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 BRIEF

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JULY 17, 2009

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REVISED ERRATA SHEET

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

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

Dated: July 16, 2009

Respectfully Submitted

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INTRODUCTION

Polypore International Inc. ("Daramic") acquired Microporous, its closest and only competitor in the deep-cycle, motive and UPS battery-separator markets. This is a merger to monopoly. The acquisition also eliminated a third competitor in the market for automotive battery separators ("SLI"), leaving only the dominant supplier, Daramic, and Entek in North America. Daramic and Entek rarely competed aggressively in the past, and the acquisition of Microporous has returned the SLI separator market to a duopoly, which no court has ever approved in a Section 7 case.[1] Daramic's other conduct goes beyond the pale. Daramic: (i) sued Microporous to keep it from competing; (ii) bought Microporous to keep it from competing; (iii) eliminated other competition; (iv) held back products from customers to force them into contracts; (v) raised prices immediately after the acquisition of Microporous; (vi) sued one customer for not agreeing to the higher prices; and (viii) threatened another customer with a lawsuit if it did not agree to higher prices. In short, Daramic's unrestrained exertion of market power is shocking.

As Douglas Gillespie of Exide testified:

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

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

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

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

violation of the law. Indeed, the facts at trial revealed an acquisition and other conduct that have gone far beyond what the law proscribes. For example, as your Honor has explained, to prove a Section 7 violation, Complaint Counsel needs to prove far less than what is alleged in this case. Complaint Counsel needs to show only that "'the effect of [the] acquisition may be substantially to lessen competition, or tend to create a monopoly.'"[3] To show that competition "may be substantially" lessened, all that Complaint Counsel must show is that the acquisition would produce "'a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of the firms in that market.'" *CB&I Initial Decision*, at 88 (citations omitted). Complaint Counsel did so, and Daramic failed to rebut that case.

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

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

[3] *In re Chicago Bridge & Iron Co., N.V.*, et al., 2003 WL 21525006, Dkt. No. 9300 (Initial Decision, June 18, 2003) [hereinafter, "CB&I Initial Decision"] at 84-85, *aff'd*, 2003 WL 22217293 (F.T.C. Sep. 10, 2003), *aff'd Chicago Bridge & Iron Co., N.V., et al. v. FTC*, 534 F.3d 410 (5th Cir. 2008), (citing 15 U.S.C. § 18 and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963)).

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

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

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

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

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

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

Bearing in mind that the full remedy in this case is warranted if the evidence shows a mere likelihood that the acquisition lessens competition substantially in any one of these four markets, additional evidence showing Daramic's undisputed, brazen conduct has taken us far beyond what it required by the law, and is essentially unrebutted. For example, Daramic failed to offer any evidence to counter Complaint Counsel's evidence of monopoly, except to say that it simply raised prices to recover cost increases and forced customers into exclusionary contracts for planning purposes. Yet, no other competitor has ever been able to raise prices to the levels Daramic was able to impose on its customers. [redacted] (Seibert, Tr. 4278, *in camera*). Thus, cost cannot be the real basis for the amount of increases.

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

[5] Daramic's hard-ball tactics are simply astounding. *See e.g.*, PX1793 at 001, *in camera* (Hauswald: Make [redacted] sign the contract or "no product today," show them "no mercy"); Hauswald Tr. 743-744, 1132-1133, *in camera* [redacted] Bregman, Tr. 2901-2903, 2906; PX1050, *in camera* (Hauswald told [redacted] Roe, Tr. 1267-1268 (offer "all or nothing" to C&D); Hall,

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

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

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

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

[redacted]

* * *

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

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

I. Factual Background

As a result of Daramic's acquisition of Microporous on February 29, 2008, there is only one manufacturer of deep-cycle, motive, and UPS separators in North America today, and only two manufacturers of SLI separators. The merger is a final step in a long history of exclusionary conduct by Daramic intended either to monopolize or to protect its existing monopoly power in flooded battery separator markets.

