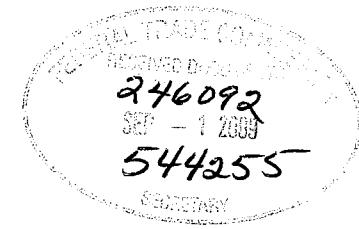


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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)
Polypore International, Inc.,) Docket No. 9327
a corporation,) Public Document
Respondent.)

)

**NON-PARTY HOLLINGSWORTH & VOSE COMPANY'S MOTION
FOR LIMITED INTERVENTION AND MEMORANDUM IN SUPPORT**

Non-party Hollingsworth & Vose Company ("H&V") moves, pursuant to 16 C.F.R. § 3.14(a), for leave to intervene in this action for the limited purpose of opposing any order or remedy affecting its rights and in particular its contractual rights arising under the March 23, 2001 Cross Agency Agreement between H&V and Daramic, Inc. (the "Cross Agency Agreement" or the "Agreement"),¹ providing for [REDACTED]

[REDACTED] }

H&V's intervention satisfies the requirements of 16 C.F.R. § 3.14(a).

Complaint Counsel has asserted in this case that Daramic, as a part of an unlawful pattern of anticompetitive conduct intended to monopolize certain markets for PE battery separators, entered into the Cross Agency Agreement and the non-competition provisions in Section 4 thereof "in order to prevent H&V from entering the PE separator market." (Compl. ¶ 47.) As a remedy for Daramic's alleged unfair competition with respect to the Cross Agency Agreement, Complaint Counsel seeks an order – not only requiring Daramic to cease and desist from enforcing the non-competition provisions with respect to PE battery separators – but also

¹ A copy of the Cross Agency Agreement is attached hereto as Exhibit 1. H&V believes that the Agreement was admitted into evidence as PX 0094.

compelling Respondent to modify the Agreement in order to *rescind H&V's rights* arising under Section 4(a) of the Agreement.

Fundamental principles of due process prohibit such an order. H&V was not a party to this action, and no claims were asserted against it. Absent a full and fair opportunity to be heard, including through the presentation of evidence and the right of cross-examination, H&V's contractual rights may not be adjudicated. In addition to the constitutional infirmity of Complaint Counsel's proposed rescission, the requested remedy is overbroad and not reasonably related to the unlawful practices alleged to have been committed by Daramic and therefore an impermissible exercise of the Commission's remedial authority. At issue in this case with respect to the Cross Agency Agreement was Daramic's conduct, not H&V's.

These "substantial issues of law" relating to the Cross Agency Agreement are unique to H&V and have not and will not be raised by the Respondent. Their consideration is of utmost importance, will not materially delay the proceedings and will avoid ancillary litigation. Under the standards for intervention, H&V should be permitted to intervene to be heard on the merits of the proposed remedy insofar as it affects H&V's rights.

BACKGROUND

Through its Battery Products Business Unit, H&V has manufactured, sold and distributed, among other products, an AGM battery separator, for use in valve-regulated lead acid ("VRLA") batteries. Unlike PE battery separators made by Daramic, H&V's AGM battery separators cannot be used in flooded lead acid batteries.

In March 2001, Daramic and H&V entered the Cross Agency Agreement providing for

[REDACTED]

[REDACTED]

[REDACTED] } The Agreement contemplated that [REDACTED]

[REDACTED]

[REDACTED] } As
H&V witnesses testified in deposition, [REDACTED]

[REDACTED]
[REDACTED] } (PX0917 at 077 (Cullen Dep. at 321-22, *in camera*)).²

Indeed, [REDACTED]
[REDACTED] } (PX0917 at 077-078 (Cullen Dep. at
322-24, *in camera*)). [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } (Agreement § 4(a-
b); PX0917 at 012 (Cullen Dep. at 47-48, *in camera*); PX0925 at 018 (Porter Dep. at 65-66, *in
camera*)).³ Section 4 of the Cross Agency Agreement states in relevant part:

{ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] }

(Agreement § 4(a-b)).

The Cross Agency Agreement was { [REDACTED]
[REDACTED]
[REDACTED] }

Complaint Counsel has alleged that Daramic did not have a proper procompetitive

² Excerpts of PX0917, with relevant passages highlighted, are attached hereto as Exhibit 2.

