

**ORIGINAL**



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**Docket No. 9327**

**PUBLIC**

**RESPONDENT'S PRE-TRIAL BRIEF**

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## I. INTRODUCTION

Polypore International, Inc. (“Polypore”) acquired the stock of Microporous Holdings Company, the parent of Microporous Products, LP (“MPLP”), on February 29, 2008. At that time, Polypore’s Daramic subsidiary produced polyethylene (“PE”) battery separators for which it had sales in 2007 of \$283 million. MPLP primarily sold rubber-based separators. Its total worldwide sales in 2007 were only \$39 million. Daramic’s PE separators did not compete with MPLP’s rubber-based separators. As a result, the transaction was market extension rather than horizontal. Accordingly, the loud and persistent claims by Complaint Counsel that this transaction produced monopoly market positions for Daramic are huge distortions of reality.

Key facts ignored by Complaint Counsel include that, in 2007 in North America (the geographic area claimed by Complaint Counsel to be relevant), Daramic’s PE separator sales were just over \$72 million. {REDACTED}.

MPLP was a high cost producer and its PE separator sales were a mere \$2 million. MPLP’s PE product was the only one for which there was an overlap with any Daramic product. MPLP’s sales of PE, which resulted in a North American market share of {REDACTED} gave it no market power, no ability to constrain pricing and certainly no ability to be a market “maverick.” Thus, in the only overlap market in this case, the acquisition had no market or competitive effects.

The real “other” player in this market is not MPLP, but {REDACTED} is the competitive “winner” of this story – it recently won the business of Daramic’s second largest customer, {REDACTED}<sup>1</sup>, and {REDACTED}<sup>2</sup>

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<sup>1</sup> The significance of JCI to Daramic is emphasized by the fact that {REDACTED}.

<sup>2</sup> Expert Report of Henry J. Kahwaty, PH.D., Attachment 5. JCI accounted for 16% of Daramic’s sales of PE separators in 2007 and {REDACTED}. Percentages are calculated on Daramic’s worldwide sales.

{REDACTED} separator production in recent times has been focused on the auto battery sector and { REDACTED}In short, {REDACTED} has demonstrated its vigor as a market competitor sufficient to constrain any anticompetitive events { REDACTED}.

Notwithstanding these current industry realities, the FTC's expert, John Simpson, unrealistically attempts to contend that in the post-transaction world competition is threatened both by coordinated interaction and unilateral effects.<sup>3</sup> Dr. Simpson, however, fails to explain how, in light of the events noted above, Daramic {REDACTED} can realistically be expected to engage in brotherly anticompetitive coordination or how, { REDACTED}.

Daramic can be expected to increase prices unilaterally as a result of the merger. The weakness of Dr. Simpson's competition theories may best be evidenced by the fact that *he rates not one mention* in the FTC Brief and his report is referred to only as PX0033. F.T.C. Br. p. 10.

Perhaps the absence of Dr. Simpson's name in Complaint Counsel's Brief is related to the fact that it is devoid of any economic analysis of pre- and post-transaction market events. This is particularly striking given that this acquisition closed 14 months ago. Complaint Counsel's Brief does not show that competition has been lessened but, instead, only contends that it "is likely" to be lessened. FTC Br. p. 16. Although Dr. Simpson argues that prices have been increased, the Brief shows no estimate of the extent of any price increases, but merely asserts that Daramic has raised them. FTC Br. p. 2. Without any analysis of competitive effects, Complaint Counsel's brief is woefully insufficient.

## **II. SUMMARY OF ARGUMENT**

Complaint Counsel cannot support either the four product markets, or the geographic market, they claim, thus they fail in a "necessary predicate" of a claim under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 ("Section 7"). United States v. E.I. duPont de Nemours & Co., 353 U.S.

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<sup>3</sup> Export Report of John Simpson at 19-22.