Daramic's exclusionary behavior began almost 10 years ago, soon after Microporous acquired its polyethylene ("PE") battery separator technology from a company called Jungfer. Jungfer built the PE separator line located in Piney Flats, Tennessee for Microporous in 2001. Daramic acquired Jungfer almost immediately thereafter and shut it down {[redacted]} and then sued Microporous to prevent it from selling SLI in Europe. (PX2124 at 002, *in camera*; PX2241, *in camera*); *see also* CCFOF ¶¶ 657-659).

While much of the exclusionary conduct at issue in this case revolves around Respondent's efforts to prevent Microporous from expanding its presence in Daramic's PE

markets, Daramic also entered into illegal market division agreements. When Daramic learned that an Absorptive Glass Mat ("AGM") separator manufacturer, Hollingsworth & Vose ("H&V"), might enter one or more of the markets for PE separators, it entered into an agreement with H&V, [redacted]. (PX0169 at 001; PX0035 at 005). This market division agreement took effect March 23, 2001, [redacted]. (PX0094, *in camera*; PX0158, *in camera*). This agreement is an unreasonable, horizontal restraint of trade and is illegal.

Daramic's actions had the intended consequences of eliminating the possibility of future competition, but only by acquiring Microporous did Daramic fully succeed in its efforts. Daramic documents demonstrate that as early as 2003 Daramic understood that Microporous was planning to expand. **{*See* PX0758 at 017, *in camera*** [redacted]. Shortly thereafter, Daramic began a campaign of exclusionary conduct. After Daramic learned in 2003 that Microporous [redacted] (PX0744 at 001). The President of Daramic then put an acquisition of Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic simply as [redacted] (PX0932).

In 2005, when Daramic learned that Microporous planned to build a line to support [redacted] business, it concluded that Microporous [redacted]

[redacted] (PX0168 at 002). Daramic decided that it should fight this threat because [redacted] (PX0694 at 001). [redacted] (*Id.* at 001; PX1211 at 001, *in camera*; PX0456 at 001-002).

When Daramic learned that another customer, [redacted] needs. (*See* CCFOF ¶¶ 1069-1071). Because of capacity restraints at Microporous and Entek, Daramic knew its capacity was essential to [redacted] and its response prevented [redacted] from switching any of its business to Microporous. (*See* CCFOF ¶¶ 1072-1076).

The last steps taken by Daramic to exclude Microporous occurred in 2007, just prior to the merger. In 2007, Daramic devised the "MP Plan." (PX0258; PX0255; Roe, Tr. 1285-1286, 1289-1290, 1292-1294, 1350-1354). Pursuant to this plan, Daramic entered into long-term, exclusionary contracts with key customers to prevent Microporous from contracting with them. (*See* CCFOF ¶ 725). Daramic believed that by contracting with these customers, Microporous's expansion could be slowed. (*See* CCFOF ¶¶ 726-727, 735). Daramic's conduct prevented Microporous from acquiring sales opportunities needed for its expansion. Despite Daramic's continued efforts, Microporous finally managed to build a new facility in Feistritz, Austria in 2008. Daramic bought Microporous just weeks before the new factory was set to begin full commercial production. Microporous's European expansion would have freed up significant

capacity for the North American markets, and Microporous had marketed this capacity in North America for months before it was acquired and had even agreed to supply Exide with SLI separators. (*See* CCFOF ¶¶ 618, 678-679, 681).

Daramic thus believed that it needed to [redacted] (PX0168 at 002; PX0694 at 001). Daramic believed an acquisition would [redacted]. (PX0932). Daramic finally acquired Microporous on February 29, 2008.[6]

Daramic's documents analyzing the 2008 acquisition of Microporous demonstrate its anticompetitive intent. Presentations to Daramic's Board highlight that: [redacted] PX0203 at 088 (Hauswald, Tr. 776-781). Indeed, Daramic management asserted to the Daramic Board that [redacted] (PX0203 at 089, *in camera*; Hauswald, Tr. 781, *in camera*). All of the financial projections that were done at Daramic and presented to the Daramic Board of Directors incorporate expectations and assumptions that the merger would [redacted]. The management of the former Microporous conveyed similar analyses to their board, asserting that as a result of the acquisition,

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

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

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

(PX1109 at 003).

