. Daramic believed an acquisition would **REDACTED**

PX0932. Polypore finally acquired Microporous on February 29, 2008.<sup>2</sup>

Polypore's documents analyzing the 2008 acquisition of Microporous demonstrate its anti-competitive intent. Presentations to Polypore's Board highlight that:

**REDACTED**

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<sup>2</sup>Although valued at \$76 million the transaction **REDACTED**

PX0954-006.  
On receiving several customer complaints shortly after the acquisition was announced, the FTC staff requested that Polypore hold the former Microporous separate during the FTC proceedings. PX0290; PX0291. Polypore refused. PX0955-005.

**REDACTED**

PX0203-088. Indeed, Daramic management asserted to the Polypore Board that **REDACTED**

*Id.* All of the financial projections that were done at Polypore and presented to the Polypore Board of Directors incorporate expectations and assumptions that the merger would eliminate competition from Microporous and allow for higher prices. The management of the former Microporous conveyed similar analyses to their board, asserting that as a result of the acquisition,

**REDACTED**

PX0049-001.

These predictions proved to be prescient. The acquisition reduced or completely eliminated competition in four markets for flooded battery separators: (1) deep-cycle separators; (2) motive separators; (3) UPS separators; and (4) SLI separators. There are no effective substitutes for the Microporous and Daramic products in the first three markets, and only one competitor in SLI separators for North America. As a result, Daramic has gained significant market power. Since the acquisition, it has forced customers to pay higher prices.

In SLI separators, Polypore eliminated Microporous as an emerging competitive threat whose presence had already had a significant competitive impact. The only other competitor to Daramic in this product market is Entek. Microporous had targeted an expansion into this business for years, and had competed to supply two SLI separator customers:

**REDACTED**

It was only because of Daramic's efforts to ward off the

Microporous threat that Microporous had not secured commercial sales. Yet, Microporous' efforts to obtain business with SLI customers had already led to lower SLI separator pricing.

The acquisition also eliminated Microporous as a uniquely positioned entrant into the UPS market. Prior to the acquisition Daramic had a monopoly in the North American market for UPS separators for flooded batteries. Microporous, however, had developed a PE separator for the UPS market that competed with Daramic's product and was testing it with customers. By virtue of its location and expertise, Microporous was uniquely situated to enter this market. Absent the acquisition, Microporous would have entered the market for UPS separators and disrupted Daramic's monopoly. The acquisition eliminated this actual potential competition.

There is no evidence of timely, likely, or sufficient entry from any other competitor that would counter such anti-competitive effects. Indeed, no other competitor has attempted to enter the North American market despite Polypore's achievement of monopoly in three of the four markets at issue and its anti-competitive conduct, including increased prices and its litigation and threatened litigation against customers who will not accept these monopolistic price increases. Nor is there any evidence of efficiencies that benefit competition or customers.

The only effective remedy for the unlawful acquisition is to restore competition by requiring that Polypore divest the complete Microporous business, including its recently completed plant in Feistritz, Austria, the equipment purchased for its expansion in North America, all of the former Microporous' intellectual property, and the business and employees associated with those facilities. Because Polypore's exclusionary conduct has effectively reduced competition in these markets for nearly ten years, Complaint Counsel also seeks the divestiture of additional PE manufacturing lines, that contracts be voidable at any customer's request, and that a monitor trustee be appointed at Polypore's expense to ensure that Polypore does not take anti-competitive actions that reduce the effectiveness of the Commission's remedy in this matter. Finally, the ALJ should void the market

division agreement with H&V and enjoin similar future agreements. Complaint Counsel also seeks additional orders consistent with these remedies.