586, 593 (1957) Further, this acquisition does not threaten to “substantially lessen competition” and Daramic has no monopoly power – either in the proper market of “PE Separators” or in the incorrect markets on which the FTC and its expert attempt to rely. Finally, entry will be sufficient, timely and likely to resolve any competitive concerns. Specifically:

- The relevant product market in this case is “PE separators.” Complaint Counsel cannot sustain their alleged product markets because, among other things, they are not based on the Horizontal Merger Guidelines (herein “Guidelines”) hypothetical monopolist test for defining a market. Moreover, the facts relied upon for the FTC’s markets are in error.
- The relevant geographic market is worldwide. The FTC does not apply the Guidelines system for determining a geographic market and fails to credit the ability of foreign suppliers to market and sell in North America in response to a SSNIP.
- No anticompetitive effects have been demonstrated as a result of the acquisition and none is likely. There is no basis for any claims that either coordinated interaction or unilateral effects have been or will be seen as evidenced {REDACTED} vigorous competitive efforts. Further, Daramic did not acquire additional market power from its acquisition of MPLP or use any such market power to increase prices. There are no substantial barriers to entry into the production of battery separators and the likelihood { REDACTED} is a significant procompetitive factor.
- Substantial efficiencies specific to the merger have been realized, and have had, and will continue to have, the effect of reducing production costs and prices. Additional efficiencies specific to the merger that will further benefit consumers are imminent.
- Daramic does not have monopoly power in any markets, including the FTC’s alleged markets. Daramic lacks the power to control prices or exclude competition.
- Daramic has not used exclusionary conduct to monopolize any markets. Its alleged use of exclusive contracts has no foundation given the fact that the contracts pointed to by Complaint Counsel have not had an exclusionary effect.
- Daramic’s agreement with Hollingsworth & Vose (“H&V”) was a legitimate and productive joint venture that had no adverse effect on competition between the two companies and, in any event, was reasonably ancillary to their joint selling activities.
- The remedies proposed by Complaint Counsel are vastly broader than would be required to remedy the impacts on competition that they have alleged.

### III. BACKGROUND

A. Transaction Background

On February 29, 2008, a subsidiary of Polypore acquired 100% of the stock of the parent company of MPLP pursuant to an agreement with MPLP's stockholders (the "Acquisition"). Polypore paid approximately \$76 million, \$29 million in cash and \$47 million in debt.

On March 7, 2008, the FTC initiated a non-public investigation into the Acquisition. A complaint was issued on September 9, 2008, claiming the Acquisition violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 ("Section 5") and Section 7, and that Polypore monopolized certain product markets in North America. Polypore denies these claims.

B. Factual Background

**i. Batteries, Battery Separators and the Industry**

Batteries generally have four key components - an anode and cathode, an electrolyte that flows between them (usually acid, but some are alkaline) and separators to keep the anodes and cathodes apart and prevent short circuits while allowing ions to flow between them. Separators are commodities<sup>4</sup> and can be made of paper, glass, wood, sintered polyvinyl chloride ("PVC"), polyethelene. rubber and plastic for use in a wide variety of batteries. The process of storing electricity in a battery is not dependent on the separator, which is essentially a passive element, but separators are needed in order to compact space and extend the life of a lead acid battery.

Batteries with separators are manufactured for a myriad of end uses including for example for use in automobiles, trucks, buses, boats, RVs, motorcycles, forklifts, floor scrubbers, golf carts, and backup for electrical and telecommunication systems. Some of these uses require a short, intense discharge, like the starting of an automobile engine and are often referred to as SLI for "starting-lighting-ignition". Other batteries require a deeper discharge such as a battery used in floor scrubbers or golf carts and are sometimes referred to as "deep cycle." Some batteries need to operate under

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<sup>4</sup> PX2110-033.

conditions of great vibration. Still others may lie dormant for long periods of time and then have to provide power for a short period (such as back-up batteries). While each of these operational requirements lends itself to a particular type of separator, manufacturers often do not know the end use to which a particular separator will be put. Kawhaty Report at ¶119. Deposition of Kevin Whear, p. 12:19-13:1, 23:9-23:12, 46:8-47:5.

