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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

PUBLIC

Docket No. 9327

COMPLAINT COUNSEL'S REPLY BRIEF TO INTERVENOR  
HOLLINGSWORTH & VOSE COMPANY'S BRIEF ON REMEDIES  
AFFECTING ITS CONTRACTUAL RIGHTS

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October 13, 2009

**I. INTRODUCTION**

Intervenor Hollingsworth & Vose Company (“H&V” or “Intervenor”) was a party with Daramic to an unlawful agreement in restraint of trade. That agreement, known as the Cross Agency Agreement, [REDACTED].} (PX0158, *in camera*).<sup>1</sup> Fearing future competition from Daramic in the manufacture and sale of AGM battery separators, H&V now requests protection. It asks this Court to constrain its relief to Section 4(b) of the Agreement, which [REDACTED] [REDACTED]. For the reasons explained below, H&V’s request should be denied.

**II. CROSS AGENCY AGREEMENT**

All joint sales and promotional activities between Daramic and H&V have ceased. H&V is not petitioning this Court to limit the remedy with respect to the Agreement so that the company can continue a productive, ongoing relationship with Daramic that benefits their customers. Rather, H&V seeks to preserve Section 4(a) of the Cross Agency Agreement, which [REDACTED] [REDACTED] [REDACTED].} (CCFOF ¶ 1189; H&V FOF ¶ 7). As the facts surrounding the formation of the Agreement make clear, however, [REDACTED] [REDACTED] [REDACTED].} (CCFOF 1180-1182).

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<sup>1</sup> This central fact is undisputed. See H&V FOF ¶12; Respondent’s Responses to Complaint Counsel’s Proposed Findings of Fact (hereinafter, “RRFOF”) ¶1189.

**III. THE PROPOSED RELIEF DOES NOT VIOLATE H&V'S RIGHT TO PROCEDURAL DUE PROCESS**

A. The Government Provided Proper Notice to H&V Concerning its Contractual Rights in this Litigation

Intervenor's claim that it was deprived of notice that its contractual rights were at stake in this litigation lacks merit. As the Court previously noted, "[i]t cannot reasonably be disputed that H&V was aware of the allegations of the Complaint well before filing [its] motion to intervene." (See Order on Motion for Leave to Intervene by Non-Party H&V, dated September 23, 2009 (the "Order on Intervention by H&V", at 2). H&V had more than adequate notice that its contractual rights under the Cross Agency Agreement were at issue in this matter, as demonstrated by the clear and plain language of the Complaint itself. (See Complaint at Section XIV, specifically proposing, among other among other remedies, "an order that requires Daramic to cease and desist from the conduct, agreements, and attempts to enter agreements alleged in the Complaint..."; see also ¶¶ 41 and 47 specifically alleging that the Agreement is an unlawful agreement in restraint of trade, and ¶ 38.a. specifically alleging that Daramic's conduct eliminated potential competition with H&V). Throughout discovery in this matter, H&V and its counsel were informed repeatedly that Complaint Counsel considered [REDACTED] [REDACTED] }.

B. H&V Had a Meaningful Opportunity to Be Heard

Despite its awareness, H&V chose not to intervene while this matter was in active litigation. It had a full and fair opportunity to avail itself of the benefits and burdens of "the discovery [and] trial rights of a party," but it decided not to participate. Intervenor Hollingsworth & Vose Company's Brief on Remedies Affecting its Contractual Rights,

September 30, 2009. H&V simply filed three motions for *in camera* treatment<sup>2</sup> and on May 12, 2009, filed a motion to quash the subpoenas *ad testificandum* served on H&V employees, Robert Cullen and Kevin Porter. In light of the advanced stage of these proceedings, and the ability of the Court to protect H&V's legitimate interests without artificially limiting its remedial authority, Complaint Counsel respectfully requests that the Court reject H&V's proposed modification.