**II. Polypore's Acquisition of Microporous Has Increased Market Power and Reduced Current and/or Potential Competition Significantly in the Markets for Deep-Cycle, Motive, SLI and UPS Battery Separators**

Section 7 of the Clayton Act prohibits acquisitions “in any line of commerce or in any activity affecting commerce . . . [if] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18; *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001). The Supreme Court has explained that Section 7 uses the word “may,” because it “deals in ‘probabilities, not certainties.’” *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505, (1974) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). Complaint Counsel may demonstrate its prima facie case by showing that the acquisition would lead to “undue concentration in the market for a particular product in a particular geographic area.” *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). This evidence creates a “‘presumption’ that the merger will substantially lessen competition.” *Id.* (citations omitted). Upon such a showing, the burden shifts to Respondent to rebut the presumption with evidence that “‘shows that the market-share statistics [give] an inaccurate account of the [merger’s] probable effects on competition’ in the relevant market.” *Heinz*, 246 F.3d at 715 (quoting *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975)); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D. D.C. 1997). Respondent cannot do so here.

**A. The Relevant Product Markets are Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries**

In determining relevant 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*, 370 U.S. at 325. 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.” *Staples*, 970 F. Supp. at 1074 (internal quotations omitted). “[T]he determination of the relevant market in the end is ‘a matter of business reality – of how the market is perceived by those who strive to profit in it.’” *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (citations omitted). 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).

There are four relevant markets in which to properly assess the anti-competitive impact of Polypore’s acquisition of Microporous: 1) separators for deep-cycle batteries; 2) separators for motive power batteries; 3) separators for UPS batteries; and 4) separators for SLI batteries.<sup>3</sup>

#### **1. Deep-Cycle Battery Separators are a Product Market**

The deep-cycle separator market comprises separators used in golf cart and scrubber batteries. Due to the technical requirements of deep-cycle batteries, the only separators considered effective by purchasers in this market are made from rubber and PE-rubber. These rubberized separators are unique in that they offer the ability for the battery to outlive batteries with conventional PE separators while being constantly discharged and then recharged (cycling) after exhausting up to 100% of the battery’s energy. Deep-cycle batteries contain an antimony additive that facilitates this cycling process. *See, e.g.*, PX1791-001. The deposition of antimony onto the negative plate, sometimes called “antimony poisoning” drastically reduces the cycle life of the battery. *See, e.g.*, PX1791-001; PX1124-001. Deep-cycle batteries require separators containing rubber to suppress antimony poisoning. *See, e.g.*, PX1791-001; PX0072-020; PX0798. Pure PE

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<sup>3</sup> Complaint Counsel also asserts an alternative relevant market comprising all battery separators made with PE.

does not sufficiently suppress the transfer of antimony in a deep-cycle battery. In a deep-cycle application, a battery with a pure PE separator would last far fewer cycles. PX1124. Using a PE separator could risk a golf cart not lasting a full round of golf.

Microporous' Flexsil is a natural rubber separator that is recognized as the industry standard for deep-cycle batteries. **REDACTED** for a

less expensive separator, Microporous developed a PE-rubber separator called CellForce. The addition of rubber allows the PE separator to achieve antimony suppression similar to Flexsil, but at a significantly lower cost. See PX0798-003-004. Daramic introduced a competing PE-rubber separator, HD<sup>4</sup>, several years ago, and had been gaining market share ever since. See, e.g., PX1744-004; PX1071; PX0222-001; PX0033-040; see also, PX0736-002

PX0316-002. According to the former CEO of Microporous, HD was the only competitor to Microporous' Flex-Sil and CellForce products for deep-cycle batteries. PX0920-013; PX0906-016. There are no economic substitutes for rubber or PE-rubber separators for deep-cycle batteries. PX0319-007 **REDACTED**

For these reasons deep-cycle separators made from rubber or a blend of PE and synthetic or natural rubber are a relevant product market in which to assess the competitive impact of the merger.

## 2. Motive Separators are a Relevant Market

The motive power battery market is composed primarily of batteries for forklifts. See, e.g., PX0922-016; PX0185-006; PX1786-113

**REDACTED** These batteries serve as



counterweights in the design of industrial vehicles and are among the largest batteries made. *See* PX2110-035. These batteries require separators which are much thicker and larger than other separators. In North America, motive separators are made of PE or PE-rubber.

