UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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

RESPONDENT'S POST-TRIAL BRIEF

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I. INTRODUCTION

After almost five weeks of trial, 30 live witnesses, 22 witnesses presented by deposition[1], and over 2,000 trial exhibits, it is clear that Complaint Counsel have failed to prove their case for at least five reasons:

1. They have not properly defined the relevant product market;
2. They have not properly defined the relevant geographic market;
3. They have not shown a reasonable probability that the acquisition of Microporous by Polypore would substantially lessen competition;
4. They have not shown that Daramic has monopoly power or engaged in exclusionary conduct;
5. They have not shown that the divestiture relief they seek is appropriate and not punitive; and
6. They have not shown that the Feistritz plant in Austria is properly included in any necessary divestiture.

Because Complaint Counsel have failed in these fundamental underpinnings to their case, the FTC's claims in its Complaint cannot succeed and this Court must find that the acquisition of Microporous Products, L.P. ("Microporous"), a niche and fringe player in the battery separator industry, by Polypore International, Inc. ("Polypore"), has not lessened competition.

II. SUMMARY OF ARGUMENT

Before the acquisition at issue in this case, Polypore's Daramic subsidiary produced polyethylene ("PE") battery separators for sale to flooded lead acid battery manufacturers throughout the world from its seven manufacturing facilities. (FOF 227, 230, 232-33). By contrast, Microporous had become the sole provider of rubber-based separators to flooded lead acid battery manufacturers throughout the world from its one manufacturing location in Piney Flats, Tennessee.

[1] Four third-party witnesses were presented by deposition, the other 18 deposition and investigational hearing transcripts all relate to testimony given by Daramic, Polypore and former Microporous employees provided to the FTC prior to the hearing on this matter.

(FOF 316, 318, 325, 332). Daramic's total worldwide sales in 2007 were { } (FOF 239, 338) Daramic's PE separators did not compete with Microporous' rubber-based separators and they were not, and are not, economic substitutes for each other. (FOF 84, 120-24, 239, 248, 335 544-550, 1201; Hauswald, Tr. 676-77). Daramic produced PE separators for use in two general types of batteries: industrial and starting, lighting and ignition ("SLI"). (FOF 84, 239, 248; Hauswald, Tr. 676-77). Again, in contrast, Microporous primarily produced separators for "specialty" batteries used in golf carts and floor scrubbers, a niche where Daramic had virtually no sales. (FOF 106-108, 118, 128, 239, 314, 569, 734; Gilchrist, Tr. 299, 461-62, *in camera*; Hall, Tr. 2799).

Prior to the time of the acquisition, Microporous did not sell pure PE separators, but instead a product called CellForce that is made of PE with a rubber additive. (FOF 17, 127, 318, 336). Microporous' CellForce product was high cost vis-a-vis pure PE separators, and its sales of CellForce in North America were { } (FOF 339, 1298). CellForce is the only product that was produced by Microporous at the time of the acquisition for which there was any competitive overlap with Daramic products. (FOF 127, 339, RX01119). Even if Microporous' sales of CellForce are included, it only resulted in a North American market share of { } which gave it no market power. (FOF 338-339, RX00114, RX01119, PX0949) Thus, in the only overlap market in this case, the acquisition had no market or competitive effects.

This transaction, as these facts show, essentially is a market extension, not a horizontal merger. (FOF 108, 262-67, 1329). Complaint Counsel's claims that Daramic and Microporous competed against each other "for years" and that "prices went down and products improved" during that time are baseless and unsupported by the evidence that was adduced at trial. (Robertson, Tr. 12). There is no evidence that this transaction has, or will, "substantially lessen competition" in the

sale of PE products. Nor is there evidence that Daramic has improperly obtained monopoly power, or engaged in exclusionary conduct.

Moreover, Complaint Counsel have not provided sufficient evidence to support the four product markets they allege, or the geographic market they claim. As a result, they fail in a "necessary predicate" of a claim under Section 7 of the Clayton Act, 15 U.S.C. § 18 ("Section 7"). The FTC has also failed to prove that the acquisition threatens to "substantially lessen competition" or that Daramic has a monopoly in the correct market of "PE Separators" (also alleged in the complaint as a market) or in the incorrect markets on which the FTC and its expert have attempted to rely.