Battery separators come in many shapes and sizes. Some are made with ribs, others without; some with additives, other without. They are made in differing thicknesses, in roll and cut form, with different rib spacings, with glass mats and without. Different battery separators will effectively do the same job – keeping the positive and negative plates in a battery apart while allowing the charged particles to flow between them. Battery manufacturers develop their own unique “profiles” for the separators they use in their batteries. Profiles are often unique to specific battery manufacturers, rather than the applications in which they are used.<sup>5</sup>

The tooling required to make the profiles for specific customers is inexpensive and can be obtained quickly, and the “technology” needed to make PE battery separators is publicly available and not subject to any unrestricted patents. Deposition of Peter Gaugl, p. 146:2-147:5; Whear Depo., p. 316:18-317:6. In fact, PE separators have been on the market for over 40 years and the original patent on PE separators expired in 1984. US Patent No. 3,351,495 (issued Nov. 7, 1967). Production lines are also highly flexible and can easily be shifted to produce different types of separators simply by changing the tooling (called “calendar rolls”) to make the specific profiles. Tools can be switched quickly and easily.<sup>6</sup> Thus, battery separator manufacturers that can produce a PE separator for one application has the skill to produce any other type of PE separator.

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<sup>5</sup> See, e.g., { REDACTED }; Trevethan Depo., p. 114:24-115:2.

<sup>6</sup> { REDACTED } The FTC Complaint incorrectly states that there are barriers to switching between production of SLI separators and industrial separators. Complaint ¶12. This is incorrect and is refuted by significant testimony. See also Gilchrist Tr. p. 61; Riney Tr. p. 194-195; Gaugl Depo., p. 179:24-180:25; Gilchrist Depo., p. 61:11-24.

The industry is characterized not by the size of its suppliers, but by the size and power of its customers on the market. { REDACTED} For instance, in 2007 Daramic's two largest customers were Exide, whose revenues for the quarter ending December 31, 2008 were \$914.2 million<sup>7</sup> and JCI, whose net sales for the quarter ending December 31, 2008 were \$7.336 billion.<sup>8</sup> Conversely, Daramic's total separator sales worldwide in all of 2007 were only \$283 million. Similarly, prior to the merger, MPLP sold 81% of its total worldwide sales of \$39 million to two customers – EnerSys and Trojan Battery Company. Trojan is not a public company, but EnerSys reported sales of approximately \$461 million for the three months ending December 28, 2008. The size of these customers, in addition to a keen understanding of the businesses of their suppliers, gives customers tremendous bargaining power and influence regarding entry and exit of separator producers.<sup>9</sup>

This industry is also characterized by its global reach, including the rise in Asia's consuming power and Asian battery and separator manufacturers. Since 2003, at least 43 new battery manufacturers have emerged in Asia, and since 1998 approximately 16 battery separator manufacturers have either joined the market or expanded.<sup>10</sup> Separators from several of these Asian companies are considered “globally acceptable”<sup>11</sup> and are sold worldwide.<sup>12</sup>

Further, the entire industry has recently lost millions of square meters of sales leaving enormous excess capacity, and the global automobile industry – accounting for the majority of separators produced in the world<sup>13</sup> – is in a catastrophic situation.<sup>14</sup> Deposition of Christophe Thuet,

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<sup>7</sup> <http://ir.exide.com/financials-income.cfm>. Exide's fiscal year ended on March 31 and its annual report has not yet been released. This is the most recent quarterly information announced by Exide.

<sup>8</sup> <http://www.johnsoncontrols.com/publish/etc/medialib/jci/corporate/investors.Par.69333.File.dat/Q408factsheet.pdf>. JCI's fiscal year ends on September 30, and it has not yet released its annual earnings report. This is the most recent available information.