Evidence of a separate motive separator market is found in Respondent's documents. Microporous' former owners wrote that

**REDACTED**

PX1124-002. *See also, e.g.,* PX0072-020;

PX0185-006. Daramic's documents also describe a separate motive market. A Daramic marketing flyer describes the motive market as follows:

*the requirements for traction batteries in respect of mechanical properties and chemical stability are considerably higher than for starter separators. [A] forklift battery is typically operated for about 40,000~50,000 hours in charge – discharge service whereas a starter battery only for 2000 hours. The requirements as to electrical resistance are lower because of the typically low current densities for traction batteries. These differences are reflected in the design of the modern traction battery separator material.*

PX1790-001 (emphasis added). Motive separators are in fact distinguished from other types of battery separators and are a separate market based on technical and physical properties of the separator as demanded by the specific end use of the battery in which they are contained.

The demand for motive power battery separators is inelastic, as purchasers do not consider any other type of battery separator as an adequate substitute. Purchasers of motive separators consistently testify that they would not switch to PVC, or any other material, in the event of a five percent increase in the price of Daramic's motive separators.

### **3. UPS Separators are a Product Market**

Battery separators used in UPS batteries are a relevant product market. The UPS battery market comprises mainly batteries used to provide temporary back-up power supply in the event of an unplanned outage to critical data centers and buildings. UPS batteries are designed to sit idle for extended periods of time then, when needed, provide a quick burst of sustained current for a few

minutes until a generator is engaged or an orderly shutdown is made.

The market for flooded UPS battery separators consists of separators made from PE. Daramic's UPS PE product has the vast majority of sales. Daramic also manufactures a product called DARAK in Europe that can be used in flooded UPS batteries, but it is more than two times more expensive. A small but significant and nontransitory increase in price ("SSNIP") in Daramic's PE product to North American customers would not cause switching to DARAK or rubber because of the significant price difference and because Daramic controls the price and sales of both. Finally, Amersil's PVC made in Europe is considered suspect by many North American purchasers because it can degrade at higher temperatures. Thus a SSNIP in Daramic's UPS separators would not lead customers to switch to other materials.

#### **4. Starting, Lighting, Ignition ("SLI") Battery Separators**

SLI separators is a relevant market in which to assess the impact of Polypore's acquisition of Microporous. The SLI application is predominately an automotive end use. SLI batteries are used to provide a quick and unsustained surge of current primarily to start the engine after which the car's engine becomes the source of power. The SLI market is the largest separator market. PX0131-032.

Separators for SLI are made from PE. SLI batteries contain little or no antimony and do not require a rubberized separator. SLI separators must have a very low electrical resistance ("ER"). PX0913-004; PX0669-019. The low ER is achieved partly due to the thin profile of the separator. *See, e.g.*, PX0669-004. These attributes of PE account for its being recognized as the best material from which to make a separator for a flooded battery for an SLI application. In some parts of the world, other material is used but in decreasing quantities, as even these more remote regions are progressively converting to PE. PX0923-016-017. North American battery manufacturers would

not switch to these inferior SLI materials in response to a SSNIP.<sup>5</sup> PE battery separators for SLI batteries are, for all of these reasons, a relevant product market in which to assess the competitive impact of Polypore's acquisition of Microporous.

**B. The Relevant Geographic Market is North America**

The relevant geographic market is that geographic area “to which consumers can practically turn for alternative sources of the product and in which the antitrust defendant faces competition.” *Staples*, 970 F. Supp. at 1073 (quoting *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994)). The geographic market can 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. A monopolist of all North American separator production could profitably increase prices to North American customers for each relevant product by a SSNIP.

Currently, North American battery manufacturers only buy separators for use in their North American flooded batteries from Daramic and, with respect to SLI separators, Entek. Other than Daramic, there is not a single producer of separators for lead acid batteries who manufactures or sells a deep-cycle battery separator outside of North America. PX0911-031; PX0906-028. Likewise there are no producers of UPS or motive separators outside of North America who are currently capable of meeting the specifications of North American UPS or motive battery manufacturers.<sup>6</sup> PX0911-031. A SSNIP in deep-cycle, UPS, and motive separators will not be defeated by an

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<sup>5</sup> AGM batteries require AGM separators, and AGM separators are not compatible with flooded batteries and are thus not in the relevant market. Purchasers of SLI separators for flooded batteries cannot switch to using an AGM separator and would not switch to producing AGM batteries in response to a SSNIP. *See, e.g.*, PX0513.

