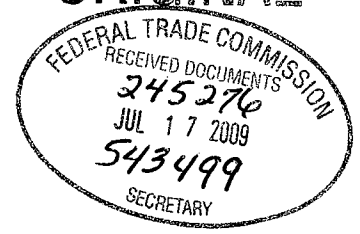


ORIGINAL



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

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

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S POST-TRIAL BRIEF

RICHARD A. FEINSTEIN
Director
NORMAN ARMSTRONG
Acting Deputy Director
Bureau of Competition

J. ROBERT ROBERTSON
STEVEN DAHM
BENJAMIN GRIS
JOEL CHRISTIE
STEPHEN ANTONIO
CHRISTIAN WOOLLEY
PRIYA VISWANATH

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Telephone: (202) 326-2008
Fax: (202) 326-2884

CATHARINE MOSCATELLI
Assistant Director
MORRIS BLOOM
Deputy Assistant Director
Bureau of Competition
Mergers II

Counsel Supporting the Complaint

JULY 17, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
I. Factual Background	6
II. Daramic’s Illegal Acquisition of Microporous	11
A. The Relevant Product Markets are Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries	12
1. Deep-Cycle Battery Separators are a Product Market	13
2. Motive Separators are a Relevant Market	20
3. UPS Separators are a Product Market	23
4. Starting, Lighting, Ignition (“SLI”) Battery Separators	25
B. The Relevant Geographic Market is North America	28
C. Respondent Cannot Rebut Complaint Counsel’s Prima Facie Case	33
1. Respondent Cannot Demonstrate that Entry Into the Relevant Markets Would be Timely, Likely or Sufficient	34
a. Entry Would Not Be Timely	37
b. Respondent Cannot Demonstrate that Entry Into the Relevant Market is Likely	38
c. Respondent Cannot Demonstrate that Entry Would be Sufficient to Overcome Anticompetitive Effects	39
2. Respondent’s Claim of No Anticompetitive Effects is Contrary To The Evidence	41
a. Daramic’s Intent To Raise Prices Post-Acquisition	42
b. Post-acquisition, Daramic Has Exerted Unilateral Market Power	44

c. In a Three-to-Two Merger in SLI, Coordinated Effects are Likely	45
3. Respondent’s Claimed Efficiencies Defense Fails	48
III. Daramic Monopolized and Attempted to Monopolize the Relevant Markets and Entered into Agreements that Unlawfully Restrained Trade	49
A. Count III: Monopolization and Attempted Monopolization	50
1. Legal Standard	50
2. Monopoly Power/Dangerous Probability of Maintaining Monopoly Power	51
3. Exclusionary Conduct	52
4. Specific Intent	62
5. No Legitimate Justification for Daramic’s Monopoly Conduct	62
B. Count II: Unreasonable Restraint of Trade	63
1. Legal Standard	65
2. The Daramic/H&V Market Division Agreement Unreasonably Restrains Competition	65
IV. Complete Divestiture and a Cease and Desist Order Are Necessary to Restore and Protect Competition	68
A. Complete Divestiture Restores the Entity That Would Have Existed But For the Merger and Allows it to Compete on an Equal Footing with Daramic	70
1. Divestiture of the Piney Flats, Feistritz and Microporous Facilities and Production Line is Necessary to Restore Competition	71
2. The Remaining Provisions of Paragraph II of the Proposed Order Will Further the Creation of a Viable Competitor	75
3. A Cease and Desist Order is Necessary to Prevent Respondent’s Further Anticompetitive Behavior	76
V. Conclusion	78

TABLE OF AUTHORITIES

CASES:

<i>A.I. Root Co. v. Computer/Dynamics, Inc.</i> , 806 F.2d 673 (6th Cir. 1986)	19
<i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> , 472 U.S. 585 (1985)	53
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962)	11, 12, 42
<i>California Dental Assn. v. FTC</i> , 526 U.S. 756 (1999)	49
<i>Capital Imaging Assoc. v. Mohawk Valley Medial Assoc.</i> , 996 F.2d 537 (2d Cir. 1993)	66
<i>Chicago Bridge & Iron Co., N.V., et al. v. FTC</i> , 534 F.3d 410 (5th Cir. 2008)	34
<i>Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.</i> , 411 F.3d 1030 (9th Cir. 2005)	62
<i>Conwood Co. v. United States Tobacco Co.</i> , 290 F.3d 768 (6th Cir. 2002)	51, 60
<i>Engine Specialties, Inc. v. Bombardier Ltd.</i> , 605 F.2d 1 (1st Cir. 1979)	67
<i>Fashion Originators' Guild v. FTC</i> , 312 U.S. 457 (1941)	49
<i>Fineman v. Armstrong World Indus. Inc.</i> , 980 F.2d 171 (3d Cir. 1992)	52
<i>Ford Motor Co. v. United States</i> , 405 U.S. 562, 573 (1972)	70
<i>FTC v. Cardinal Health</i> , 12 F. Supp. 2d 34 (D.D.C. 1998)	12, 29, 35
<i>FTC v. CCC Holdings, et al.</i> , 605 F. Supp. 2d 26 (D.D.C. 2009)	4, 13, 46, 47
<i>FTC v. Cement Inst.</i> , 333 U.S. 683 (1948)	49
<i>FTC v. H.J. Heinz Co.</i> , 246 F.3d 708 (D.C. Cir. 2001)	<i>passim</i>
<i>FTC v. Indiana Federation of Dentists</i> , 476 U.S. 447 (1986)	66
<i>FTC v. Motion Picture Advertising Serv. Co.</i> , 344 U.S. 392 (1953)	1
<i>FTC v. Nat'l Lead Co.</i> , 352 U.S. 419 (1957)	69
<i>FTC v. Proctor & Gamble Co.</i> , 386 U.S. 568 (1967)	27

<i>FTC v. Staples, Inc.</i> , 970 F. Supp. 1066 (D. D.C. 1997)	12, 29
<i>FTC v. Univ. Health, Inc.</i> , 938 F.2d 1206 (11th Cir. 1991)	46
<i>FTC v. Whole Foods Mkt., Inc.</i> , 548 F.3d 1028 (D.C. Cir. 2008)	12
<i>Grumman Corporation v. The LTV Corporation</i> , 665 F.2d 10 (2d Cir. 1981)	28
<i>Hack v. The Presidents and Fellows of Yale College</i> , 237 F.3d 81 (2d Cir. 2000)	19
<i>Hospital Corp. of America v. FTC</i> , 807 F.2d 1381 (7th Cir. 1986)	77, 78
<i>Image Technical Servs. v. Eastman Kodak Co.</i> , 125 F.3d 1195 (9th Cir. 1997)	52
<i>In re Chicago Bridge & Iron Co., N.V., et al.</i> , 2003 WL 21525006, Dkt. No. 9300 (Initial Decision 2003)	2, 5, 34
<i>In re Chicago Bridge & Iron Co., N.V., et al.</i> , 2003 WL 22217293 (F.T.C. Sep. 10, 2003) ..	2, 34
<i>In re B.F. Goodrich Co.</i> , 110 F.T.C. 207 (1988)	68, 70
<i>In re North Texas Specialty Physicians</i> , 2005 WL 3366980 (F.T.C. Dec. 1, 2005)	77
<i>In re RSR Corp.</i> , 88 F.T.C. 800 (1976)	68, 70
<i>Jacob Siegel Co. v. FTC</i> , 327 U.S. 608 (1946)	68
<i>LePage's Inc. v. 3M</i> , 324 F.3d 141, 164 (3d Cir. 2003)	68
<i>Lorain Journal Co. v. United States</i> , 342 U.S. 143 (1951)	51, 55
<i>Masimo Corp. v. Tyco Health Care Group, L.P.</i> , 2006 U.S. Dist. LEXIS 29977 (C.D. Cal. March 22, 2006)	61
<i>Morgenstern v. Wilson</i> , 29 F.3d 1291 (8th Cir. 1994)	29
<i>Nynex Corp. v. Discon, Inc.</i> , 525 U.S. 128, 134 (1998)	66
<i>Oahu Gas Serv., Inc. v. Pac. Res., Inc.</i> , 838 F.2d 360 (9th Cir. 1988)	51
<i>Palmer v. BRG of Georgia, Inc.</i> , 498 U.S. 46 (1990)	67
<i>PolyGram Holding, Inc. v. FTC</i> , 416 F.3d 29, 36 (D.C. Cir. 2005)	64