Complaint Counsel ignore the market realities since the acquisition. The reality is, and the evidence at trial showed, that in the time since the acquisition Daramic {

} (FOF 948-950, 963-972). {

} will be supplied by one or more of Daramic's competitors. (FOF 946). In assessing the available "competition" in the PE marketplace, {

} (FOF 948-950, 963-972, 981, 991, 1022). The Asian competitors are real, and their existence, along with the looming presence of Entek, is sufficient to curtail any alleged anticompetitive effects of the acquisition. (FOF 941-942, 981, 991, 1022, 1033, 11035, 1043).

Entek's PE separator sales in 2007 { }. Although its separator production is primarily focused on SLI batteries, {

} Complaint ¶43;

(FOF 943). Further, the evidence at trial showed that Entek does, in fact, produce non-SLI battery separators and it { } (RX00114, FOF 948-950, 963-972). The majority of the { } (FOF 948-950, 963-972). Additionally, because of { } quickly shift its existing production facilities from producing SLI battery separators to all other types of PE separators, and { } sufficient to constrain any anticompetitive events alleged as a result of the acquisition. (FOF 969).

The FTC has also not met its burden with respect to its claim that in the post-transaction world competition is threatened both by coordinated interaction and unilateral effects of the merger. Not one iota of evidence adduced at trial would suggest that Daramic { } can realistically be expected to engage in brotherly anticompetitive coordination or that Daramic could increase prices unilaterally as a result of the merger in light of { }.

Although, the acquisition of Microporous closed over 16 months ago, Complaint Counsel were unable to produce any evidence that competition has actually been lessened. (FOF 1094, 1152, 1298, 1300, 1384, 1403). The evidence at trial was more than adequate to show that entry has been, and will continue to be, sufficient, timely and likely to resolve any competitive concerns. (FOF 1061-1104). No anticompetitive effects have been demonstrated as a result of the acquisition and none is likely. Further, there is no proof that Daramic acquired additional market power from its acquisition of Microporous or that it has the power to control prices or exclude competition. (FOF 1462-1463). Indeed, substantial efficiencies specific to the merger have been realized, and have had, and will continue to have, the effect of reducing production costs and thus show that Microporous was a high cost producer. (FOF 273-276). Finally, evidence at trial defeats Complaint Counsel's

claims that Daramic has used exclusionary conduct to monopolize any markets or that its agreement with Hollingsworth & Vose ("H&V") was not a legitimate and productive joint venture.

Finally, the FTC has sought the divestiture of the former Microporous plant in Austria (the "Feistritz Plant"). However, even if any divestiture is necessary, which Respondent disputes, the divestiture of the Feistritz Plant is unnecessary and inappropriate. Not only is it outside the FTC's jurisdiction, but it was not a part of the acquisition as an operating facility, is not located within the FTC's alleged North America market and was not even owned by Microporous Products L.P. (Trevathan, Tr. at 3571-72; RX1227 at 2, 39, Exh. A; RX1228; RX1229 at 47; RX1572; FOF 378.)

Furthermore, the Feistritz Plant does not sell products to customers located in North America or the United States and there is no evidence that its operation enhanced North American competitive conditions. Finally, there is no evidence that the Feistritz Plant is in any way necessary for a reconstituted Microporous to be "viable," and, in fact, there is evidence that its inclusion would further threaten the viability of a new entity. (Gilchrist, Tr. at 511, 540-41; Gaugl, Tr. at 4643; Hauswald, Tr. at 922-24, *in camera*.)

Ultimately, the FTC has failed to prove that any remedy is necessary. However, to the extent the Court finds otherwise, Complaint Counsel have also failed utterly to show that the remedies they propose are required to cure the impacts on competition they have alleged. (FOF 1133-1150).