These predictions proved to be prescient. The acquisition reduced or completely eliminated competition in four markets for flooded battery separators: (1) deep-cycle separators; (2) motive separators; (3) UPS separators; and (4) SLI separators. There are no effective substitutes for the Microporous and Daramic products in the first three markets, and only one competitor in SLI separators for North America. As a result, Daramic has gained significant market power. Since the acquisition, it has forced customers to pay substantially higher prices. (*See* CCFOF ¶¶ 422-424, 467, 465).

In SLI separators, Daramic classified Microporous as an emerging competitive threat whose presence had already had a significant competitive impact. The only other competitor to Daramic in this product market is Entek. (*See* CCFOF ¶ 547). Microporous had targeted an expansion into this business for years, and had competed to supply [redacted] SLI separator customers: {[redacted]} (*See* CCFOF ¶¶ 554-555, 604-605, 607). It was only because of Daramic's efforts to ward off the Microporous threat that Microporous had not secured commercial sales. Yet, Microporous's efforts to obtain business with SLI customers had already led to lower SLI separator pricing.

The acquisition also eliminated Microporous as a uniquely positioned entrant into the UPS market. Prior to the acquisition Daramic had a monopoly in the North American market for UPS separators for flooded batteries. (*See* CCFOF ¶ 507). Microporous, however, had developed a PE separator for the UPS market that competed with Daramic's product and had an agreement to sell it to Enersys, which would have given Microporous more than half the market. (*See* CCFOF ¶¶ 503-504, 520).

There is no evidence of timely, likely, or sufficient entry from any other competitor that would counter such anticompetitive effects. Indeed, no other competitor has entered the North American market despite Daramic's achievement of monopoly in three of the four markets at issue and its anticompetitive conduct, including increased prices and its litigation and threatened litigation against customers who will not accept these monopolistic price increases. Nor is there any evidence of efficiencies that benefit competition or customers. (*See* CCFOF ¶¶ 1051-1056).

II. Daramic's Illegal Acquisition of Microporous

Section 7 of the Clayton Act prohibits acquisitions "in any line of commerce or in any activity affecting commerce . . . [if] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; *see Heinz*, 246 F.3d at 713. The Supreme Court has explained that Section 7 uses the word "may," because it "deals in 'probabilities, not certainties.'" *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505, (1974) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). Indeed, the language of Section 7 is "designed to arrest in its incipiency" acquisitions that may violate the Act. *United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 589 (1957).

Complaint Counsel may demonstrate its prima facie case by showing that the acquisition would lead to "undue concentration in the market for a particular product in a particular geographic area." *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). This evidence creates a "'presumption' that the transaction will substantially lessen competition." *Id.* Upon such a showing, the burden shifts to Respondent to rebut the presumption with evidence that "'shows that the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246

F.3d at 715 (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975)); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1072 (D.D.C. 1997). Respondent cannot do so here.

A. The Relevant Product Markets are Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries

A prima facie Section 7 case typically "rests on defining a market and showing undue concentration in that market." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (*citing Baker Hughes*, 908 F.2d at 982-83).[7] In determining relevant product markets, courts have traditionally considered two factors: (1) "the reasonable interchangeability of use [and (2)] the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. In other words, the issue is "whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other." *Staples*, 970 F. Supp. at 1074 (internal quotations omitted). Cross-elasticity of demand refers to the "responsiveness of the sales of one product to price changes of the other." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956) (finding cellophane in same market as other wrapping products even though the prices were very different); *See* 2B Phillip Areeda et al., Antitrust Law ¶ 562a, at 371 (3d ed. 2007) ("[A]ctual shifts between two products in response to – or even without – changes in their relative prices indicate a single market.").