<i>RDK Truck Sales and Service Inc. v. Mack Trucks, Inc.</i> , 2009 U.S. Dist LEXIS 43245 (E.D. Pa. May 19, 2009)	66
<i>Rebel Oil Co. v. Auto Flite Oil Co.</i> , 51 F.3d 1421 (9th Cir. 1995)	51
<i>R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.</i> , 199 F. Supp. 2d 362 (M.D.N.C. 2002), <i>aff'd</i> , 67 Fed. Appx. 810 (4th Cir. 2003)	53
<i>Rothery Storage & Van Co. v. Atlas Van Lines</i> , 792 F.2d 210 (D.C. Cir. 1986)	13
<i>SPAHR v. Leegin Creative Leather Products</i> , 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008) .	19
<i>Spectrum Sports v. McQuillan</i> , 506 U.S. 447 (1993)	62
<i>Spirit Airlines v. Northwest Airlines</i> , 431 F.3d 917 (6th Cir. 2005)	51, 62
<i>Tampa Elec. Co. v. Nashville Coal Co.</i> , 365 U.S. 320 (1961)	28
<i>Tops Mkts., Inc. v. Quality Mkts., Inc.</i> , 142 F.3d 90 (2d Cir. 1998)	62
<i>United States v. Baker Hughes, Inc.</i> , 908 F.2d 981 (D.C. Cir. 1990) .	11, 12
<i>United States v. Citizens & S. Nat'l Bank</i> , 422 U.S. 86 (1975) .	12
<i>United States v. Dentsply Int'l Inc.</i> , 399 F.3d 181 (3d Cir. 2005) .	<i>passim</i>
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 366 U.S. 316 (1961) .	11, 12, 68
<i>United States v. El Paso Natural Gas Co., et al.</i> , 376 U.S. 651 (1964) .	26
<i>United States v. Gen. Dynamics Corp.</i> , 415 U.S. 486 (1974) .	11, 19, 28, 45
<i>United States v. Grinnell Corp.</i> , 384 U.S. 563 (1966) .	51
<i>United States v. Marine Bancorp., Inc.</i> , 418 U.S. 602 (1974) .	27
<i>United States v. Microsoft Corp.</i> , 253 F.3d 34 (D.C. Cir. 2001) .	<i>passim</i>
<i>United States v. Philadelphia Nat'l Bank</i> , 374 U.S. 321 (1963) .	2, 33
<i>United States v. Visa U.S.A., Inc.</i> , 344 F.3d 229 (2d Cir. 2003)	65

STATUTES:

15 U.S.C. § 18 2, 11, 76
15 U.S.C. § 21 69
15 U.S.C. § 45 49, 77

OTHER AUTHORITIES

2A Areeda, et al., *Antitrust Law* *passim*
1992 Horizontal Merger Guidelines (Merger Guidelines) *passim*
Jonathan M. Jacobson & Scott A. Sher, “No Economic Sense” Makes No Sense For Exclusive
Dealing, 73 *Antitrust L. J.* 779 (2006) 53
Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal
Standards, and Microsoft*, 7 *Geo. Mason L. Rev.* 617, 627 (1999) 54

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

Polypore International, Inc.)
a corporation.)

Docket No. 9327
PUBLIC

FEDERAL TRADE COMMISSION
2009 JUL 16 PM 12:02
DOCUMENT PROCESSING


REVISED ERRATA SHEET

This Revised Errata Sheet to Complaint Counsel's Post-Trial Brief corrects the page and line number references in the brief.

<u>Page No.</u>	<u>Line</u>	<u>Corrections</u>
75	21	change from "(Paragraph II.F.4)". to "(Paragraph II.F.3)".
77	5	change from "Paragraph VI" to "Paragraph VIII".
77	8	change from "alternative suppliers. These provisions..." to "alternative suppliers (Paragraph VII). These provisions..."
77	15	change from "Paragraph VII" to "Paragraph VI"
78	7	change from "Paragraph VIII" to "Paragraph IX".

Dated: July 16, 2009

Respectfully Submitted



Steven A. Dahm
J. Robert Robertson
Complaint Counsel
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, Nw
Washington, DC 20580
Telephone: (202) 326-2192
Telephone: (202) 326-2008

INTRODUCTION

Polypore International Inc. (“Daramic”) acquired Microporous, its closest and only competitor in the deep-cycle, motive and UPS battery-separator markets. This is a merger to monopoly. The acquisition also eliminated a third competitor in the market for automotive battery separators (“SLI”), leaving only the dominant supplier, Daramic, and Entek in North America. Daramic and Entek rarely competed aggressively in the past, and the acquisition of Microporous has returned the SLI separator market to a duopoly, which no court has ever approved in a Section 7 case.¹ Daramic’s other conduct goes beyond the pale. Daramic: (i) sued Microporous to keep it from competing; (ii) bought Microporous to keep it from competing; (iii) eliminated other competition; (iv) held back products from customers to force them into contracts; (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.