<sup>9</sup>

<sup>10</sup> See, e.g., Expert Report of Henry J. Kahwaty, Ph.D., Attachments 8 and 9.

<sup>11</sup> Kahwaty Report p. 52, fn. 169, 170. RX01512, RX01523.

<sup>12</sup> Id.

<sup>13</sup> PX02110-004, 009; { REDACTED}

p. 68:24-69:23, 72:9-73:11. Without the Acquisition, it is doubtful that MPLP would have survived, given the current global economic situation and MPLP's failure to fill its new capacity. Deposition of Larry Trevethan, p. 99:13-100:17; Deposition of Matt Wilhjelms, p. 86:4-87:14.

**ii. The Merging Companies**

*a. Polypore International, Inc.*

Daramic, a division of Polypore, manufactures and sells battery separators for various applications within the battery manufacturing industry.<sup>15</sup> Before the Acquisition, all of Daramic's products except one<sup>16</sup> were made with ultra-high molecular weight polyethylene, a plastic that is generally referred to simply as "PE." PE separators are found in a wide range of end-uses including batteries for cars, trucks, buses, lawn mowers, golf carts, floor scrubbers and other electric vehicles as well as back-up in critical buildings.<sup>17</sup> Separators intended for use in SLI batteries comprised 74 percent of Daramic's global separator revenue and 68 % of its North American revenue in 2007.

Although most of Daramic's revenue is derived from the sale of separators targeted for SLI batteries, it also makes separators for low-end after market batteries sold for deep-cycle uses, as well as separators for back-up power. Daramic's PE-only products can be, and are, used in each of these types of batteries.<sup>18</sup> In addition, Daramic's DARAK product may be used in stationary applications or industrial applications, and Daramic's "HD," PE with a latex additive, can be used in after market deep-cycle batteries and back-up batteries.

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<sup>14</sup> See also [www.bizjournals.com/dallas/stories/2009/04/20/daily56.html?t=printable](http://www.bizjournals.com/dallas/stories/2009/04/20/daily56.html?t=printable) (GM closing 13 North American assembly plants, an action that will remove 190,000 vehicles from the company's production schedule).

<sup>15</sup> Only Daramic, a company in Polypore's energy storage segment, is implicated by the FTC's Complaint.

<sup>16</sup> Daramic's "DARAK" product is made by saturating a scrim with phenolic resin. There is no PE in this product, despite Dr. Simpson's incorrect assertions to the contrary. Simpson Report, fn. 3.

<sup>17</sup> See Kahwaty Report p. 8, fn. 14.

<sup>18</sup> { REDACTED } Keith Depo., p. 127:7-12; RX00678; See also PX0798 ("for most traction batteries the polyethylene separator is an excellent choice and does not impose any restrictions on the cell...")

{REDACTED} Daramic's primary competitor for many years. As of June 2007, and effective January 1, 2009, {REDACTED} and is now the largest supplier of SLI separators in North America and the world.<sup>19</sup>

b. *Microporous Products, L.P.*

MPLP was founded in 1953 when the American Hard Rubber Company, which had been making its rubber ACE-SIL® separator since 1934, formed Amerace Corporation. Amerace introduced its FLEX-SIL® rubber separator product in 1978 and did not install its first production line capable of producing non-rubber separators until 2001. PX0072-005. That line produced a PE product with a rubber additive called "CellForce." At the time of the Acquisition, MPLP sold no PE-only battery separators.<sup>20</sup> The rubber-only products that MPLP produces are unique in the world.<sup>21</sup> Its prices and costs were generally higher than other battery separator manufacturers.

