ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S POST-TRIAL REPLY 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

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I. Introduction[1]

"The bottom line is that [Microporous] can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth," wrote Daramic's General Manager, "[w]e must do everything possible to stop this process." (PX0694 at 001) Daramic's Pierre Hauswald said, "I agree...it would be better to solve the [Microporous] case definitively." *Id.* Microporous was a "real threat" to Daramic, and so it acquired Microporous to "secure [its] market share," stop "price erosion," avoid lower prices, and "eliminate price competition."[2] Daramic's acquisition of Microporous, its closest and only competitor in the deep -cycle, motive and UPS battery-separator markets, resulted in a merger to monopoly. The acquisition also eliminated Microporous as a third competitor in the North American SLI separator market, leaving only Daramic and Entek as a duopoly. Under the law, this acquisition cannot stand.

Often misciting the law and using citations that do not support their factual arguments,[3] Daramic's story ignores the evidence at trial. For example, Daramic still insists that all separators (except Flex-Sil and Ace-Sil) are the same because of supposed, "supply-side" substitution. (RB at 11; Kahwaty, Tr. 5152, *in camera*) Contrary to Daramic's argument, "[m]arket definition focuses ***solely*** on ***demand*** substitution factors – *i.e.,* possible consumer responses." (Horizontal Merger Guidelines ¶ 1.0) (Emphasis added). Substantial evidence shows that customers treat these markets separately: *e.g.,* customers will not use a polyethylene separator without rubber (for antimony control) in a deep-cycle battery.[4] Clear proof that customers cannot easily switch, for example to an SLI separator when they need motive

[1] "CCB" refers to Complaint Counsel Post-Trial Brief; "RB" refers to Respondent's Post-Trial Brief; "CCFOF" and "RFOF" refer to Complaint Counsel's and Respondent's, respectively, Proposed Findings of Fact. "CCRF" is Complaint Counsel's Rebuttal Findings.
[2] PX0168 at 002; PX0935 at 001; PX0932 at 001.
[3] We do not say so lightly. Respondent has had to resort to extreme mischaracterizations of case law and the evidence.
[4] PX0033 at 006, 012; Simpson, Tr. 3169-3172, *in camera*; Gillespie, Tr. 2933 (Using PE would not "make any sense"); Godber, Tr. 151-152 (would only use Flex-Sil, CellForce, or HD).

separators, is that [redacted].[5]

The evidence at trial demonstrates that North American customers simply cannot grab any separator on the planet for use in a deep cycle, motive, or UPS battery. The Asian producers are not in the market. [redacted].[6] Daramic's claim that one could change a calendar roll and make another separator is not relevant when no other company has designed, tested, or manufactured a SLI separator for North America, except for Microporous, Daramic, and Entek. Further [redacted] is qualified in deep cycle, motive, or UPS for any of these customers. This marketplace reality means that Daramic's supply-side substitution is a fantasy and Complaint Counsel has properly measured market concentration.

Moreover, Daramic's claim that Daramic HD and Microporous' Flex-Sil were not competitors in the deep cycle market is false. Customers uniformly agreed that Daramic's HD was a substitute for Daramic's Flex-Sil. (Godber, Tr. 152-153; Wallace, Tr. 1971-1972; Qureshi, Tr. 2004, 2063; Gillespie, Tr. 2933) Over 90% of the "total market" for deep cycle batteries,

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[5] *See, e.g.*, {**Gillespie, Tr. 2953-2954, 3041, *in camera*** [redacted] **Godber, Tr. 299, *in camera*** [redacted]; Wallace, Tr. 1951 ("nowhere to go but to" Daramic); Gagge, Tr. 2611 ("[t]here's no other source"); Leister, Tr. 4028 (Entek not supplying motive separators); Douglas, Tr. 4082 (no other supplier); Benjamin, Tr. 3522 (Daramic is the "sole supplier. That's it. Take it or leave it."), *id.* 3526 ("there is no other supplier, so you're kind of stuck). Daramic also ignores the evidence that Daramic now has "control" over all but the SLI separator market, in which Daramic has only Entek as a competitor. (*See* PX1104 at 001; PX0395 at 023, 025-027)

[6] [redacted] **(Weerts, Tr. 4507-4509,** *in camera* [redacted]; PX1823, *in camera*: CCFOF ¶ 928)

Exide, U.S. Battery, and Trojan, all used Daramic HD as a competitive threat to Microporous' deep cycle separators.[7]