"[T]he determination of the relevant market in the end is 'a matter of business reality – of how the market is perceived by those who strive for profit in it.'" *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) (citations omitted). Indeed, the Merger Guidelines, ¶ 1.0, explains that market definition must focus "solely on demand substitution factors," which is why "possible customer responses" are critical here. Thus, "'industry or public recognition of the

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

[market] as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities." *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 219 (D.C. Cir. 1986). "Courts generally will include functionally interchangeable products in the same product market unless factors other than use indicate that they are not actually part of the same market." *CCC Holdings,* 605 F. Supp. 2d at 38).

In this case, there are four relevant markets in which to properly assess the anticompetitive impact of Daramic's acquisition of Microporous: 1) separators for deep-cycle batteries; 2) separators for motive power batteries; 3) separators for UPS batteries; and 4) separators for SLI batteries.[8] In each case, the evidence demonstrates that the products in each relevant market are substitutes for each other, that competition from these products have had price effects upon the other products within each relevant market, and that the industry recognizes these market distinctions.

1. Deep-Cycle Battery Separators are a Product Market

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

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

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

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

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

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

[9] **{PX0319-003** [redacted]

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

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

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

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

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

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

"sweeper/scrubber" batteries. (Gilchrist, Tr. 305). Just prior to the acquisition, Microporous analyzed the deep-cycle separator market and found that ***only*** Microporous and Daramic competed in that market. (PX0078 at 007, *in camera*; Gilchrist, Tr. 305, 343, 363, 366-367)). Gilchrist testified that "Daramic HD" competed against both "Flex-Sil and CellForce" and that they lost "business to HD." (Gilchrist, Tr. 343, 368; McDonald, Tr. 3949 (lost sales from Flex-Sil to HD), 3955 (Microporous "worried" that they would lose sales to Daramic); PX0319 at 007 (2006 Daramic HD strategy update noting no competitive threat to HD in deep-cycle other than Microporous)). There is simply no question that Flex-Sil, CellForce, and HD competed in the deep-cycle market. (*Id.* Hauswald, Tr. 662 ("not surprised" that Daramic claims that HD, CellForce and Flex-Sil are the three products used in golf cart batteries in PX1791; PX0171 at 008), McDonald, Tr. 3911, 3944 (Daramic's HD and Microporous competed), 3948 ("no other competitor" other than Daramic in deep-cycle); Seibert, Dep. at 58 ([redacted]. Daramic's head of sales, Tucker Roe, had no problem identifying "deep-cycle as golf cart and floor scrubber[s]." (Roe, Tr. 1196-1197) Roe was clear that Daramic's HD was designed for the deep-cycle "market" to compete against "Flex-Sil." (Roe, Tr. 1200, 1209; PX0316 at 002)). Indeed, in Roe's words, Daramic was "aggressively pursuing this market," and he believed he could convert all of Exide's Flex-Sil purchases to HD. (Roe, Tr. 1211, 1789, *in camera*; PX1071 at 002).

Daramic's HD was far more than just a functional substitute for Microporous's Flex-Sil. It had a substantial economic force over the pricing of Flex-Sil. For example, over 90% of the "total market" for deep-cycle batteries (*i.e.,* Exide, U.S. Battery, and Trojan) all used Daramic HD as a competitive threat to Microporous's deep-cycle separators. (Gilchrist, Tr. 379-380) Daramic even positioned HD as a competitor in the deep-cycle market. (*Id.* at 381)

Microporous's CEO knew [redacted]. (Gilchrist, Tr. 467-468, *in camera*). Prior to the acquisition, Daramic even recognized the price elasticity between HD and CellForce. (Hauswald, Tr. 746-747; PX0749) [redacted] (Gilchrist, Tr. 526, *in camera*; *see also* CCFOF ¶ 392).