Before the Acquisition, MPLP operated only one manufacturing facility. It was in the process of expanding into Europe in February 2008, although that plant, in Feistritz Austria, was not yet operational. MPLP had a plan to expand in the United States, but it had never been approved by the MPLP Board, and had been shelved prior to the Acquisition. Further, the MPLP board issued a mandate in November 2007 declaring that the "long term MPLP strategy" was to be a "specialist separator player" and not to compete with "larger, entrenched competitors with products that are not differentiated." PX0092-002; Wilhelm Depo., pp. 53:9-21, 117:21-118:2. It went on to declare that "the Board does not endorse a pure PE growth strategy competing head to head with larger competitors (ie: Daramic{REDACTED})." *Id.* Further, the Board declared that "MPLP must prove out the financial viability of [the pending Austrian plant] before further capital will be committed to

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<sup>19</sup> Complaint Counsel seems unable to decide what position each company holds in North American SLI business – declaring that Daramic is the largest supplier on p. 1, reducing that to a less than {REDACTED}{REDACTED}FTC Br. 1, 2, 19 fn. 10.

<sup>20</sup> In fact, it has only had one such sale in its entire 75 year history and has chosen not to pursue that product. Investigational Hearing of Steve MacDonald, May 21, 2008, pp. 33:20-37:18.

<sup>21</sup> See PX1124-001; McDonald Depo., p. 25:18-26:3; PX0072-005; RX01128.

the business in either Europe or the United States.” Id. See also Investigational Hearing of Steve McDonald, p.107:22-109:8; Deposition of Michael Gilchrist, pp. 143:1-16, 144:23-146:6; Trevethan Depo., p. 77:1-79:21; Wilhelm Depo., p. 34:25-36:19. The MPLP Board never approved the purchase of any equipment for a new “third” line either in the United States or Europe. Trevethan Depo., 77:1-79:21; Deposition of Eric Heglie (IGP), p. 156:9-157:12.

#### IV. ANALYSIS

##### A. Complaint Counsel Cannot Meet Their Burden Under the Applicable Law

Complaint Counsel’s claims under both Section 5 and Section 7<sup>22</sup> require them to prove, by a preponderance of the evidence, the relevant product and geographic markets in which to assess the Acquisition, and that, in those markets, the Acquisition is “reasonably likely to have ‘demonstrable and substantial anticompetitive effects.’” New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995).<sup>23</sup> Complaint Counsel have the ultimate burden of persuasion on every element of their challenge; “a failure of proof in any respect means the transaction should not be [divested].” FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C. 2004).<sup>24</sup>

Importantly, the probability of anticompetitive effect is judged at the time of trial – not at the time of the Acquisition. Complaint Counsel largely ignore the fact that the realities of the post-Acquisition world are vastly different than they were prior to February 29, 2008. Thus, the consideration of post-Acquisition evidence is crucial for a realistic and accurate determination of the probable effects of this merger. See, e.g., Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7<sup>th</sup>

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<sup>22</sup> The legal standard under both Section 7 and Section 5 are the same. See, e.g., F.T.C. v. PPG Indus. Inc., 798 F.2d 1500, 1501 n. 2 (D.C. Cir. 1986)(“for present purposes [Section 5 is] . . . assumed to be merely repetitive of [Section 7] of the Clayton Act.”)

<sup>23</sup> Quoting U.S. v. Atlantic Richfield Co., 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969), aff’d, 401 U.S. 9986 (1971).

<sup>24</sup> The fact that here the FTC is challenging a consummated merger may make its burden even higher. See Interview with Timothy Muris, Global Competition Review (December 21, 2004)(“the FTC has to face a very high hurdle to bring a consummated merger case. If the merged entity has been operating for a while, it’s not enough to asset that the transaction was anticompetitive – you have to prove it.”).

Cir. 1981)(“[p]ost-acquisition evidence favorable to a defendant can be an important indicator. . . where the evidence . . . could not reflect deliberate manipulation by the merged companies...”).