The substantial reduction of competition in deep-cycle, motive, UPS, and SLI separators is impossible to refute. However, faced with four markets with extraordinarily high HHIs and unequivocal evidence of high barriers to entry, Daramic argues that if we use an "all PE market" (combining CellForce, HD, and PE of all types, sizes and ingredients but excluding Flex-Sil), that the concentration levels are just not high enough. Not true. Even without Flex-Sil, Microporous' largest volume product, Daramic's own numbers from an all-PE market yield HHIs that are far above the level in the Merger Guidelines (¶ 1.51) at which "it will be presumed" that the acquisition is "likely to create or enhance market power or facilitate its exercise."[8] No matter how Daramic slices the pie, its acquisition is presumptively illegal.[9]

Despite these high HHIs and the high barriers to entry, Daramic claims that timely, likely, and sufficient entry rebuts Complaint Counsel's case because some unknown Asian producer might enter. But, despite all the talk of Asian companies, the only evidence in the record is that [redacted]

[7] Gilchrist, Tr. 379-380, 406-407 [redacted] (Gilchrist, Tr. 467-468, 343, 368; McDonald, Tr. 3911, 3944, 3948-3949 ("no other competitor" other than Daramic in deep cycle).

[8] [redacted]

[9] Daramic is wrong that acquisition of [redacted] of a market does not trigger Section 7. *See, e.g., United States v. Pabst Brewing Co.* , 384 U.S. 546, 547 (1966) (holding a merger of a firm having 3.02% of the market, with a firm, having 1.47% of the market, was a Section 7 violation); *Stanley Works v. FTC*, 469 F.2d 498, 505-07 (2d Cir. 1972) (24% with 1%).

[redacted] Daramic offered ***no*** evidence from any non-Daramic, Asian producer – the supposed entrants. [redacted].[10] Even Polypore's CEO, Bob Toth, admitted that the Asians were not in North America because their margins "aren't high enough" to be competitive. (Toth, Tr. 1404)

Absent any evidence of entry, Daramic then claims that efficiencies are a defense to its massive assault on competition. But Daramic failed to show the required, "verifiable," "extraordinary efficiencies" that would be passed through to consumers. [11] Indeed, none of their claimed efficiencies is even cognizable or detailed. At best, Mr. Graff said they [redacted] (RB at 45, *citing* Graff, Tr. 4863, *in camera*) This is not sufficient.

Daramic's final defense is that although Microporous was a strong, profitable company at the time of the acquisition, now that Daramic controls it, the "viability of Microporous as a stand alone entity is seriously in question." (RB at 49) This "failing-firm" defense was never raised in Daramic's answer and was waived, but more importantly it is contrary to the facts. The evidence

[10] **{Hall, Tr. 2727, *in camera* [redacted]; PX0907, *in camera* (Kung, Dep. 153, 155-156 [redacted] (Gillespie, Tr. 3025-3029, *in camera* [redacted] Axt, Tr. 2220, *in camera.*}**

[11] *FTC v. CCC Holdings Inc., et al.,* 605 F. Supp. 26, 72-74 (D. D.C. 2009); *Heinz*, 246 F.3d at 720; *FTC v. Univ. Health, Inc* ., 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (Defense "must demonstrate...significant economies and that these economies ultimately would benefit competition and, hence, consumers.").

is that Microporous was "profitable" and was "on track to improve its profitability." (Gilchrist, Tr. 344, 403; Trevathan, Tr. 3562, 3659, 3750)

In the end, the complete undoing of this illegal acquisition is mandated as a matter of law. An effective remedy must restore competition to what it would have bee n but for Daramic's illegal conduct. However, Daramic claims that Complaint Counsel has to prove that a "complete" divestiture is necessary; otherwise it is somehow overbroad or punitive. (RB at 59-60) This argument is a complete rerun of *Chicago Bridge*, which rejected this precise argument and which Daramic fails to even cite. Notably, in *Chicago Bridge*, the Fifth Circuit affirmed the ALJ's and Commission's complete divestiture of PDM including a division that was not even at issue in the case. *Chicago Bridge & Iron Co. N.V. v. FTC* , 534 F.3d 410, 441 (5th Cir. 2008). Here, every aspect of Microporous is at issue – even Ace-Sil, which forms the key ingredient for CellForce. Thus, all of the stock and assets of Microporous must be divested so that Microporous can compete on the same "equal footing," as it had prior to the acquisition. *Id.*

This relief must include the Austrian plant because that expansion was what made the company a world-wide competitor that could properly service its world -wide customers, like EnerSys and Exide. Indeed, one of Microporous' key assets [redacted], which requires that the company have [redacted] Microporous' Ace-Sil line in Tennessee was also essential because Ace-Sil is an ingredient vital for the manufacture of CellForce, [redacted] required to be manufactured both in [redacted] In short, Microporous' world-wide scale is what put it on equal footing with Daramic and Entek. It hardly makes sense to let the monopolist keep it.