In short, any way one analyzes separators for deep-cycle batteries, it is clear that this is a distinct market within which only Flex-Sil, CellForce, and HD compete. No one else, including Asian producers, makes a deep-cycle separator. (Roe, Tr. 1216-1217). Dr. Simpson, the FTC's economic expert, also confirmed that deep-cycle battery separators constitute a separate market for antitrust purposes. (*See* CCFOF ¶ 62). He evaluated the critical loss and determined that even if there were a 5% increase in price, [redacted]. (PX0033 at 006, 012, *in camera*; Simpson, Tr. 3169-3172; Gillespie, Tr. 2933 (Switching to PE would not "make any sense")). As described above, customers have uniformly considered Flex-Sil, CellForce, and HD to compete against each other for deep-cycle products. For years, all the shifts of sales from Flex-Sil have been to HD and CellForce and nowhere else. As the Areeda treatise explains, "A single market is suggested where (1) many buyers shifted their purchases from *X* to *Y* during the specified period," 2B Areeda, *Antitrust Law*, ¶ 534e at 272. Even Dr. Kahwaty, Respondent's expert, [redacted]. (Kahwaty, Tr. 5328-5329, *in camera*).

Daramic has argued, however, that Flex-Sil is unique and that this somehow makes it a product market in itself. This argument ignores the commercial realities of competition and the law. Flex-Sil may, like all the other products in this case, have some unique attributes. Indeed,

Microporous's CEO reminded Daramic's counsel that CellForce was "unique" as well. (Gilchrist, Tr. 519, *in camera*). Yet, Flex-Sil and HD [redacted] (Whear, Tr. 4839, *in camera*). Indeed, [redacted]. (*See* Whear, Tr. 4783). Under the law, mere uniqueness of a product, however, does not result in a distinct product market if it competes against substitutes. *See, e.g., 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); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986) (small business computers was the relevant market, not just those that would run on BOSS software); *see also 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."). Flex-Sil, CellForce and HD may each have unique properties, but all compete against each other for the use in deep-cycle batteries, which is thus a market with just these three competitive products.[11]

The change in HHI for the deep-cycle separator market is {[redacted]} with a resulting HHI of 10,000. (Simpson, Tr. 3184-3185). Such a dramatic change is far above the change that the *Heinz* court said "create[d], by a wide margin, a presumption that the merger w[ould] lessen

[11] Daramic also argued that deep-cycle separators (HD and CellForce) are in the same market as SLI separators because two examples of these products overlapped in backweb thicknesses. That argument ignores the other aspects of these separators, such as rubber content, flexibility, cost and other factors that make the products competitive for their purposes. No one testified that he or she would use an SLI separator in a deep-cycle battery. Moreover, Daramic's claimed overlap in backweb thicknesses is misleading, because 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). [redacted].

competition." *Heinz*, 246 F.3d at 716; *see Merger Guidelines*, ¶ 1.51(c) (any change above 100, when the resulting HHI is 1800, creates a presumption of competitive harm).

2. Motive Separators are a Relevant Market

The motive power battery separator market is composed primarily of separators for forklift batteries. (*See, e.g.,* PX0922 at 010 (Roe, Dep. at 58, *in camera*); PX0185 at 006; PX1786 at 113 ("Motive power or so-called traction batteries are used for the propulsion of electric vehicles, primarily forklift trucks.")). These batteries serve as counterweights in the design of industrial vehicles and are among the largest batteries made. (*See* PX2110 at 035). These batteries require separators that are much thicker and larger than other separators. (*See* CCFOF ¶¶ 111-113). In North America, motive separators are made of PE or PE-rubber and have very different properties than separators used in other products. (PX1790 at 001). (*See* CCFOF ¶¶ 114-115).

Evidence of a separate motive separator market is found in Respondent's documents. Microporous's former owners wrote that "CellForce product is being quickly adopted (109% CAGR since 2001) by the motive power market." (PX1124 at 002; s*ee also, e.g.,* PX0072 at 020; PX0185 at 006; CCFOF ¶¶ 117-118). Daramic's documents also describe a separate motive market. A Daramic marketing flyer describes the motive market as follows:

> the requirements for traction batteries in respect of mechanical properties and chemical stability are considerably higher than for starter battery separators. [A] fork lift battery is typically operated for about 40,000~50,000 hours in charge – discharge service whereas a starter battery only for 2000 hours. The requirements as to electrical resistance are lower because of the typically low current densities for traction batteries. *These differences are reflected in the design of the modern traction battery separator material.*

PX1790 at 001 (emphasis added).