**IV. COMPLAINT COUNSEL'S PROPOSED REMEDY IS PROPERLY TAILORED TO REDRESS THE ALLEGED WRONGDOING BY RESPONDENT**

Any remedy to address Daramic's anticompetitive conduct must, by definition, involve its rights and obligations under the Agreement – especially those in Sections 4(a) and (b). Therefore, the major premise of H&V's procedural due process argument – that it possesses “a constitutionally protected property interest” in the enforcement of [REDACTED] [REDACTED] the Agreement – is invalid. Moreover, such a premise has no foundation in antitrust jurisprudence. Businesses do not have legitimate interests in protection from competition at large.<sup>3</sup> *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (competitors cannot seek damages for lost profits resulting from reduced competition); *Heatron, Inc. v. Shackelford*, 898 F.Supp. 1491, 1500 (D. Kan., 1995) (in deciding whether to enforce covenant not to compete, court noted the desire to prevent “ordinary competition” was not a protected interest). Protection from market forces, especially when obtained through private agreement, is antithetical to basic antitrust policy. *See, e.g., Nynex Corp. v. Discon, Inc.*,

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<sup>2</sup> H&V submitted motions for *in camera* treatment on April 9, 2009; May 28, 2009; and June 16, 2009.

<sup>3</sup> Statutory immunities and exemptions from the antitrust laws are not at issue here, and in any event, they are the exception and not the rule. *See, e.g.,* Statement of Alden F. Abbott before the Antitrust Modernization Commission on Statutory Immunities and Exemptions, Dec. 1, 2005, located at <http://www.ftc.gov/os/2005/12/051202statutory.pdf>.

525 U.S. 128, 134 (1998); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990); *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995). *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 377-80 (1977) (economic self-interest of defendant in enforcement of anticompetitive contract terms not cognizable under Sherman Act Sections 1 and 2).

Complaint Counsel does not seek a remedy that requires or allows the disclosure by Daramic or H&V of each other's confidential business information. H&V has a legitimate business interest in the protection of its intellectual property rights and other proprietary company information that it may have shared with Daramic while the Agreement was in effect. (See CCFOF ¶ 1195, noting that to the extent the parties exchanged any confidential information, [REDACTED]; see also Response to H&V FOF ¶ 13, showing that [REDACTED] [REDACTED]}.) Rescission or limitation of the non-compete provisions in Sections 4(a) and 4(b) of the Agreement can occur while [REDACTED]. Such relief would be "narrowly tailored and reasonably related to the violation of law found to exist," which in this case results from Daramic's reciprocal agreement with H&V [REDACTED] [REDACTED]. *In re Kentucky Household Goods Carriers Ass'n*, 139 FTC 404, 506 (2004) (Initial Decision). This Court has the discretion and the ability to accommodate confidentiality protection in its Order.

## V. CONCLUSION

For the foregoing reasons and the reasons outlined in Complaint Counsel's Post-Trial Brief, the Court should adopt section VIII of Complaint Counsel's Proposed Order.

Dated: October 13, 2009

Respectfully submitted,

Handwritten signature of J. Robert Robertson in black ink, with the initials "JRR" written to the right of the signature.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2009, I filed via hand and electronic mail delivery an original and two copies of the foregoing public version of Complaint Counsel's Reply Brief to Intervenor Hollingsworth & Vose Company's Brief on Remedies Affecting its Contractual Right with:

Donald S. Clark, Secretary  
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I hereby certify that on October 13, 2009, I filed via hand delivery four copies of the foregoing public version of Complaint Counsel's Reply Brief To Intervenor Hollingsworth & Vose Company's Brief on Remedies Affecting Its Contractual Rights with:

The Honorable D. Michael Chappell  
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I hereby certify that on October 13, 2009, I filed via electronic mail delivery a copy of the foregoing public version of Complaint Counsel's Reply Brief To Intervenor Hollingsworth & Vose Company's Brief on Remedies Affecting Its Contractual Rights with:

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