III. APPLICABLE LEGAL STANDARDS

A. COMPLAINT COUNSEL BEAR THE BURDEN OF PERSUASION ON ALL ELEMENTS IN A SECTION 7 CASE

Complaint Counsel bear the burden of proving every element of their claim that the merger or acquisition violates Section 7. Complaint Counsel retain the ultimate burden of persuasion at all times and on all components of the Section 7 claim. FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001); FTC v. Univ. Health, Inc., 937 F.2d 1206, 1218 (11th Cir. 1991); FTC v. Arch Coal, Inc.,

329 F. Supp.2d 109, 116-17 (D.D.C. 2004); United States v. Oracle Corp., 331 F. Supp.2d 1098, 1110 (N.D. Cal. 2004).

This burden is not insubstantial. "[T]o satisfy section 7, the government must show a *reasonable probability* that the proposed transaction would *substantially* lessen competition in the future." University Health at 1218 (emphasis added). Complaint Counsel must show "demonstrable *and substantial* anticompetitive effects." New York v. Kraft General Foods, Inc., 926 F. Supp. 321, 359 (S.D.N.Y. 1995) (emphasis added).

It is also necessary for the government to show that the alleged violation affected a substantial volume of commerce. "The market affected must be substantial." United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 595 (1957). The government's case has a problem where that is not the case. As the district court in Baker Hughes said, "The minuscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" United States v. Baker Hughes, Inc., 731 F. Supp. 3, 9 (D.D.C. 1990)(citing *duPont*, 353 U.S. at 595).

B. COMPLAINT COUNSEL BEAR THE BURDEN OF PROVING THE RELEVANT PRODUCT AND GEOGRAPHIC MARKET, ESTABLISHING A PRIMA FACIE CASE AND REBUTTING THE RESPONDENT'S CASE

Section 7 decisions describe the procedure as involving, first, establishment of a *prima facie* case by Complaint Counsel and, second, rebuttal of that case by the respondent. University Health at 1218 ; United States v. Baker Hughes Inc., 908 F.2d 981, 983 (D.C. Cir. 1990). But, since the prima facie case involves "showing that a transaction will lead to undue concentration in the market for a particular geographic area," Baker Hughes at 983, it is necessary for the government first to establish its product and geographic market(s). "Determination of a relevant market is the necessary predicate" to a claimed violation of Section 7. duPont at 593. Indeed, assessing a merger or acquisition under Section 7 "requires determinations of (1) the 'line of commerce' or product market

in which to assess the transaction, (2) the 'section of the country' or geographic market in which to assess the transaction, and (3) the transaction's probable effect on competition in the product and geographic markets." FTC v. Staples, Inc., 970 F. Supp. 1066, 1072-73 (D.D.C. 1997).

Even if Complaint Counsel can establish a *prima facie* case on the basis of concentration statistics,[2] courts, and the FTC itself, have warned that market shares and concentration data alone may not be sufficient to determine whether a violation has occurred or might occur. The Merger Guidelines state that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." Sec. 2.0. The Guidelines further provide that "market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger." Sec. 1.52. The courts have agreed that concentration data "[are] not conclusive indicators of anticompetitive effect." United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974). Further, "evidence of a high market share does not require a district court to conclude that there is an antitrust violation" (United States v. Syufy Enterprises, 903 F.2d 659, 665 n.6 (9th Cir. 1990)), because market share statistics can be "misleading as to actual future competitive effect." United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984). The D.C. Circuit summed up these views in Baker Hughes when it said, "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." 908 F.2d at 984.

Importantly, judicial and other authority establish that it is not necessary for the respondent's rebuttal case to prevail by a preponderance of the evidence. It is only necessary for the rebuttal case "to cast doubt on the accuracy of the Government's evidence as predictive of future anticompetitive effects." Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 423 (5th Cir. 2008). The Horizontal

[2] "Typically the Government establishes a *prima facie* case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition." *Chicago Bridge*, 534 F.3d at 423.

Merger Guidelines merely require that the rebuttal case make a "showing" that presumptions raised by Complaint Counsel's case may not be justified.