As Douglas Gillespie of Exide testified:

“[S]ome things are right in the world and some things are wrong. . . . [I]t’s just wrong for [Daramic] to be able to restrict or prevent . . . others from being able to compete or others to grow in the marketplace. And the only agency that we knew about that we’re supposed to go to is the FTC to be able to deal with these issues. . . . [T]hat’s why you’re here. . . . It’s something that we needed a higher authority to be able to inject their opinion and help us to . . . convince others that it’s just wrong at the end of the day.” (Gillespie, Tr. 2980-2981).

Mr. Gillespie is right. Congress created the FTC and our administrative process to deal with issues just like these.² He is right that Daramic’s conduct is “just wrong.” It is also a clear

¹ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001).

² *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953) (“It is also clear that the Federal Trade Commission Act was designated to supplement and bolster the Sherman Act

violation of the law. Indeed, the facts at trial revealed an acquisition and other conduct that have gone far beyond what the law proscribes. For example, 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 needs to show only that “the effect of [the] acquisition may be substantially to lessen competition, or tend to create a monopoly.”³ 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). Complaint Counsel did so, and Daramic failed to rebut that case.

The evidence in Complaint Counsel’s prima facie case is overwhelming. Before 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, worldwide competitor in all of these markets, significantly lessened competition. Concentration levels confirm this. Daramic’s market share in North America for deep-cycle, motive and UPS battery separators is now 100% -- a monopoly. For SLI, it is about 50%, with only one remaining supplier, Entek, which supplies mainly one customer, JCI. Even if the relevant geographic markets were worldwide, these market shares are essentially the same.⁴ The HHI’s are simply off the charts: 10000, post-merger, for deep-cycle, motive and UPS, and over

and the Clayton Act - to stop in their incipency acts and practices which, when full-blown, would violate those Acts”).

³ *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. 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)).

⁴ No other producers compete in deep-cycle or UPS anywhere in the world. One small producer sells PVC motive separators in Europe but not in North America. The Asian producers of SLI *collectively* have a single digit market share both in Asia and in the world and have never entered North America.

5000 for SLI. Even Dr. Kahwaty, Daramic's expert, calculated a post-merger HHI for his PE market that are far above the level required to show a presumption that the acquisition is "likely to create or enhance market power or facilitate its exercise." *Merger Guidelines*, § 1.51(c) (using a threshold of 1,800 HHI and a change of 100).

Daramic claimed only three defenses to this strong prima facie case: entry, efficiencies, and that no anticompetitive effects had occurred. None of these got out of the starting gate. *First*, Daramic did nothing to prove that entry was anything more than a rumor, much less than it would be timely, likely, or sufficient. There are no entrants anywhere in the world for deep-cycle, motive, or UPS battery separators. In SLI, there are none entering in North America. The evidence is undisputed that foreign suppliers cannot enter at Daramic's higher-than-market prices, much less pre-acquisition prices. Even Polypore's CEO, Bob Toth admitted that Asian firms have not entered because they cannot make enough money in the market here.

Second, Daramic's efficiencies defense died at trial. Not even their expert was willing to support it.

Finally, although Complaint Counsel has no obligation to prove effects, the evidence at trial demonstrated anticompetitive effects in spades. That Daramic has the ability to exert market power unilaterally is obvious from its monopoly position in deep-cycle, motive, and UPS separator markets and its dominance in SLI. Yet, there is more: Daramic has actually raised prices above competitive levels after the acquisition. A simple comparison is that just in the last year, Daramic's only competitor in SLI, Entek, announced a [REDACTED] while Daramic announced increases for as much as [REDACTED]. Daramic also raised prices higher for customers [REDACTED] [REDACTED]. This was Daramic's intent from the beginning. It knew that it if failed to

acquire Microporous, [REDACTED]. [REDACTED]. (PX0203 at 084, *in camera*). Moreover, in the SLI separator market, in which Entek and Daramic remain, it is axiomatic that these two remaining competitors are more likely to coordinate – and thereby reduce competition – than if there were three. *Heinz*, 246 F.3d at 716; *FTC v. CCC Holdings Inc., et al.*, 605 F. Supp. 2d 26, 66-67 (D. D.C. 2009). Daramic failed to offer any evidence of any “structural barriers” to such potential coordination, as required under the law. *Heinz*, F.3d at 724-25.