**B. Complaint Counsel Cannot Meet their Burden of Proving a Relevant Market**

**i. Complaint Counsel are Required to Define and Prove a Relevant Market**

The proper definition of a relevant market is a “necessary predicate” to a legitimate Section 7 claim. See E.I. duPont de Nemours & Co., 353 U.S. at 593. It is impossible otherwise to identify the alternatives available to consumers and evaluate whether competition has been adversely affected in light of those alternatives. The language of Section 7 itself is clear and unequivocal. A merger is only prohibited where competition may be substantially lessened in a relevant market.

**ii. Applying the Correct Standard Proves a “PE Separators” Relevant Market**

The Guidelines identify the “hypothetical monopolist test” as the method for defining a relevant market.<sup>25</sup> Complaint Counsel ignore the Guidelines system of economic substitutes and argue for functional substitution instead. They fail even in this incorrect application as set forth below. Applying a correct “hypothetical monopolist test” to the four markets alleged by the FTC shows that those markets are not valid relevant markets in which to analyze the Acquisition. Instead, the “alternative” all PE separator market alleged by the FTC is the correct relevant market here.<sup>26</sup> Complaint ¶6; Kahwaty Report ¶¶72-123.

Pricing for PE separators is dictated by the thickness of the product – thicker product is typically more expensive. A SSNIP imposed on a 10 mil SLI separator would likely lead to substitution by buyers to an 11 mil non-SLI separator where that price is held constant. Id. at ¶82. A 10% SSNIP added to Daramic's average price of \$0.76 for 6 mil PE SLI separators sold in 2008 is higher than the average price for 8 mil SLI separators (\$0.751). Id. at ¶83. Attachment 10 to Dr.

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<sup>25</sup> Horizontal Merger Guidelines, 57 Fed.Reg. 41552, 41560, S 2.22 (1992) (herein “Guidelines”) § 1.11.

<sup>26</sup> Complaint Counsel’s entire argument supporting competitive harm in its alternative PE market comprises less than half a page. FTC Br. p. 23. This is clearly not enough to support its Section 7 claim in that market.



Kahwaty's Report shows the extent of separators overlap among the categories advocated by the FTC and the extent to which the actual characteristics of the separators refuse to comply with Complaint Counsel's descriptions of them. Given these overlaps, the FTC should submit detailed economic analysis to support its market definitions, but it has failed to do so.

*a. The FTC's Proposed Markets Overlap*

Complaint Counsel base their argument for the four alternative markets on the statement that "separators manufactured for a particular application cannot be effectively used for other applications." Complaint ¶13. This statement is not true.

Many individual separators are used in more than one of the FTC's relevant markets.<sup>27</sup> For instance, Daramic CL is used in the FTC's "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." Kahwaty Report ¶79; Deposition of Bill Keith, p. 127:7-12. In 2008, Daramic sold an individual PE profile called "FC" with a backweb thickness of 11 mils {REDACTED} for use in a UPS application, to {REDACTED} for use in a deep-cycle application and to {REDACTED} use in an SLI application.<sup>28</sup> This leads to another problem for Complaint Counsel and their expert – until PE (or rubber or PE with a rubber additive) passes through rollers fitted with a profile pattern tool and adjusted to a certain width, all PE is identical to all other PE. It is these "patterns" that are added to the material, along with the thickness of the material, that differentiates PE separators.<sup>29</sup>

Considering the characteristics of separators – primarily backweb thickness and overall product thickness – it is impossible to classify them into distinctive "buckets." A separator for a UPS application may be as thin as 8 mils – a size that easily fits into SLI applications. Similarly, a

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<sup>27</sup> This discussion does not take into account AGM and PVC separators which work effectively in all the FTC's alleged relevant markets, but, as the FTC concedes are not "economic" substitutes.

<sup>28</sup> Similarly, profile "TH" is used in automotive and industrial batteries. Kahwaty Report p. 28, fn. 94.