The Horizontal Merger Guidelines themselves provide guidance regarding the rebuttal case to be made by the respondent. The Guidelines state that any presumptions that are raised by the government's *prima facie* case "may be overcome by a showing that factors set forth in Sections 2 – 5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares." Horizontal Merger Guidelines, 57 Fed.Reg. 41552, 41560, § 1.51(c) (1992). The rebuttal case puts the ball back in Complaint Counsel's court with all of the burdens of persuasion noted above. "[I]f the respondent successfully rebuts the *prima facie* case, the burden of production shifts back to the Government and merges with the ultimate burden of persuasion, which is incumbent on the Government at all times." Chicago Bridge & Iron Co. v. FTC , 534 F.3d 410, 423 (5th Cir. 2008).

IV. COMPLAINT COUNSEL HAVE NOT PROVED THEIR PRIMA FACIE CASE

A. COMPLAINT COUNSEL HAVE NOT PROVED A PROPER PRODUCT MARKET

Complaint Counsel in this case have acknowledged that "[d]etermination of a relevant market is a necessary predicate" to proof of the case. Complaint Counsel's Pre-Trial Brief at 8-15. (Baker Hughes, 908 F.2d at 983). However, by asserting four incorrect product markets they have not met this necessary predicate. Specifically, Complaint Counsel have ignored the smallest market principle and use of the hypothetical monopolist and SSNIP system, both of which were established in the FTC/Department of Justice Horizontal Merger Guidelines "[t]o facilitate [the] analysis" that had been established by the relevant authorities. FTC v. Whole Foods Market, Inc. 548 F.3d 1028, 1037 [from sec IV(B) of the opinion] (DC Cir. 2008). "The Guidelines' method for implementing the hypothetical monopolist test starts by identifying each product produced or sold by each of the merging firms." Commentary on the Horizontal Merger Guidelines at 5 (2006). Rather than looking

at such specific products, however, Complaint Counsel "began" their product market analysis by looking at categories of products according to their end uses. (FOF 1165, 1182).

Because Complaint Counsel have not met the "necessary predicate" to a legitimate Section 7 claim by proving a valid product market, it is impossible to identify the alternatives available to consumers and evaluate whether competition has been adversely affected in light of those alternatives. See E.I. duPont de Nemours & Co., 353 U.S. at 593.

1. 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.[3] Complaint Counsel have wholly ignored the Guidelines system of economic substitutes and have offered proof only of functional substitution. (FOF 133, 139, 1201, 1352). 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 is the correct relevant market here. Complaint ¶6; (FOF 76, 77, 116, 126).

PE separators are identified, and priced, according to their thickness. (FOF 14, 29, 45-46, 58). Thicker product is more expensive than thinner product. (FOF 244; Riney, Tr. 4497). Generally, separators made for SLI type applications are thinner, while separators made for the various industrial applications are thicker. (FOF 25, 65, 67-68). Despite Complaint Counsel's attempts to show four alternative markets of "UPS," "SLI," "Motive" and "Deep Cycle" on the basis that "separators manufactured for a particular application cannot be effectively used for other applications" the evidence presented at trial does not bear this out. (FOF 69-78).

As an initial matter, there was significant evidence at trial that separators among the categories advocated by the FTC overlap significantly. (FOF 69-78). For instance, Mr. Hauswald,

[3] Horizontal Merger Guidelines, at §§ 1.11, 2.22 (herein "Guidelines").

Mr. Whear and Mr. Brilmyer, in addition to several customers, { } all testified that a so-called "UPS" separator might well be effectively used in a "motive" application, or that an "SLI" separator may be used in a "deep cycle" application. (FOF 37, 72, 1185-1188, 769, 885). In fact, the evidence not only shows that this "could" happen, but that it does happen every day in the reality of the PE battery separator market. (FOF 37, 721, 1185-1188, 769, 885). This is true in all of the FTC's alleged product categories. (FOF 69-78).

Further evidence shows that various products made by Daramic are used across the spectrum of the FTC's product categories. (FOF 45-46, 64, 67, 69-78). Daramic CL is used in the "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." (FOF 89, 95, 127-128). In 2008, Daramic sold an individual PE profile called "FC" with a backweb thickness of 11 mils to { } for use in a UPS application, to { } for use in a deep-cycle application and to { } for use in an SLI application. (FOF 73).