As Dr. Simpson evaluated, customers would not switch to other types of separators with a 5% (SSNIP) increase in price. (PX0033 at 014; *see also* CCFOF ¶¶ 126-129). Enersys, one of

the largest manufacturers of motive batteries, had bought their separators only from Microporous and Daramic – and now, only Daramic. (*See* CCFOF ¶¶ 461-465). No one else makes the product. (Axt, Tr. 2100-2101) Respondents' own executives agree with the lack of competitors for the product. For example, just before the acquisition, Microporous analyzed the market for motive battery separators and found that only Microporous and Daramic competed in this market in North America.[12] (Gilchrist, Tr. 342) Just after the acquisition, Daramic analyzed the market [redacted] (PX395 at 025, *in camera*; Gilchrist, Tr. 463-464, *in camera* (No other competitors for motive)) Daramic even lowered its prices on motive separators to respond to lower prices from Microporous. (Roe, Tr. 1255-1257, 1261 (C&D), 1263 (East Penn); PX0836; PX0409).

In short, there is no question that in the motive market, Microporous and Daramic were each other's closest competitors, and that the only competitor that Daramic had lowered its prices to meet was Microporous. (Roe, Tr. 1265-1266). Daramic's head sales executive, Roe, admitted that HD competed against CellForce in the "motive power traction market." (Roe, Tr. 1202; PX0316 at 002; PX0598; (Hauswald, Tr. 848-849, 853 ([redacted]); PX0023 at 002). Roe was so concerned about Microporous that he recommended that Daramic buy Microporous, because, if it failed to do so, prices in motive power separators would continue to fall. (Roe, Tr. 1270-1273; PX0433 at 003).

Indeed, due to heavy competition from Microporous, Daramic had previously reduced its motive-separator prices and price increases to Enersys. (Axt, Tr. 2122, 2125, 2138; 2161-2166, 2176, *in camera*; RX00209, *in camera*). From this experience, it was clear to Enersys that

[12] [redacted] (Gilchrist, Tr. 307; PX0916 ([redacted] **Dauwe, Dep. at 152, *in camera***).

having two strong suppliers was essential to their having a "competitive edge." (Axt, Tr. 2131; *see also* CCFOF ¶ 468). But after the acquisition, "[t]here's no other source" except Daramic, and its prices have increased substantially. (Gagge, Tr. 2611; Gillespie, Tr. 3041, 3047-3048); Leister, Tr. 4028 (Entek not supplying motive separators); Douglas, Tr. 4082 (not aware of others; no reason to go overseas to find another source, even with a 5% price increase). Bulldog's Benjamin also testified about obtaining lower prices from Microporous due to steep competition from Daramic in motive separators. (Benjamin, Tr. 3516-3517). But post-acquisition, Daramic gave Bulldog a 10% price increase, which it cannot fight. (*See* CCFOF ¶¶ 470-471; Benjamin, Tr. 3522 (Daramic is the "sole supplier. That's it. Take it or leave it."), 3526 ("there is no other supplier, so you're kind of stuck")).[13]

Daramic's own documents reflect that the company understood that it was competing against Microporous in motive, and [redacted]. (*See* PX0247, *in camera*; PX0153 at 002 [redacted]; PX0243, *in camera*; PX0085; PX0023 at 004). Where Daramic did not face competition from Microporous, it recognized that it could raise prices. (*See* PX0843 at 001 [redacted]; PX0254, *in camera* [redacted]).

[13] The fact that in 2006 Daramic was able to use its market power to force [redacted] into a new contract would only make sense if motive products were a separate market. (See discussion *infra* at pages 55-56) Otherwise, [redacted] would have just switched to SLI or some other separator for motive batteries.

There are no other competitors in this market. Entek does not make motive separators today. [redacted] **(Weerts, Tr. 4507, 4509, *in camera* ([redacted]).** [redacted] (Weerts, Tr. 4520, *in camera*; PX1823, *in camera*; *see also* Simpson, Tr. 3461-3462, *in camera* [redacted]).