<sup>29</sup> Contrary to the FTC's incorrect understanding, 'molds' are not used to make separators. Kahwaty Depo., p. 189:2-23.

separator of 11 mil thickness coded as 'industrial' is just as functionally effective in a car battery as an SLI separator of 10 mil thickness.<sup>30</sup> Typically, however, the extra thickness is not worth the additional cost. Kahwaty Report ¶¶81-83. The only real difference between industrial and automotive separators is thickness. Layered automotive separators work efficiently for industrial applications. Further, because some separator profiles are unique to individual customers, a separator manufactured for one customer's deep-cycle application may not be substituted into the same type of application for another customer. PX1124-003; Trevethan Depo., p. 114:24-115:2; Kahwaty Report ¶116; Gaugl Depo., p. 146:21-148:6. Thus the FTC's "functional substitution" theory would produce the ridiculous outcome that two separators produced for different customers but used in the same application are in their own product markets because, by its theory, they are not substitutable. Id.

The high degree of supply-side substitution that exists in the production of PE separators also supports their designation as the relevant product market here. It is easy to shift between production of different kinds of separators and courts have recognized that where one facility can easily switch from producing one product to another, they may belong in the same relevant market.<sup>31</sup>

*b. Ace-Sil and Flex-Sil Comprise Their "Own" Markets*

The parties agree that Ace-Sil comprises its own product market. The FTC does not even mention Ace-Sil in its relevant markets discussion. FTC Br. pp. 8-13. The Acquisition had no effect in this market. Ace-Sil is a product without competitors that simply moved from MPLP to Daramic. Kahwaty Report ¶¶88-92; Gilchrist Investigational Hearing, pp. 24:23-25:15; 27:15-28:12.

Flex-Sil is also its own relevant market and Complaint Counsel's own logic proves this. In attempting to define its "UPS" market, the FTC argues that Daramic's DARAK product is not a

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<sup>30</sup> Daramic includes the FTC's UPS and motive categories under the term "Industrial" in many of its business documents.

<sup>31</sup> Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9<sup>th</sup> Cir. 1995)(holding full-serve gasoline sales and self-serve sales in the same market since stations could easily convert from full-serve to self-serve); Kraft General Foods, 926 F. Supp. at 361 (holding all ready-to-eat cereals in the same product market because of production flexibility); Frank Saltz & Sons v. Hart Schaffner & Marx, 1985 WL 2510 (S.D.N.Y. 1985)(holding all men's suits in the same product market because plants could easily switch from producing low quality to higher quality suits).

substitute for PE UPS separators because a SSNIP “in Daramic’s PE product to North American customers would not cause switching to DARAK or rubber because of the significant price difference.”<sup>32</sup> FTC Br. p. 12.<sup>33</sup> Applying the same logic to Flex-Sil effectively puts Flex-Sil alone in its relevant market.

The price of Flex-Sil in 2008 was \$3.64, while the price for Daramic HD, the product with which the FTC contends Flex-Sil competes, was only \$2.92 – a “significant” 25% difference. See PX00442. Flex-Sil is a niche product used in deep-cycle applications, particularly in OE golf carts. Flex-Sil has very different (and superior) technical capabilities than PE and PE/rubber separators because it is made of pure rubber.<sup>34</sup> Furthermore, it cannot be “enveloped” putting it even more squarely into a unique ‘niche’ market. See, e.g. Deposition of {REDACTED}.<sup>35</sup> Finally, approximately 83% of all 2008 Flex-Sil sales were made to two customers which position their products as high end and unique – in large part because of the inclusion of Flex-Sil as opposed to a cheaper (and less effective) PE or PE/rubber separators. Both these customers have continued to purchase Flex-Sil despite the 25% price difference between it and HD – suggesting that a further SSNIP increase would not lead to a substitution from Flex-Sil to HD. HD has not been qualified for use in OE batteries so is only used in low end after-market deep cycle batteries;<sup>36</sup> simply because it can also be used in a ‘deep-cycle’ application does not make the product economically substitutable

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<sup>32</sup> The FTC goes on in that sentence to say there would also be no switch “because Daramic controls the prices and sales of both” however, this is irrelevant in a market definition test and suggests Complaint Counsel does not understand its own test. In a SSNIP test all other prices are fixed and the price of interest is raised in order to see whether a customer will switch to another product. Who controls the other fixed prices is immaterial.