Considering the characteristics of separators – primarily backweb thickness and overall product thickness – it is impossible to classify them into distinctive "buckets." (69, 70, 74). Since the only real difference between industrial and automotive separators is thickness, a separator for a UPS application may be as thin as 8 mils – a size that easily fits into SLI applications. (FOF 65). Similarly, an "industrial" separator of 11 mil thickness is just as functionally effective in a car battery as a separator of 10 mil thickness, although the extra thickness is generally not worth the additional cost. (FOF 67, 71, 244; Riney, Tr. 4497). 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 Dep., p. 114-115; Gaugl Dep., p. 146-148; FOF 588, 691, 795, 799, 885). This turns the FTC's "functional substitution" theory on its head in that two separators produced for different

customers but used in the same application become their own product markets because they are not functionally substitutable. (FOF 588, 691, 795, 799, 885, 1334-1336,; PX1124-003; Trevethan Dep., p. 114-115; Gaugl Dep., p. 146-148). Importantly, all PE looks identical until it passes through the calender rolls fitted with specific profile patterns and adjusted to specific widths. It is the calender roll patterns, along with the thickness of the material, that differentiates PE separators from each other. (FOF 151-154, 939-940).

Furthermore, the FTC concedes that AGM and PVC separators are not part of their separator markets, but there is ample evidence that when looking at the "end-use" of separators (ie: whether they are going into a "deep-cycle" golf cart battery, or an "SLI" car battery) both AGM and PVC separators are found in all these end-use applications. (FOF 105, 134-139). This alone is enough to show that the FTC has failed in the fundamental proof of identifying a product market in which to analyze the effects of the transaction at issue.

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 – separate and apart from Ace-Sil and Flex-Sil. It is easy to shift between production of different kinds of PE separators. (FOF 155, 156, 969). Courts have recognized that where one facility can easily switch from producing one product to another, they may belong in the same relevant market.[4] It is also telling that it is not easy to switch between the production of PE separators and rubber separators like Ace-Sil and Flex-Sil. (FOF 181, 160, 161, 162, 165-180). In fact, testimony and evidence prove that {

} (FOF 181-185).

[4] Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th 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).

a. Ace-Sil is a separate product market

The parties agree that Ace-Sil comprises its own product market and that the acquisition has had no effect in this market. Ace-Sil is a product without competitors that simply moved from Microporous to Daramic. (FOF 11, 114-116, 161; Gilchrist, Tr. 339; Gilchrist IHT, pp. 24-25, 27-28).

b. Flex-Sil is a separate product market

Contrary to Complaint's Counsel's claims, Flex-Sil is also its own relevant product market. Flex-Sil is a niche product used in very specific applications - particularly in OE golf cart batteries. (FOF 119, 120, 121, 123, 126, 239, 314, 569; Gilchrist, Tr. 299; Hall, Tr. 2799). The evidence is clear that Flex-Sil is a superior product to PE and PE/rubber separators, and that Flex-Sil has very different technical capabilities compared to those separators because it is made of pure rubber. (Gilchrist Dep., p. 117-118; FOF 117-127, 1200; Heglie Dep., p. 98-99; Whear, Tr. 4684-4685). Furthermore, it cannot be "enveloped" putting it even more squarely into a unique 'niche' market. (FOF 21, 123, 125, 734; PX0433 at 022; Godber, Tr. 373; PX0428-003.)

Approximately { } were made to two customers that position their products as high end and unique – in large part because of the inclusion of Flex-Sil as opposed to cheaper (and less effective) PE or PE/rubber separators. (FOF 1332, 1394, 121, 867-68, 1200, 341, 727, 740, 743, 66, 855). These customers continue to purchase significant amounts of Flex-Sil despite the { } (FOF 66, 548-49, 745-754, 864-865, 1339; Gillespie Tr. 2954-2955). Testimony that those customers "could" substitute some of their Flex-Sil purchases with HD is not only suspect in light of their continued failure to do so, but does not advance the FTC's product market cause, as they also testified that HD definitely could not be substituted, regardless of the price of Flex-Sil, for a majority of the separators they use. (FOF 1, 124, 745-747, 751, 868-70, 875, 877).