Again, the HHI's are very high. Without including the latest contract that [redacted] and Microporous had executed for motive separators, the change in HHI would be [redacted] and the resulting HHI would be 10,000 (Simpson, Tr. 3185-3186; *see* CCFOF ¶¶ 280, 288). But this does not tell the entire story, based on what Microporous had already contracted to sell to [redacted], which would have raised Microporous's market share to over half the market, the change in HHI would be [redacted] and the resulting HHI would be 10000. (Simpson, Tr. 3185-3186; *see* CCFOF ¶ 282). This also creates a strong presumption of a significant lessening of competition. *Heinz,* 246 F.3d at 716.

3. UPS Separators are a Product Market

Battery separators used in UPS batteries are a relevant product market. (*See* CCFOF ¶ 133). The UPS battery market comprises mainly batteries used to provide temporary back-up power supply in the event of an unplanned outage to critical data centers and buildings. (*See* CCFOF ¶ 135). UPS batteries are designed to sit idle for extended periods of time then, when needed, provide a quick burst of sustained current for a few minutes until a generator is engaged or an orderly shutdown is made. (Brilmyer, Tr. 1833, *in camera*).

The market for flooded UPS battery separators consists of separators made from Daramic's PE or Darak or Microporous's CellForce. (*See* CCFOF ¶¶ 145-146). Microporous recognized that there were only two competitors for UPS battery separators – Daramic and Microporous. (Gilchrist, Tr. 306, 343; *see also* CCFOF ¶¶ 134, 501). Microporous had made some sales of UPS separators for over a "year and a half" to C&D and had already agreed to sell to EnerSys, which would have given Microporous 40-50% of the UPS market in North America.[14] (Gilchrist, Tr. 398-399; Axt, Tr. 2104) Entek made the product years ago but has [redacted] (Gillespie, Tr. 3037, *in camera*).[15] [redacted] (Gillespie, Tr. 3041, *in camera*). [redacted] (Gillespie, Tr. 3018-3020, 3041, *in camera*). [redacted] (Gillespie, Tr. 3048). Yet, there is no one else that Exide can turn to for these separators. (*See* CCFOF ¶¶ 503, 507). Without Microporous, Exide and other customers have lost the only leverage they had.

Although any HHI calculation would be an estimate, based on what Microporous was [redacted], the resulting HHI post-merger would be 10,000, and the change [redacted].

[14] Executives at Microporous anticipated revenues from the product as early as 2008 or 2009. ({**PX0664 at 001**, ***in camera*** [redacted] Since the acquisition however, [redacted] **PX0579 at 003**, ***in camera***}). [redacted] (Weerts, Tr. 4492-4493) [redacted] (Gillespie, Tr. 3037)

Thus, the loss of competition from Microporous clearly lessened competition substantially in the UPS market.

4. Starting, Lighting, Ignition ("SLI") Battery Separators

Separators for automobile SLI batteries is a relevant market in which to assess the impact of Daramic's acquisition of Microporous. (*See* CCFOF ¶ 147). SLI batteries are used to provide a quick and unsustained surge of current primarily to start the engine, after which the car's engine becomes the source of power. The SLI market is the largest separator market. (PX0131 at 032).

In North America, separators for SLI batteries are made from PE. (*See* CCFOF ¶¶ 293-294). SLI batteries contain little or no antimony and do not require a rubberized separator. SLI separators must also have a very low electrical resistance ("ER") to provide the surge in current. (PX0913 at 004, *in camera*; PX0669 at 004, 019, *in camera*). [redacted][16] PE battery separators for SLI batteries are, for all of these reasons, a relevant product market in which to assess the competitive impact of Daramic's acquisition of Microporous.

Post-acquisition, Daramic analyzed the SLI product market and "competition" and found that only Entek competed against it outside of Asia. (PX0395 at 023; *see generally* CCFOF ¶¶ 247-252). Microporous also analyzed the SLI battery separator market and found that it competed against Daramic and Entek; the other producers, primarily Asian, were only regional players and did not compete in North America. (Gilchrist, Tr. 307). Indeed, Microporous was

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[16] (PX0033 at 018). Daramic's Strategy Audit states [redacted] (PX0265 at 005). AGM batteries require AGM separators, and AGM separators are not compatible with flooded batteries and are thus not in the relevant market. Purchasers of SLI separators for flooded batteries cannot switch to using an AGM separator and would not switch to producing AGM batteries in response to a SSNIP. (*See*, e.g., PX0029).