<sup>33</sup> Similarly, in relation to its SLI market, the FTC argues at p. 12 of its brief that “North American battery manufacturers would not switch to these inferior SLI materials in response to a SSNIP.” This is just as easily applied to Flex-Sil, for which the evidence is uncontroverted that it is a superior product to HD. Gilchrist Depo., p. 117:19-118:8; {REDACTED}

<sup>34</sup> McDonald Depo., 25:18-26; 29:13-20; 30:5-23; PX0034-02; PX0037-016, 042, 055.

<sup>35</sup> See also PX0433-022; {REDACTED}; PX0428-003.

<sup>36</sup> {REDACTED}.

as the SSNIP test requires.<sup>37</sup> See, e.g., FTC v. Swedish Match, 131 F.Supp.2d 151, 165 (D.D.C. 2000)(concluding that chewing tobacco and snuff were not in the same market despite similar uses because consumers would not switch for price reasons or in response to a SSNIP).

**iii. Complaint Counsel Cannot Define and Prove the Alleged Geographic Market**

Like its inability to define valid relevant product markets, the FTC is also unable to define a valid relevant geographic market. Complaint Counsel claim a relevant North American geographic market, but cannot support this statement when a proper hypothetical monopolist SSNIP test is applied. The relevant geographic market is the “area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.” Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). It is the area in which “antitrust defendants face competition.” FTC v. Freeman Hosp., 69 F.3d 260, 268 (8<sup>th</sup> Cir. 1995)(citations omitted). Importantly, “determination of the proper geographic market . . . must involve a dynamic as opposed to static analysis of ‘where consumers could practicably go, not on where they actually go.’” California v. Sutter Health Sys., 130 F.Supp. 2d 1109, 1120 (N.D. Cal. 2001)(citations omitted).

In this case, Complaint Counsel seem to have made up their own test for determining a relevant geographic market instead of applying the SSNIP test. FTC Br. p. 13.<sup>38</sup> Complaint Counsel fail to notice that the producers of PE separators sell globally. {REDACTED} RX01530-003. It has chosen to operate from only two locations but maintains a worldwide reach despite an inability to

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<sup>37</sup> This is highlighted by the behavior of {REDACTED} was in bankruptcy and requested that Daramic purchase {REDACTED} facility in order to get an infusion of cash. In exchange for agreeing to purchase a facility – and its significant additional capacity, that Daramic had not been in the market for – Exide agreed to a long term contract to ensure capacity utilization at that new facility. The contract requires {REDACTED} per year. If {REDACTED} to purchase the required amount it may offset amounts it would otherwise owe with the purchase of HD separators. It receives a credit toward its deficit for the HD separators it purchases. In 2008, the purchase of HD separators (instead of Flex-Sil) generated a credit of – meaning the HD separators {REDACTED} percent less expensive than the price it pays for Flex-Sil. Despite this enormous incentive {REDACTED} not purchase any meaningful quantities of HD until after the FTC began its investigation into the Acquisition, and still purchased {REDACTED} meters of Flex-Sil – meaning it was willing to spend an additional \${REDACTED} for Flex-Sil over HD. It is illogical to suggest that Flex-Sil and HD are economic substitutes under these circumstances.

<sup>38</sup> The FTC cites to Section 1.21 of the Guidelines, which relates to market definition in the absence of the ability to price discriminate based on the location of customers. But the test they claim to use appears to be based on the location of customers and, therefore, follows a price discrimination approach.