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increase in purchases from producers of any of these three products outside of North America since there are currently no such producers. To the extent that a company entered one of these three product markets outside of North America, they would face the same geographic barriers discussed with respect to SLI separators below, and therefore would still not be in the North American geographic market.

There is no evidence that customers located in North America have ever sourced any of the relevant products from anywhere but North America.

a single instance in which an Asian producer has ever supplied a North American customer with any of the relevant products. PX0902-022-023; PX0909-012; PX0911-031; PX0264-003; PX0506. Indeed, of the hundreds of thousands of documents produced in this matter, Daramic has not been able to point to any evidence that Asian producers are selling any of the relevant products to any North American customer.

Nor would a price increase entice imports. For example, Daramic/Microporous and Entek all raised prices on all of their relevant products in North America in 2007, 2008, and 2009 and not one customer began importing separators for any of the relevant products from outside of North America. PX0263-003; PX0371; PX0911-031. Significantly, in 2006, when Daramic declared force majeure and informed its North American customers that they would not receive all of their separator requirements, customers were unable to import any of the relevant products from any producer. The same was true in October 2008 when Daramic declared force majeure because of a strike at its Owensboro, KY plant: customers were unable to substitute any of the relevant products from other producers outside of North America despite a lack of complete supply from Daramic.<sup>7</sup> Indeed at least one company had to idle its lines for days while it waited for product from Daramic

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This would not be a durable solution.

during the strike. These two instances demonstrate that non-North American suppliers are not available even when there is a large and significant increase in price, much less a SSNIP.

North American battery manufacturers prefer to source their PE separators from local suppliers. Having a local source of supply reduces the time and expense needed to get the product to the customers, which reduces the risk of a disruption in the supply chain. *See* PX0923-020-021; PX0920-024-026, PX0910-018-019. For example, [REDACTED] told Microporous that it must build a PE separator plant in Europe to supply their European battery production facility, instead of continuing to source its needs from Microporous' plant in Piney Flats, TN. PX0910-018-019. If the separator manufacturer is local it has a better opportunity to quickly troubleshoot technical problems that a customer may be having with its separators or the customers machines.

The only Asian producer of SLI separators who can produce the most common thickness of SLI separators used in North America (6 mm) is a Chinese company called Baoding Fengfan Rising Battery Separator Company ("BFR"). [REDACTED] have studied the possibility of importing SLI separators from China and found it to be uneconomical. PX1522. BFR

[REDACTED]

Adding shipping and other costs, such as China's VAT,

[REDACTED]

BFR will not supply North America in response to a SSNIP.

The evidence in this case indicates that a North American monopolist in all four product markets would lose very little, if any, sales to products outside the geographic market. PX0033-007. Thus the relevant geographic market to analyze deep-cycle battery separators, motive battery separators, UPS battery separators, and SLI battery separators is North America.

**C. The Acquisition is Likely to Lessen Competition in the Relevant Markets in Violation of Section 7**

Section 7 of the Clayton Act prohibits any acquisition of stock or assets “where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition or to *tend to create a monopoly*.” 15 U.S.C. § 18 (2008) (emphasis added). “Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.” *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986); see *CB&I Initial Decision* at 87-88. In the markets for deep-cycle, motive, and UPS separators, the acquisition eliminated the only competition and is presumptively illegal. *United States v. Franklin Electric Co., Inc.*, 2000 U.S. Dist. LEXIS 20676, \*20 (W.D. Wis. 2000).

A starting point for analyzing the competitive effects of acquisitions is the level of concentration in a market. All of the battery separator markets identified in the Commission’s Complaint are highly concentrated, as measured by the Herfindahl-Hirschman Index (“HHI”). Three of the markets, after the acquisition, are 100% monopolies. A monopoly market share raises the strongest level of concern that could be associated with a merger.<sup>8</sup> *Merger Guidelines* § 1.5.