Bearing in mind that the full remedy in this case is warranted if the evidence shows a mere likelihood that the acquisition lessens competition substantially in any one of these four markets, additional evidence showing Daramic’s undisputed, brazen conduct has taken us far beyond what it required by the law, and is essentially un rebutted. For example, Daramic failed to offer any evidence to counter Complaint Counsel’s evidence of monopoly, except to say that it simply raised prices to recover cost increases and forced customers into exclusionary contracts for planning purposes. Yet, no other competitor has ever been able to raise prices to the levels Daramic was able to impose on its customers. [REDACTED]

[REDACTED] (Seibert, Tr. 4278, *in camera*). Thus, cost cannot be the real basis for the amount of increases.

Signally, Daramic’s General Manager, Pierre Hauswald’s mantra of “*no mercy*” to its customers if they considered any competitive supplier, and even to his own staff if they failed to raise prices, is a reflection of Daramic’s unabashed sense of entitlement to monopoly profits.⁵

⁵ Daramic’s hard-ball tactics are simply astounding. *See e.g.*, PX1793 at 001, *in camera* (Hauswald: Make [REDACTED] sign the contract or “no product today,” show them “no mercy”); Hauswald Tr. 743-744, 1132-1133, *in camera* [REDACTED] Bregman, Tr. 2901-2903, 2906; PX1050, *in camera* (Hauswald told [REDACTED])

[REDACTED] Roe, Tr. 1267-1268 (offer “all or nothing” to C&D); Hall,

Daramic's analysis that it could raise [REDACTED] and its hard-fought pursuit of this deal over two years to eliminate competition also reveal its intent to maintain its monopoly power. In addition, numerous customers testified that Daramic repeatedly threatened to shut them down if they refused to sign contracts and pay higher prices. First, the supposed force majeure against Enersys is a prime example – a claimed force majeure event in 2006 that never affected North America, did not affect Microporous or any Daramic customers who were not negotiating for a new contract, and disappeared as soon as Enersys signed an exclusive contract with Daramic. (Trevathan, Tr. 3655; Gillespie, Tr. 2985; Craig, Tr. 2556). Daramic admitted that its force majeure in North America for Enersys was simply a **“fabricated situation . . . perfectly timed with the renewal of the contract with Enersys.”** (Gilchrist, Tr. 414-415, *in camera*, 611, 621). What Daramic did, quite simply, was “wrong” and “unethical.” (Craig, Tr. 2596). Second, Daramic's exclusionary contracts forced customers to pay high penalties if they used any other vendor. Third, Daramic's agreements with H&V and Jungfer were for the admitted purpose of excluding competition. And, finally, when Daramic's “MP Plan” (*i.e.*, Microporous Plan) was insufficient to keep Microporous out completely, the acquisition became the final, knockout blow.

The evidence at trial demonstrated that this acquisition and Daramic's conduct have harmed competition significantly and that only a full divestiture and a cease and desist order will eliminate the anticompetitive effects caused by Daramic. A full remedy must restore competition by reestablishing Microporous as the maverick and third largest battery separator company in the

Tr. 2869-2870, *in camera* [REDACTED]
[REDACTED] McDonald, Tr. 3880-3882, *in camera*, PX0617 at 002, *in camera*
[REDACTED]

world. The goal here is to restore competition, the fabric of America, because as Larry Burkert of Enersys said,

[REDACTED]

* * *

[REDACTED]
(Burkert, Tr. 2314, 2344, *in camera*).

In sum, the facts at trial demonstrated that Daramic's conduct and acquisition of Microporous systematically lessened competition. The law demands a quick and complete remedy.

I. Factual Background

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] [REDACTED] } and then sued Microporous to prevent it from selling SLI in Europe. (PX2124 at 002, *in camera*; PX2241, *in camera*); *see also* CCFOF ¶¶ 657-659).