³ An excerpt of PX0925, with relevant passages highlighted, is attached hereto as Exhibit 3.

purpose to enter the Cross Agency Agreement and that it utilized the Cross Agency Agreement to solidify its unlawful monopolization of several PE battery separator markets. Complaint Counsel's allegations include:

- “[T]he evidence establishes that *Daramic induced H&V to agree not to compete in several markets* – markets that have long been dominated by Daramic.” (CC Post-Trial Br. at 67 (emphasis added)).
- Upon learning that H&V was exploring the possibility of entering the PE business, “[in] order to block this competitive threat, *Daramic approached H&V* and proposed an ‘alliance’.” (*Id.* at 63 (emphasis added)).
- “*Daramic’s principal purpose* in contracting with H&V was to keep H&V out of the PE separator market.” (CC Pre-Trial Br. at 32 (emphasis added)).
- The relationship with H&V was part of “Daramic’s pattern of coercive and exclusionary behavior to obtain or maintain monopoly status in several relevant markets.” (*Id.* at 29.)⁴

The “relevant markets” where Complaint Counsel alleges the Agreement operated unlawfully are markets for PE battery separators. Complaint Counsel maintains that AGM battery separators, such as those made by H&V, do not compete with Daramic’s PE separators in the same markets. (See CC Post-Trial Br. at 25 & n.16 (“In North America, separators for SLI batteries are made from PE Purchasers of SLI separators for flooded batteries cannot switch to using an AGM separator.”)).

This case was limited to markets for PE separator and Daramic’s conduct with regard to the Cross Agency Agreement; the AGM battery separator industry was not at issue. The Commission has not adjudicated whether the non-competition provisions of the Agreement are unreasonable restraints of competition with respect to the AGM battery separator industry. The essence of Complaint Counsel’s claim here is that the non-competition provisions in Section 4(b)

– { [REDACTED]

⁴ H&V does not concede that Daramic’s motives were improper or that the non-compete in Section 4(b) was not a reasonable ancillary restraint, but agrees with Respondent that Daramic had a proper procompetitive purpose to expand its sales and distribution globally and that the non-compete with respect to PE separators was reasonably necessary to allow for the operation of the joint venture.

{ – were overbroad or not otherwise reasonably necessary restraints ancillary to a legitimate sales agency agreement for PE battery separators. Nevertheless, in Part VIII of its proposed order for relief, Complaint Counsel seeks not only to prohibit Daramic from enforcing Section 4(b), *but also to rescind the provisions of Section 4(a), and H&V's rights thereunder,* { ordering Respondent as follows:

1. Within fifteen (15) days after the date this Order becomes final: (a) *modify and amend the H&V Agreement in writing to terminate and declare null and void*, and (b) cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing, *the covenant not to compete set forth in Section 4 of the H&V Agreement*, and all related terms and definitions, as that covenant applies to North America and to actual and potential customers within North America.

2. Within thirty (30) days after the date this Order becomes final, file with the Commission the written amendment to the H&V Agreement (“Amendment”) that complies with the requirements of Paragraph VI.A.1 [*sic*] . . .

(CC Proposed Order VIII.A, at 26-27 (emphases added)). While rescission of Section 4(b) could reasonably remedy purportedly illegal activity arising from Daramic’s actions in entering the agreement, rescission of Section 4(a) could not and does not address the government’s claim in this case. To the contrary, rescission of Section 4(a) would permit Daramic to {
{
{ – the very reason for the non-competition provision.

ARGUMENT

A. H&V Must be Permitted to Intervene to Address Substantial Issues of Law Not Already Raised with Respect to Remedies Relating to the Cross-Agency Agreement.

Under the FTC Act, any non-party “may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person” upon “good cause shown.” 15 U.S.C. § 45(b); *see* 16 C.F.R. § 3.14(a) (“The Administrative Law Judge or the Commission may by order

permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.”). In order to demonstrate good cause, it must be shown that “the persons seeking such intervention desire to raise substantial issues of law or fact which would not otherwise be properly raised or argued; and that the issues raised are of sufficient importance to warrant additional expenditure of Commission resources on a necessarily longer and more complicated proceeding.” In re *Ky. Household Goods Carriers Ass'n*, Dkt. No. 9309, 2004 FTC LEXIS 84, at *3 (Mar. 10, 2004) (Chappell, A.L.J.); In re *Kellogg Co.*, Dkt No. 8883, 1978 FTC LEXIS 280, at *8, *9 n.9 (June 9, 1978) [*Kellogg I*] (similar). The ALJ has discretion in determining whether to limit intervention to certain portions of the proceeding, and if so, to what extent. See *Kellogg II*, 1979 FTC LEXIS 89, at *2-*3.

There is good cause for H&V’s intervention for the narrow purposes sought by this Motion. If Complaint Counsel prevails with respect to the relief sought by Part VIII of its proposed order, H&V’s contract rights will have been adjudicated without its having been a party to this action. No other party can adequately represent H&V’s interest with respect to this issue: Complaint Counsel seeks abrogation of the entirety of Sections 4(a) and 4(b) without regard to the proper scope of its claim for relief. While Respondent has an interest in avoiding any modification of the Cross Agency Agreement, it does not have the same interest as H&V to preserve H&V’s rights with respect to AGM battery separators. Respondent stands to gain unfairly by virtue of Complaint Counsel’s requested remedy by using H&V’s confidential information and goodwill to compete in the sale of AGM battery separators.