Daramic argues that it should keep ***all*** of Microporous' products, contracts, and five of its six lines (including two in Austria) and divest merely one Daramic product -- Daramic HD -- that Daramic's own brief says is not a "competitive" product. (RB at 24) It makes even less sense to

give the new Microporous the least competitive product Daramic has, and one that Microporous never owned in the first place and hope that it can compete. This would be an absurd result. *Northern Securities Co. v. United States*, 193 U.S. 197, 357 (1904), *quoted by Ford Motor Co. v. United States*, 405 U.S. 562, 574, n.9 (1972) ("To permit Ford to retain" what it bought "would perpetuate the anticompetitive effects of the acquisition").

In addition, the remedy sought in this case is buttressed by the strong evidence of monopolization and other anticompetitive conduct by Daramic over the past decade. Daramic's strong-arm, "no-mercy" tactics against EnerSys and others is clear from the evidence. [12] Daramic's exclusionary contracts were also a clear monopoly tactic -- making it more expensive for customers to take on a competitive supplier, like Microporous. (CCFOF ¶¶ 1069-1076)

What we see here, especially in Daramic's post-acquisition behavior, is anticompetitive conduct that has harmed customers. If this is what Daramic does when it's being sued by the Federal Trade Commission, what do we expect to see if this litigation ends without an adequate remedy? But the law requires that Daramic must be stopped and competition must be reinstated. To paraphrase Exide's Doug Gillespie and the Supreme Court: that is why we are here. (Gillespie, Tr. 2980-2981 ("[T]hat's why you're here"); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953) (FTC's mandated role is "to stop in their incipiency acts and practices which, when full blown, would violate" the antitrust laws).

[12] This was Daramic's pattern of conduct. *See, e.g.,* PX1793 at 001 [redacted] Hauswald Tr. 743, 1132-1133, *in camera* [redacted]; **Bregman, Tr. 2901-2903, *in camera*, 2906, *in camera*; PX1050, *in camera*** [redacted].

II. The Correct Burden of Proof Requires Daramic to Rebut Complaint Counsel's Strong Prima Facie Case

Daramic claims that Complaint Counsel must "show 'demonstrable and substantial anticompetitive effects'" to prove its case. (RB at 6, (*citing New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 359 (S.D. N.Y. 1995));[13] RB 7 n.2). This is hardly a statement of the law. [14] Daramic ignores the legal presumption that evidence of high concentration creates.

The law requires that Complaint Counsel establish its prima facie case by proving only that Daramic's acquisition of Microporous "significantly increase[d] market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition." *Chicago Bridge*, 534 F.3d at 423; *FTC v. Whole Foods Mkt., Inc.,* 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (A prima facie Section 7 case typically "rests on defining a market and showing undue concentration in that market."). As Complaint Counsel's "prima facie case anticipates and addresses the respondent's rebuttal evidence . . . the prima facie case is very compelling and significantly strengthened." *Chicago Bridge*, 534 F.3d at 426. Under the law, Daramic has a "heavy burden" to "clearly disprove future anti-competitive effects." *Id.* at 426.

Even if Daramic produces evidence, "the evidence must justify the rebuttal arguments the respondent espouses." *Id.* Daramic's rebuttal case, however, fails to rebut Complaint Counsel's strong prima facie case that shows a likelihood of anti-competitive effects.

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[13] Judge Wood in *Kraft* goes further to explain that the market shares (less than 15% for both firms combined) were insufficient to create a "presumption that the [a]cquisition violates Section 7." 926 F. Supp. at 363.

[14] Daramic claims that Complaint Counsel must show that the merger actually resulted in increased prices and lower output, RB at 23, an assertion contrary to law, including Daramic's cited cases. In *Forsyth*, cited by Daramic, the court stated was addressing a case in which the plaintiff attempted to show monopoly power through *direct* evidence. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1475-76 (9th Cir. 1997) (emphasis added). The court explained that one can prove monopoly power through *circumstantial* evidence of the defendant's dominant share in a market. *Id.* (emphasis added).