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 Absorptive 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, [REDACTED] [REDACTED]. (PX0169 at 001; PX0035 at 005). This market division agreement took effect March 23, 2001, [REDACTED] [REDACTED]. (PX0094, *in camera*; PX0158, *in camera*). 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. {*See* PX0758 at 017, *in camera* [REDACTED] [REDACTED]}. Shortly thereafter, Daramic began a campaign of exclusionary conduct. After Daramic learned in 2003 that Microporous [REDACTED] [REDACTED] [REDACTED] [REDACTED] (PX0744 at 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 [REDACTED] [REDACTED] business, it concluded that Microporous [REDACTED] [REDACTED] [REDACTED]

[REDACTED] (PX0168 at 002). Daramic decided that it should fight this threat because [REDACTED]

[REDACTED] (PX0694 at 001). [REDACTED] [REDACTED] [REDACTED] }

[REDACTED] [REDACTED] } (*Id.* at 001; PX1211 at 001, *in camera*; PX0456 at 001-002).

When Daramic learned that another customer, [REDACTED]

[REDACTED] } needs. (*See* CCFOF ¶¶ 1069-1071). 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. (*See* CCFOF ¶¶ 1072-1076).

The last steps taken by Daramic to exclude Microporous occurred in 2007, just prior to the merger. In 2007, Daramic devised the “MP Plan.” (PX0258; PX0255; Roe, Tr. 1285-1286, 1289-1290, 1292-1294, 1350-1354). Pursuant to this plan, Daramic entered into long-term, exclusionary contracts with key customers to prevent Microporous from contracting with them. (*See* CCFOF ¶ 725). Daramic believed that by contracting with these customers, Microporous’s expansion could be slowed. (*See* CCFOF ¶¶ 726-727, 735). 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. Daramic bought Microporous just weeks before the new factory was set to begin full commercial production. Microporous’s 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 and had even agreed to supply Exide with SLI separators. (See CCFOF ¶¶ 618, 678-679, 681).

Daramic thus believed that it needed to [REDACTED] (PX0168 at 002; PX0694 at 001). Daramic believed an acquisition would [REDACTED] [REDACTED]. (PX0932). Daramic finally acquired Microporous on February 29, 2008.⁶

Daramic's documents analyzing the 2008 acquisition of Microporous demonstrate its anticompetitive intent. Presentations to Daramic's Board highlight that: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX0203 at 088 (Hauswald, Tr. 776-781). Indeed, Daramic management asserted to the Daramic Board that [REDACTED]

[REDACTED] (PX0203 at 089, *in camera*;

Hauswald, Tr. 781, *in camera*). All of the financial projections that were done at Daramic and presented to the Daramic Board of Directors incorporate expectations and assumptions that the merger would [REDACTED]. The

management of the former Microporous conveyed similar analyses to their board, asserting that as a result of the acquisition,

Daramic will have complete control of 100% of the deep-cycle markets . . . >97% of the Industrial markets for motive power . . . 100% of the industrial flooded reserve power

⁶ Although valued at \$76 million the transaction [REDACTED] [REDACTED] (PX0954 at 006). On receiving several customer complaints shortly after the acquisition was announced, the FTC staff requested that Daramic hold the former Microporous separate during the FTC proceedings. (PX0290; PX0291). [REDACTED] (PX0955 at 005).

markets [and] Daramic will dissolve the threat of [Microporous] in automotive SLI as no new competitor will be introduced into the market with a secured position.

(PX1109 at 003).

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 substantially higher prices. (See CCFOF ¶¶ 422-424, 467, 465).

In SLI separators, Daramic classified 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. (See CCFOF ¶ 547). Microporous had targeted an expansion into this business for years, and had competed to supply [REDACTED] SLI separator customers: [REDACTED] } (See CCFOF ¶¶ 554-555, 604-605, 607). It was only because of Daramic's efforts to ward off the Microporous threat that Microporous had not secured commercial sales. Yet, Microporous's 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. (See CCFOF ¶ 507). Microporous, however, had developed a PE separator for the UPS market that competed with Daramic's product and had an agreement to sell it to Enersys, which would have given Microporous more than half the market. (See CCFOF ¶¶ 503-504, 520).

There is no evidence of timely, likely, or sufficient entry from any other competitor that would counter such anticompetitive effects. Indeed, no other competitor has entered the North American market despite Daramic's achievement of monopoly in three of the four markets at issue and its anticompetitive 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. (See CCFOF ¶¶ 1051-1056).

II. Daramic's Illegal Acquisition of Microporous

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 *Heinz*, 246 F.3d at 713. 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)). Indeed, the language of Section 7 is "designed to arrest in its incipiency" acquisitions that may violate the Act. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).