Intervention should be granted as a matter of right where, as here, “the intervenors are persons whose contract rights are at stake.” *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 184 (2d Cir. 1974); see *Kellogg I*, 1978 FTC LEXIS 280, at *6 (“I believe, largely on the strength of the Second Circuit’s decision in *PepsiCo*, that a stranger may intervene as a matter of right in a Commission proceeding.”). *PepsiCo* is consistent with constitutional principles of due process,

which require that a party whose contractual rights are at stake be entitled to be heard at a meaningful time and in a meaningful manner in the disposition of those rights, as this Commission has recognized. *See Kellogg I*, 1978 FTC LEXIS 280, at *11-*12 (holding that procedural due process requires that the owner of a property interest be given notice and an opportunity to be heard before the property interest is divested); *see also Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345, 354 (2d Cir. 2009) (a court disposes of a property interest in reallocating contract rights and due process requires that each affected individual have a fundamentally fair chance to present evidence, and to rebut opposing submissions); *cf. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (a person in jeopardy of serious loss must be given notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

Thus, this Court must use its broad discretion to allow H&V to participate meaningfully in addressing a proposed remedy which directly threatens H&V's contractual rights.

B. H&V's Intervention to Address these Significant but Narrowly Defined Issues Will Not Unduly Delay these Proceedings and Will Avoid Ancillary Litigation on the Propriety of the Commission's Order for Relief.

The issues raised by H&V on the remedy question are of critical importance to protecting H&V's constitutional rights and to assuring the most appropriate formulation of relief, in the event of a finding of liability against Daramic. Additional briefing by H&V on these narrow issues in the event the requested remedy is granted will not materially delay the resolution of this matter. Ancillary litigation will.

H&V's participation as a limited intervenor will aid the Commission in selecting a narrowly tailored remedy without undue expenditure of additional resources. Remedies imposed by the Commission must bear a "reasonable relation to the unlawful practices found to exist." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957); *see, e.g., In re Ky. Household Goods Carriers Ass'n*, 139 FTC 404, 506 (2004) (Chappell, A.L.J.). By contrast, the remedy sought by

Complaint Counsel here is impermissibly overbroad. To the extent the proposed order merely requires Respondent to cease and desist from enforcing restrictions on H&V's competition in the sale of PE battery separators and to modify the Agreement such that Section 4(b) is voided, the remedy is appropriately tailored to address the claims asserted in this case. To the extent the proposed order also purports to void or prohibit the implementation of Section 4(a), it is not proper. Requiring Respondent to "modify and amend the H&V Agreement in writing to declare null and void . . . the covenant not to compete set forth in Section 4 of the Agreement" is a disproportionate remedy not tailored to redress the alleged wrongdoing by Daramic with respect to the alleged PE battery separator markets.

Issues concerning the proper scope of the Commission's remedial authority are vital. They can be addressed efficiently in this action in any briefing following the initial decision. H&V should be permitted to intervene for that purpose.

CONCLUSION

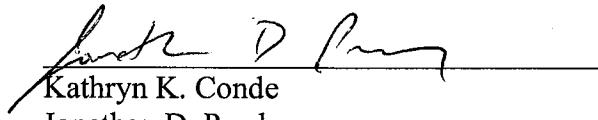
For the foregoing reasons, H&V requests that it be permitted to intervene in this action for the limited purpose of addressing any remedy affecting its rights, including its rights under the Cross Agency Agreement.

Dated: September 1, 2009

Respectfully submitted,

HOLLINGSWORTH & VOSE COMPANY

By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2009, I filed via overnight delivery and electronic mail delivery an original and two copies of the foregoing Non-Party Hollingsworth & Vose Company's Motion for Limited Intervention and Memorandum in Support (Public) and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-135
Washington, DC 20580
secretary@ftc.gov

I hereby certify that on September 1, 2009, I caused to be served via electronic delivery and first-class mail delivery a copy of the foregoing Non-Party Hollingsworth & Vose Company's Motion for Limited Intervention and Memorandum in Support (Public) on:

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{ Exhibits 1, 2, and 3 are filed *in camera* }

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

[PROPOSED] ORDER

Upon consideration of Non-Party Hollingsworth & Vose Company's ("H&V") Motion for Limited Intervention and Memorandum in Support,

It is ORDERED that the Motion for Limited Intervention is GRANTED. H&V will be permitted to intervene in this action for the limited purpose of addressing any remedy affecting its rights, including its rights under the Cross Agency Agreement.

D. Michael Chappell
Administrative Law Judge

Dated: September ___, 2009