Moreover, Daramic is wrong that Complaint Counsel must "show that the alleged violation affected a substantial volume of commerce." (RB at 6) The Commission has unequivocally held that "the volume or size of commerce affected by an acquisition is not a factor in determining the legality of a horizontal merger." *Chicago Bridge*, 138 F.T.C. at 1098-99 and n. 315; *FTC v. Food Town Stores*, 539 F.2d 1339, 1345 (4th Cir. 1976) ("The fact that the markets in which the firms compete may be small is irrelevant under the Clayton Act, and does not affect the legality of the merger."). The Commission in *Chicago Bridge* also rejected the very interpretation of *Baker Hughes* which Daramic relies on here for its proposition that the entire market must meet some minimum market size. *Chicago Bridge,* 138 FTC at 1098-1099 ("courts have consistently held that the volume or size of commerce affected by an acquisition is not a factor in determining the legality of a horizontal merger "), *aff'd,* 534 F.3d at 433 (size of Thermal Vacuum Chamber market was not relevant).[15]

III. Complaint Counsel Has Proven a Strong Prima Facie Case

A. The Acquisition Led to Undue Concentration in Four Product Markets: Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries.

Complaint Counsel has proven the existence of four relevant product markets: deep-cycle, motive, UPS, and SLI separators for flooded lead acid batteries. (CCB at 12-28) Daramic, however, claims that all of these markets (with the exception of one product, Flex-Sil) are really one product because of what Daramic calls "supply-side substitution." (RB at 10-11) Daramic is wrong as a matter of law and fact. As the Merger Guidelines states emphatically:

[15] Two market sizes affected by this merger include [redacted] (PX0033 at 041, *in camera*, CCFOF ¶¶ 273, 305) These markets are substantially greater than in *Chicago Bridge*, where the four combined markets had average annual sales of only $23 million, and *Baker Hughes* in which total sales over a three year period amounted to about $10 million. *In re Chicago Bridge & Iron Co., et al.* , Complaint Counsel's Answer and Cross Appeal Brief at p. 26, *available at www.ftc.gov/OS/ADJPRO/d9300, U.S. v. Baker Hughes, Inc.*, 731. F. Supp. 3, 9 and n.6 (D.D.C. 1990). *See also FTC v. Whole Foods Mkt., Inc.,* 548 F.3d 1028, 1035 (D.C. Cir. 2008) (each market consisted of a few grocery stores).

"Market definition focuses ***solely*** on ***demand*** substitution factors – *i.e.*, possible consumer responses." (Merger Guidelines, ¶ 1.0 (emphasis added)) The relevant issue – 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); *Staples*, 970 F. Supp. at 1074 ("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." (internal quotations omitted); *see also* 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). The uncontroverted evidence shows that customers regard these products as separate products. (*See* CCB at 12-28; CCFOF ¶¶ 63-77 and 92-99 (deep-cycle), 111-120 (motive), 134-142 (UPS), 148-158 (SLI))

Daramic also faults Complaint Counsel as having failed to apply hypothetical monopolist and smallest market principles. (RB at 8-9) This is not true. [redacted]

(PX0033 at 005-007, *in camera*)

Daramic then ignores its own advocacy for smaller markets in arguing that PE, CellForce, and HD should be included in some kind of huge "all PE separator market." (RB at 9) Not surprisingly, Daramic (and its expert) failed to perform any SSNIP test for such a market. While two PE separators may share one characteristic such as thickness, if they differ in other characteristics, such as having different compositions, they may belong in different product

markets, depending on their use. By merely identifying particular overlaps in thickness or profile between products, Daramic does not show that a customer would actually switch from one product to another based on an increase in price or for any other reason.

In this case, the concentration levels here are very high. Moreover, as was the case in *Chicago Bridge*, this "acquisition eliminated ... substantial direct competition and left [Daramic] with an 'undue' percentage share of each market." *In re Chicago Bridge & Iron Co., et al.* , 138 FTC 1024, 1053 (2004). As in *Chicago Bridge*, this "provides an independent reason for finding a strong prima facie case of presumptive liability." *Id.*

1. The Evidence Does Not Require an "All PE" Separator Market, as Endorsed by Daramic.

Daramic's theory of an all PE market (excluding Flex-Sil, Ace-Sil and Darak) relies on two theories: (i) a claimed, "supply-side substitution" argument, and (ii) substitution based on overlapping product characteristics. Complaint counsel has demonstrated that both of these theories are wrong. (RB at 10-11)

a) There is No Supply-side Substitution.