{ } and does not have the superior characteristics demanded by the customers for high-end batteries. (FOF 18, 121-125, 548-549, 745, 747; Godber, Tr. 271, 274-75, 278; Roe, Tr. 1762, McDonald, Tr. 3822; RX1094). By analogy, HD is to Flex-Sil as Timex is to Rolex – the fact that the cost of a Rolex goes up by 5-10% will not make the consumers of that watch switch to a Timex – even though they both tell time. Similarly, the evidence at trial makes it clear that a further SSNIP increase to Flex-Sil would not lead to a substitution from Flex-Sil – the gold standard in deep-cycle separators – to HD. (FOF 121-125, 271, 278, 545-549, 745, 747, 1338-39).

The behavior and testimony of { } (FOF 535-537). Specifically, { } (FOF 535-539; PX00442; RX00677). In 2008, the purchase of { } (RX00677, PX1040-002, PX1063). When the credit is included in the price comparison for 2008, the adjusted selling price for { } (RX00677, PX0489). Nevertheless, despite the fact that { } (FOF 537, 541, 545, 547; RX00677). Furthermore, the incentive to purchase { } not purchase any meaningful quantities of { } until 2006. (RX01119; FOF 535-539, 541, 545, 546, 547). These facts preclude any argument that Flex-Sil and HD are economic substitutes.

Simply because both products can be used in 'deep-cycle' applications does not make them economically substitutable as the SSNIP test requires. (FOF 271, 278, 545-49, 550, 1201, 1338-39). 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).

B. COMPLAINT COUNSEL HAVE NOT PROVED A PROPER GEOGRAPHIC MARKET

Complaint Counsel have also failed to adduce sufficient evidence to show their claimed North American geographic market. (FOF 186-223). The FTC's geographic market case requires it to show that a hypothetical monopolist could engage in price discrimination on a worldwide basis. Making that case depends, in turn, on a showing that such discrimination would not be defeated by arbitrage. Commentary on the Horizontal Merger Guidelines at 7-8. But Complaint Counsel's economic expert, Dr. Simpson, acknowledged that he had not adequately considered whether arbitrage could be used by worldwide customers to defeat price discrimination by the hypothetical monopolist. (FOF 1178, 1203-1204; Simpson, Tr., 3332-34, *in camera*).

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 (8th 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).

At trial, the Court noted, before Complaint Counsel had even put on its first witness, that they could not avoid describing the PE battery separator business as "worldwide." (Robertson, Tr.

17, 19-20). It is undisputed that producers of PE separators sell globally. (FOF 186-202, 203-223, 493, 985).

Throughout the trial, Complaint Counsel repeatedly focused on the "need" for local supply, yet attempted to "gloss over" the fact that {

} (FOF 194-95, 443, 926, 932, 933, 936, 937, 1353; RX01530-003.) {

} Id.; (FOF 933). { } cannot offer "local" supply to Austria any more than it can offer such supply to any country in Asia. Yet it ships and sells its products on every continent without disruption or impact on its ability to compete for sales of PE separators. (FOF 932, 933, 936, 937, 963, Hauswald, Tr. 1044-45; Simpson, Tr. 3335, *in camera*; { }). Likewise, Microporous, prior to the acquisition, had been operating from one small facility in Piney Flats, TN for many years, but sold its separators to customers all over the world, { } (FOF 192, 1146). Daramic, is, in fact, the only separator supplier of any type (including AGM and PVC) that operates numerous manufacturing facilities located throughout the world. (FOF 936; Gilchrist, Tr. 307; Hauswald, Tr. 859, 862; RX00677; RX01084). Asian PE separator manufacturers like { } supply separators to South America and Italy, while the {

} sells to customers in Korea – neither have more than one manufacturing facility. (FOF 1049, 1109).

In 2008 Daramic exported 24 percent of its product and {

} North America.[5] Thus, applying a SSNIP in North America, while holding prices in the rest of the world constant, Daramic's South American customers would switch to suppliers in Asia and Europe, while { } manufacturers. (FOF

[5] Daramic exported primarily to South America (80 percent of exports) {**while Entek exported 30.7 percent to Korea,**} with the remaining amount spread across the globe.