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 transaction will substantially lessen competition." *Id.* 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

A prima facie Section 7 case typically “rests on defining a market and showing undue concentration in that market.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (citing *Baker Hughes*, 908 F.2d at 982-83).⁷ 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). Cross-elasticity of demand refers to the “responsiveness of the sales of one product to price changes of the other.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956) (finding cellophane in same market as other wrapping products even though the prices were very different); See 2B Phillip Areeda et al., *Antitrust Law* ¶ 562a, at 371 (3d ed. 2007) (“[A]ctual shifts between two products in response to – or even without – changes in their relative prices indicate a single market.”).

“[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 for profit in it.’” *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (citations omitted). Indeed, the Merger Guidelines, ¶ 1.0, explains that market definition must focus “solely on demand substitution factors,” which is why “possible customer responses” are critical here. Thus, “industry or public recognition of the

⁷ *But see Whole Foods*, 548 F.3d at 1036 (Brown, J.) (noting that “this analytical structure does not exhaust the possible ways to prove a § 7 violation”).

[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). “Courts generally will include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the same market.” *CCC Holdings*, 605 F. Supp. 2d at 38).

In this case, there are four relevant markets in which to properly assess the anticompetitive impact of Daramic’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.⁸ In each case, the evidence demonstrates that the products in each relevant market are substitutes for each other, that competition from these products have had price effects upon the other products within each relevant market, and that the industry recognizes these market distinctions.

1. Deep-Cycle Battery Separators are a Product Market

The deep-cycle separator market is composed of separators used for batteries in golf cart, scrubbers, and scissor lifts. (See CCFOF ¶¶ 65-66, 97). Deep-cycle batteries contain an antimony additive that facilitates the deep-cycling process. (PX1791 at 001; see also CCFOF ¶¶ 72-74). The deposition of antimony onto the negative plate, sometimes called “antimony poisoning” drastically reduces the cycle life of the battery. (See, e.g., PX1791 at 001; PX1124 at 001; see also CCFOF ¶¶ 75-78). Deep-cycle batteries require separators containing rubber (or latex, which is liquid, natural rubber) to suppress antimony poisoning. (See, e.g., PX1791 at 001; PX0072 at 020; PX0798; see also CCFOF ¶ 81). Microporous’s Flex-Sil and CellForce and Daramic’s HD are designed for deep-cycle applications. (PX1791). Pure PE does not

⁸ But even if Daramic is right that there is some kind of world-wide PE separator market, the HHI’s are still staggering: post-acquisition of { [REDACTED] }. (Kahwaty, Tr. 5290 (derived from PX0522 at 015, *in camera*)).

sufficiently suppress the transfer of antimony in a deep-cycle battery. (PX1124; *see also* CCFOF ¶¶ 85-91).

Before the acquisition, both Microporous and Daramic were the sole competitors for deep-cycle separators. (*See* CCFOF ¶ 260). Microporous's Flex-Sil is a natural rubber separator used in deep-cycle batteries. (*See* CCFOF ¶ 79). Microporous's CellForce is a PE separator that includes ground rubber (Ace-Sil dust) and is also used in deep-cycle batteries. (*See* PX0798 at 003 at 004; *see* CCFOF ¶ 82). In 2005, Daramic introduced into the deep-cycle market HD, a competing PE separator that includes latex rubber.⁹ The evidence at trial showed that all these three products competed for deep-cycle battery business. (*See, e.g.*, PX1791; PX1744 at 004, *in camera*; PX0222 at 001, *in camera*; PX0033 at 040, *in camera*; *see also*, PX0736 at 002 (forecasting greater HD sales); PX0316 at 002). Yet, Daramic attempted, without any evidence, to argue that these products do not compete with each other.

In his opening statement, Daramic's counsel stated bluntly: "The FTC contends that Flex-Sil competes with Daramic HD. It does not, Your Honor." The Judge specifically asked counsel whether the customers would say that "HD is not substitutable," and counsel responded, "That's correct. Absolutely." (Opening, Tr. 95-96). Counsel even set the stage that Trojan and U.S. Battery would testify on this point. They did – but totally contrary to what counsel promised. (*See generally* CCFOF ¶¶ 375-379, 384).