Supply-side substitution is not relevant to market definition because even if a producer could manufacture a different separator easily, the customers must be willing to purchase that separator in order for it to be in the same market. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (full service and self-service gasoline stations sell the same gasoline and can switch from one to the other easily, so belong in the same market). The evidence at trial showed that customers will not substitute products made for one product market with those from another. (*See,* e.g., CCFOF ¶¶ 26-32, 85-91). The separators require extensive design and testing for their use in each market. (*See* CCFOF ¶¶ 928, 931 [redacted] CCFOF ¶¶ 896-903 [redacted])

Daramic argues that Asian manufacturers and Entek may be uncommitted entrants. Not true. An uncommitted entrant must be "capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times." *Merger Guidelines* § 1.0. Entek did not influence the motive market prior to the merger. (CCFOF ¶ 462, 465, 472; Kahwaty Tr. 5385) Entek also has not influenced the motive power market **{or any of Daramic's pricing in the market}** after the merger. (CCFOF ¶ 468) [redacted]. (CCFOF ¶¶ 464, 928, 931; Gillespie Tr. 3038-3039) [redacted]. (Kahwaty, Tr. 5391, *in camera*)

Tellingly, [redacted] (Weerts, Tr. 4507, *in camera*, 4509, *in camera*) [redacted].

b) No Realistic Substitution Opportunities Exist Between Separators in Different Product Markets.

Daramic's theory misrepresents the numerous differences between separators in these product markets and that the products are still sufficiently differentiated such that Daramic discriminates in its prices of products for the four relevant markets. (CCFOF ¶¶ 33-55) A separator's suitability for a particular product market depends on numerous factors including its composition, thickness, and profile, and whether a glass mat is added – all of which also determine its price. (PX0582 at 042-050)

The mere fact that polyethylene is an ingredient in certain separators does not make them interchangeable. Daramic's findings and documents distinguish separators based on their entire compositions, not just their inclusion of polyethylene. (*See, e.g.*, RFOF ¶ 15 (defining battery separators as "products of various compositions"); RFOF ¶¶ 87-96 (describing the compositions of Daramic's pre-acquisition separator products); Whear, Tr. 4821-4822, *in camera* [redacted] 4783, 4803-4806 (different separators have many different qualities); PX0582 at 042-050 (same))

Composition alone also does not determine a separator's suitability for a particular product market. While certain separators may have the same composition, they are sufficiently differentiated by other characteristics permitting Daramic to differentiate them significantly by price. [redacted] (PX0395 at 041, *in camera*) [redacted] (PX0395 at 040, *in camera*)

Daramic's argument for an all PE market rests on a theory that all products of a particular thickness must be in the same market. (RB at 11) This argument perpetuates Daramic's false premise that the backweb thicknesses of separators in these markets "overlap significantly." (RB at 9) At trial, no witness could come forward to say that any of the supposed, overlapping thicknesses that Daramic's attorneys asked about were "typical" at all. (*E.g.,* Whear, Tr. 4765 (he would have to "speculate")) The undisputed evidence, moreover, was to the contrary. For example, over 99% of SLI separators are less than 10 mils, and no deep-cycle separators are less than 12 mils. (Roe, Tr. 1312-1315; Hauswald, Tr. 678-679)[16]

[16] Backweb thicknesses are not relevant, as each separator has numerous properties, but nonetheless it became a theme in Daramic's case that no witness could substantiate on cross. [redacted] (Kahwaty, Tr. 5438-5444, 5445, *in camera*) [redacted] *Id.* at

Daramic's data shows that the products are sufficiently differentiated in other ways that Daramic can discriminate in the prices for separators between each of Complaint Counsel's product markets. [redacted] (CCRF ¶ 71) [redacted] (CCRF ¶ 73) [redacted] (CCRF ¶ 74) [redacted]

In the end, Daramic never attempts to prove its initial premise, that a correct application of the hypothetical monopolist test will show the existence of a single PE separator market. (*See* RB at 9)[17] It makes more sense to aggregate the markets at the le vel at which customers simply will not switch on the basis of price. (*See* Simpson Report, PX0033 at 005-007, *in camera*)

5445, *in camera* [redacted] (*Id.* at 5443, *in camera*)

[17] Daramic suggests that Complaint Counsel should have included PVC and AGM separators in the market definitions. AGM separators are not used in flooded lead acid batteries, and [redacted] *See* (CCFOF ¶¶ 92-96, 121-125, 129-130) [redacted] (Kahwaty Tr. 5449-5450, *in camera* [redacted])

(1) SLI, Deep-cycle and UPS Separators Are Not Substitutes for Motive Separators.