As in *Chicago Bridge*, the high concentration and the evidence of substantial direct competition establishes a very strong presumption of anti-competitive effects in each of the relevant markets. *CB&I Initial Decision* at 96; see also *Chicago Bridge*, 138 F.T.C. 1024, 1053 (January 6, 2005) (Opinion of the Commission) (“Accordingly, the evidence ‘creates, by a wide margin, a presumption that the merger will lessen competition.’”) (quoting *Heinz*, 246 F.3d at 716). Respondent must come forward with compelling evidence that the history of direct competition between Daramic and Microporous, and the monopolistic market shares that Daramic now enjoys,

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<sup>8</sup> Concentration is best measured in this case using dollar sales. *Merger Guidelines* § 1.41.

somehow do not create a strong inference of anti-competitive effects.

“If the Government’s prima facie case anticipates and addresses the respondent’s rebuttal evidence, as in this case, the prima facie case is very compelling and significantly strengthened.” *See Chicago Bridge*, 534 F.3d at 426. The compelling evidence that Respondent would need to avoid liability is not present in this case. Rather, Respondent’s documents demonstrate that it understood that acquiring Microporous would eliminate competition and allow it to increase price in the markets of concern in this case. This evidence strengthens Complaint Counsel’s prima facie case, reinforces the already strong presumption of anti-competitive effects, and adds to Respondent’s burden to overcome the Commission’s case.

**1. The Acquisition Established a Monopoly in Markets for Separators Used in Motive Power and Deep-Cycle**

In two of the markets alleged in the Commission’s Complaint - separators for deep-cycle and motive power batteries - Daramic has gained a monopoly by acquiring Microporous. For years, Daramic and Microporous were the only two firms competing to supply customers in North America in these two markets, and the competition between them grew increasingly intense, to the benefit of the key customers. After the merger, however, the benefit of that competition was lost.

**a. Deep-Cycle Monopoly**

Prior to the acquisition, deep-cycle had been Microporous’ strongest market and their share has exceeded 90 percent. However, in 2005, Daramic introduced the HD separator as a direct competitor to Microporous’ Flex-Sil separator. Daramic began to take customers from Microporous and grew its market share steadily from the low single digits to **REDACTED** by 2007. PX0033-040. Daramic has grown its share by developing new products and competing on price and service. *See, e.g.*, PX0413-005. Following Daramic’s introduction of HD, Daramic informed customers that it was “aggressively pursuing” sales into the “golf cart/deep-cycle battery market.” PX1071.

Daramic's efforts to expand the sales of Daramic HD to deep-cycle customers included touting the costs savings that would accrue to customers from the purchase of the product. PX0261-007. In fact, Daramic HD was priced lower than Flex-Sil in every instance where Microporous and Daramic competed for deep-cycle business. PX0442-002.

There is no evidence of deep-cycle competition from any other firms besides Daramic and Microporous. Despite imposing steep price increases on deep-cycle separators since the acquisition, Daramic has not lost deep-cycle business to any competitor. *See* PX0911-020. Post-acquisition, Daramic took steps to limit access to lower priced HD product. When one customer tried to increase its purchases of the lower priced HD,

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PX0224-002. As a result of the

acquisition, Daramic thus acquired a monopoly in the sale of deep-cycle battery separators to North American customers. *See, e.g.*, PX0076-002.

**b. Motive Power**

In 2007, Microporous had **REDACTED** of the motive market, while Daramic

PX0033-042. There are no other competitors. However, Microporous was aggressively targeting customers to gain business and, just before the acquisition, had displaced Daramic as a supplier to **REDACTED** motive separator customer. Microporous estimated that by 2010, its market share would be close to 60 percent, and Daramic's close to 40 percent. In any event, the post-acquisition market share is 100 percent (i.e., a monopoly).<sup>9</sup>

Microporous' efforts at EnerSys and other customers put competitive pressure on Daramic to respond by reducing its prices. *See* PX0247; PX0153-002

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<sup>9</sup> The acquisition increases the HHI, as measured by dollar sales of deep-cycle separators in North America, by 1663, from 8337 to 10000. PX0033-042. The post-acquisition market share is 100 percent.