Indeed, the very first witness, Richard Godber, the CEO and president of Trojan, the largest deep-cycle battery manufacturer, testified that *HD is in fact a substitute for Flex-Sil*, as is CellForce, but that he would not use any other separators but these three. (Godber, Tr. 151-

⁹ {PX0319-003 [REDACTED]

152). When asked whether “HD compete[s] with Flex-Sil for use in deep-cycle applications,” Mr. Godber was clear: “It does.” (Godber, Tr. 152-153). He then explained that HD, Flex-Sil, and CellForce all compete, and that prior to the acquisition, “Daramic and Microporous” were the only “competitors for sale of separators in deep-cycle applications,” not just in North America, but in the world. (Godber, Tr. 153-154). Not only was HD a substitute for Flex-Sil, prior to the acquisition, Trojan used Daramic’s HD as “leverage” to get a lower price on Flex-Sil. (Godber, Tr. 183-215, 292-295; PX1655 at 001; PX1659 at 001; PX1660 at 003-004; PX1663 at 001; PX0428 at 003; PX1664; **Godber, Tr. 258**; Gilchrist, Tr. 371-372, 406, 407-408 (agreeing); *see also* CCFOF ¶¶ 405-421). Yet, after the acquisition, Trojan has no “options anywhere in the world . . . for separators for its deep-cycle batteries.” (Godber, Tr. 229). Indeed, it has now **[REDACTED]** **[REDACTED]**}. (Godber, Tr. 241-242). Mr. Godber put it well: “Obviously, with the acquisition, that left us with no alternatives” for deep-cycle battery separators: “We definitely had only one place we could go to buy a separator for our product.” (Godber, Tr. 291).

U.S. Battery also did not testify as Daramic’s counsel promised. For U.S. Battery, Flex-Sil performs no better than HD and is “identical in performance.” (Wallace, Tr. 1971-1972; *see* Qureshi, Tr. 2004, 2063 (Flex-Sil, HD, and CellForce are functional substitutes); *see also* CCFOF ¶ 383). That is why U.S. Battery buys both Flex-Sil and HD for their deep-cycle batteries – sometimes even for use in the same battery. (Wallace, Tr. 1931, 1946). They even use HD in original equipment (“OE”), deep-cycle batteries and have quoted HD for other OE sales. (Wallace, Tr. 1934-1935, 1939). In the past, U.S. Battery, the second largest deep-cycle battery manufacturer, has purchased separators only from Microporous and Daramic. (Wallace, Tr. 1938, 1942-1944 (Entek showed no interest)) U.S. Battery knows of no one “else in the

world that make battery separators for deep-cycle batteries.” (Wallace, Tr. 1945; Qureshi, Tr. 2011). Prior to the acquisition, competition from Daramic’s HD caused Microporous to lower its prices to U.S. Battery on Microporous’s Flex-Sil. (Wallace, Tr. 1946). (See CCFOF ¶ 397). But after the acquisition, U.S. Battery has “nowhere to go but to the single source” – “Daramic,” which can “control the pricing.” (Wallace, Tr. 1951) At this point, U.S. Battery would like to use HD to replace up to 50% of their Flex-Sil purchases, but Daramic will not allow it. (Wallace, Tr. 1977-1979; Qureshi, Tr. 2043-2044, 2089-2090; *see also* CCFOF ¶ 390).

Exide, the third major supplier of golf cart batteries, also contradicted Daramic’s argument. Exide regards “Flex-Sil and HD to be substitutes for each other.” (Gillespie, Tr. 2933) Indeed, Exide uses both Flex-Sil and HD in the same battery, which is its best selling battery at 80% of their sales. (Gillespie, Tr. 2941-2944; Demonstratives PX1400 and PX1402 (batteries)). There is no difference in price, warranty, or anything else between batteries with Flex-Sil and those with HD. (Gillespie, Tr. 2944). There is also no question that HD was competing aggressively against Flex-Sil at Exide. Indeed, Microporous repeatedly gave Exide price concessions on all of their Flex-Sil purchases due to competition from Daramic’s HD. (Gillespie, Tr. 2947-2950 (price decreases) 2951-2953 (no price increases due to competition); (*see also* CCFOF ¶ 398-399, 401-405).¹⁰ But when Daramic bought Microporous, Exide lost the leverage it had to get a competitive price because there is “only one provider” of deep-cycle separators “today.” (Gillespie, Tr. 2953-2954).

The merging parties also regarded deep-cycle as a separate market – from the demand side – with Flex-Sil, CellForce and HD as the only competitors. For example, Mr. Gilchrist, the former CEO of Microporous described the deep-cycle market as “predominantly golf car” and

¹⁰ Crown is testing HD as a replacement for Flex-Sil. (Balcerzak, Tr. 4137-4138). Crown asked Entek if it would make deep-cycle separators but has never even received any samples. (*Id.* 4139).