Motive battery separators are a relevant product market. (CCB at 20-23) Daramic would combine the motive separator market into its "all-PE" market (including automotive and golf cart) because of some claimed, slight overlap in thickness and/or profile. The products for motive, however, differ significantly and are priced as a separate market. [redacted] (PX0395 at 032, *in camera*) [redacted] (PX00395 at 041, *in camera*) [redacted] (PX0395 at 041, *in camera*) Also, motive separators are so much thicker than other separators that Daramic allocates a separate part of its plant capacity for them. (CCFOF ¶ 113)

Most importantly, motive battery manufacturers have no alternative to Daramic's motive battery separators in response to a five percent price increase in Daramic's motive separators. (CCFOF ¶¶126-132) [redacted] (*See* CCFOF ¶¶ 284) Daramic's only competitive constraint in motive power separators prior to the merger was Microporous. (CCFOF ¶¶ 465-468, 472-491) The acquisition of Microporous was thus a merger to monopoly in the motive market. (CCFOF ¶¶ 461) By eliminating the competition between Daramic and Microporous, the acquisition enabled Daramic to increase prices on motive power separators. (CCFOF ¶¶ 461, 470-471)

In addition to this market concentration, there is substantial evidence bolstering Complaint Counsel's prima facie case. Daramic and Microporous closely monitored each other's activities in the motive market. (*See, e.g.,* (CCFOF ¶¶ 287)) Customers were also able to play one firm off against the other in order to obtain lower prices for motive power separators. (CCFOF ¶¶ 465-467, 472-478) The acquisition eliminated this substantial competition and left

Daramic with an undue percentage of the motive market, 100%. (Craig, Tr. 2611 ("[t]here's no other source"); Leister, Tr. 4028 (Entek not supplying motive separators); Douglas, Tr. 4082 (no other supplier; no reason to go overseas to find another source, even with a 5% price increase); Benjamin, Tr. 3522 (Daramic is the "sole supplier. That's it. Take it or leave it."), *id.* 3526 ("there is no other supplier"); Gilchrist, Tr. 342). Competitive harm is clear here.

(2) UPS Separators Constitute a Product Market.

Again, Daramic's disagreement with a UPS separator market is based on an alleged overlap in the products used for the UPS market and used in the other product markets, and again, Daramic provides no evidence that a particular product used in UPS is also used in the other markets. (RB at 10) UPS battery separators are a relevant product market in which Microporous was actually competing prior to the acquisition. [18] (CCB at 23-25) The evidence shows that UPS separators have distinct characteristics, (CCFOF ¶¶ 135-146), and are considered a separate market in the industry. (CCFOF ¶¶ 134, 501) Daramic's pricing also shows it recognizes a separate market for UPS separators. For example, Daramic [redacted] (*See* PX1450, *in camera* showing [redacted] CCFOF ¶ 1113 [redacted] Also, if all 12 mil separators are the same, as Daramic argues, [redacted] (*See* Exhibit PX01450, *in camera* showing [redacted] Instead, [redacted] (*Id., in camera*) Following the acquisition,

[18] Because Daramic did not produce the figures for these sales, we cannot determine Microporous' market share, except to say it was small and was quickly moving up to a large percentage with EnerSys.

UPS battery manufacturers do not have any alternative to Daramic's UPS battery separators. (CCFOF ¶¶ 126-132)

(3) Motive, UPS, and Deep-cycle Separators are Not Substitutes for SLI Battery Separators.

SLI battery separators are a relevant product market. (CCB at 25-28) SLI requires separators with particular characteristics, including higher resistance to puncturing and lower electrical resistance. (CCFOF ¶¶ 149-150) SLI separators are also much thinner than those in other product markets – [redacted] (CCRF ¶ 65) The documents overwhelmingly show that the market participants analyze their competition separately for this product market. (CCFOF ¶ 148)

Daramic's supply-side substitution argument again does not apply to the SLI market. SLI separators do not have the characteristics required by separators in the other product markets, are much thinner separators, and sell for much lower prices than the separators in the other product markets. (PX0582 at 043-044; Roe, Tr. 1313-1315 (in North America, average SLI separator price is $0.70 versus $1.50-$2.90 for Daramic HD for deep-cycle and $1.90-$3.00 for motive))

(4) There is No Substitution From Deep Cycle Separators.

The evidence of the deep-cycle battery market does not support Daramic's theory that PE+rubber separators for deep-cycle belong in the same product market with other PE separators. (RB at 9-11) North American battery customers will not use a PE separator without a rubber additive for antimony suppression for deep-cycle applications. (*See* CCFOF ¶¶ 85-91) Daramic itself considers only rubber and PE+rubber separators to be suitable for this application. (PX1791-001) For deep-cycle separators, customers would not switch to other types of PE separators in response to a SSNIP in deep-cycle separators. (CCFOF ¶¶ 103-109) PE+rubber separators for deep-cycle are already sold at quite a premium over products in the other separator

markets. (*See, e.g.*, CCRF ¶ 73 [redacted]; PX0395 at 041, *in camera* [redacted]) With this price differential, customers have not substituted to other PE separators. (CCFOF ¶¶ 103-107) Even the severe shortage of deep-cycle separators during the 2008 strike at Daramic's Owensboro plant did not induce customers to substitute to pure PE separators or any other type of separator. (CCFOF ¶¶ 108-109) With the acquisition, Daramic now controls the only three products for use in North America for deep-cycle: Flex-Sil, Daramic HD, and CellForce. (CCFOF ¶¶ 258-273)

In addition to the high change in HHIs in the deep-cycle market, substantial evidence bolsters Complaint Counsel's prima facie case. [redacted] (*See, e.g.*, Hauswald, Tr. 834-835, *in camera*) Customers were also able to play one firm off against the other in order to obtain lower prices. (CCFOF ¶¶ 395-421) In the end, the acquisition eliminated this substantial competition and left Daramic with a monopoly in the deep-cycle separator market.

2. Flex-Sil is One of Three Products in the Deep-Cycle Product Market.

The only products in this market are Flex-Sil, Daramic HD, and CellForce, all Daramic products after the merger. (CCFOF ¶¶ 99-107; see CCB at 14-19) Complaint counsel has proven a product market for deep-cycle battery separators. (*See* CCB at 13-20) Daramic's only argument that it does not have a monopoly in the deep-cycle market is that it disapproves of Complaint Counsel's market definition. (RB at 18) Yet, no other company makes separators for deep-cycle but Daramic. (*See* CCFOF ¶¶ 99-107; CCB at 14-19)

Daramic argues that Flex-Sil constitutes its own product market because it is unique. (RB at 12) Daramic further argues that customers' continued purchases of Flex-Sil, despite its higher cost, indicates that it is not in the same product market. (*Id.* at 12) Even assuming these facts are correct, Daramic has the law wrong. *Hack v. The Presidents and Fellows of Yale College,* 237 F.3d 81, 86 (2d Cir. 2000) (an admittedly unique product, a Yale education, is not its own product market); *SPAHR v. Leegin Creative Leather Products* , 2008 WL 3914461, at *11 (E.D. Tenn. Aug. 20, 2008) (For a single product to constitute its own market, it must be "so unique that there are no substitutes reasonably interchangeable with them in the market.").

"Courts have repeatedly rejected efforts to define markets by price variances or product quality variances." *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.* , 889 F.2d 524, 528 (4th Cir. 1989). "[T]he relevant product market is defined by the (reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.)" *Id.* The *du Pont* (cellophane) case is directly on point. *United States v. E. I. du Pont de Nemours & Co. ("du Pont")* , 351 U.S. 377 (1955). There, the Government argued that cellophane constitutes a product market separate from other wrapping materials because cellophane was three times as expensive as other materials like wrapping paper. (*Id.* at 380) The Court disagreed and held that in determining the market, "it is the use or uses to which the commodity is put that control." (*Id.* at 395-396) Thus, although cellophane cost three times as much as some other wrapping materials and had superior characteristics, they all belonged in the same product market in the Court's view because the were functionally interchangeable and because du Pont lowered its prices for cellophane in order to compete with these lower priced products. (*Id.* at 401)

Similarly here, Flex-Sil's unique characteristics do not place it in its own product market. Flex-Sil is functionally interchangeable with Daramic HD and CellForce – all of these are used

in the deep-cycle market for golf cart, scrubber, and scissor lift batteries. (*See, e.g.,* PX1791 at 001 (Daramic's own brochure marketing all three products for golf cart batteries); CCB at 13-20) Daramic specifically introduced HD to compete in deep-cycle with Flex-Sil. (CCFOF ¶¶ 356-357) Customers consider Daramic HD and Flex-Sil to be substitutes. (*See* CCFOF ¶¶ 375-384) In fact, customers offer the two products in the same batteries, sold under the same name, for the same price. (CCFOF ¶¶ 376, 378) Daramic is also wrong that customers will not use Daramic HD for their higher end, OE batteries, and thus do not consider the products in the same market. RB, at 13; *see* Wallace, Tr. 1934-1935, 1939; CCFOF ¶¶ 100, 432-433 [redacted].

As in *du Pont*, while Flex-Sil may sell for a higher price, this does not mean it cannot be in the same product market. Rather, as in *du Pont*, the products compete because the price of Flex-Sil was constrained by Daramic HD. (CCFOF ¶¶ 330-334, 395-430); *du Pont*, 351 U.S. at 401. [redacted] **(Gilchrist, Tr. 379-380, 406-407, 526, in camera; Gillespie, Tr. 2947-2950 [redacted] 2951-2953** [redacted] Because "[s]ensitivity to price change, not price differential, is usually regarded as a proper element to measure cross-elasticity of demand," Flex-Sil and HD belong in the same product market. *American Crystal Sugar Co. v. Cuban-American Sugar Co.* , 259 F.2d 524, 530 (2d Cir. 1958) (*citing Du Pont* , 351 U.S. at 395) (finding that cane and beet sugar constitute a single product market despite price differentials).

Daramic argues that because customers have not already substituted all of their sales from Flex-Sil to the lower priced HD they would not switch in response to a SSNIP in Flex-Sil. Here, the evidence undisputedly shows that buyers shift purchases from Flex-Sil to HD, and have considered shifting additional purchases, and that Microporous reduced its price on all Flex-Sil

sale to some customers to prevent buyer substitution to HD. (CCFOF ¶¶ 395-424) As Mr. Gilchrist testified: [redacted] (Gilchrist, Tr. 526, *in camera*) The evidence therefore indicates that customers *would* shift enough purchases from Flex-Sil to HD in response to a SSNIP to defeat the price increase, the proper question in a *hypothetical* monopolist test.

[redacted] (PX0033 at 005-009, *in camera,* 012-018, *in camera* (Simpson Report); c.f. Kahwaty, Tr. 5331-5332, *in camera* [redacted] *c.f.* Wallace, Tr. 1977-1979; Qureshi, Tr. 2044, 2090 (U.S. Battery wanted to switch up to 50% with HD but Daramic refused))

B. Geographic Market

Daramic advocates for a global geographic market. Yet, Daramic cannot avoid the facts: it analyzes its own markets in terms of a North American geographic mar ket, price discriminates between markets, provides local supply to North American customers that prefer and often demand local supply, and its continued price increases have not caused any North American customers to switch to supplies from any foreign producers. (*See* CCB at 28-33)

[redacted] (Roe, Tr. 1799, *in camera*; CCFOF ¶¶ 164-169) Price discrimination is thus not just possible, but ongoing. In such a market, the Merger Guidelines advocate looking at particular locations where a hypothetical monopolist would profitably and separately impose a SSNIP. (Merger Guidelines, § 1.22) As Dr. Simpson concluded, a hypothetical monopolist could impose such a price increase on buyers in North America. (Simpson, Tr. 3183)

Daramic's claim that imports from Asia might defeat price discrimination is unsupported. Daramic's significant price discrimination has not led to any importation by North American customers. [redacted] [19] [redacted] (CCFOF ¶¶ 192, 213, 234, 252); *see* also Kahwaty Tr. 5288-5289, *in camera* [redacted])

Absent evidence of any possible other source for supply, Daramic argues that it would be "economically feasible" for North American customers to import separators from **Daramic's** Thailand facility to North America. (RB at 16) Would Daramic really sell product from its own Thailand facility knowing it was being used to undercut its own prices in North America? This has never happened and makes no sense.

Daramic then says that some purchasers overseas buy from North America. (RB at 15) However, whether customers overseas buy from a non-local supplier is irrelevant. The issue is, whether North American customers, would in fact switch to a distant supplier in response to a SSNIP price increase in its local supply. (*See* Merger Guidelines § 1.21 (considering whether buyers have in fact shifted purchases in response to changes in price)) [redacted] (Seibert, Tr. 4267, *in*

[19] **{Hall, Tr. 2727, *in camera* [redacted] Hall, Tr., 2734-2736, *in camera*, 2745, *in camera* [redacted]; PX0907, *in camera* (Kung, Dep. 153, 155-156 [redacted]; 176 [redacted]); Gillespie, Tr. 3025-3029, *in camera* [redacted]**