"never confronted by a customer or potential customer with" any competitors other than Daramic or Entek in North America. (Gilchrist, Tr. 342; Seibert, Tr. 4266).

That SLI automotive separators constitute a separate market is clear. (*See* PX0033 at 018). Indeed, Respondent's documents analyze competition in the context of a market for SLI battery separators. (*See, e.g.,* PX0080 at 060, *in camera*; PX0088 at 001; PX0131 at 032-035; PX0402 at 012, *in camera*; PX0506 at 001-002, 006-007; CCFOF ¶ 303). For example, a presentation by Microporous's management to its board of directors shows [redacted] (PX0080 at 060, *in camera*). Thus, the demand for SLI separators is inelastic, meaning that Microporous, Daramic and Entek are selling into the same customer demand.

Notably, Microporous had manufactured and sold SLI separators in North America and considered itself to be a competitor in that market. (Gilchrist, Tr. 308, 313, 341-342) Microporous was definitely ready to sell SLI separators out of Feistritz, (Gaugl, Tr. 4626) and was also going to restart its SLI manufacturing in Tennessee. It had already been approved as an SLI separator producer by JCI (several years before,[17] and was again competing for JCI's business), and had agreed to produce SLI separators for Exide in North America and in Europe. (Gilchrist, Tr. 562 (JCI had even approved CellForce as an SLI separator); Gillespie, Tr. 2976 ("We had [the] full intention that we were going to be buying Microporous separators in 2010")). Microporous would also have produced SLI separators for East Penn, but for the acquisition. (Trevathan, Tr. 3722-3723 (Phase III for East Penn was "discontinued because of the acquisition of Microporous by Daramic"); Leister, Tr. 4010, 4016-4018 (East Penn wanted to purchase SLI from Microporous, which was a "viable" supplier)).

[17] *United States v. El Paso Natural Gas Co., et al.*, 376 U.S. 651, 661 (1964) ("[u]nsuccessful bidders are no less competitors than the successful one").

Daramic also regarded Microporous as a competitor in SLI. Indeed, it repeatedly reacted to the threat of Microporous as a SLI separator. (Roe, Tr. 1242-3; PX0258; PX0255, *in camera*; Roe, Tr. 1285-1286, 1289-1290, 1292-1294, 1350-1354, *in camera* (the "MP Plan")). [redacted] } (Weerts, Tr. 4517, *in camera*). Microporous was thus a very real competitor in SLI. But, at the very least, Microporous was, using the definition in the Merger Guidelines, an "uncommitted entrant," which should thus be included in the market definition as a participant. **{(Kahwaty, Tr. 5413-5414, *in camera* [redacted]; Simpson, Tr. 3461-3462, *in camera* [redacted]}.**[18]

Daramic feared Microporous's competition in SLI, and its documents express concern that "unlike prior years, we have a true legitimate big competitor entering the market (MP [Microporous]) and for sure they will capture volume at whatever it takes. This is an element we have not faced in many years." (PX0238). Absent the acquisition of Microporous, Daramic predicted that Daramic would have had to [redacted] } (PX0174 at 003, 016, *in camera*). In fact, the Polypore Board [redacted]

[18] Under the Merger Guidelines, ¶ 1.0, an uncommitted entrant should be included as a "market participant," because (as Microporous was) such an entrant "likely influenced the market pre-merger" and would thus also influence it "post-merger," but for the acquisition. Even if Microporous was not an actual competitor in SLI, it would still have been a perceived potential competitor or a potential competitor, as those terms are described by *United States v. Marine Bancorp., Inc.,* 418 U.S. 602, 627 (1974); *FTC v. Proctor & Gamble Co,* 386 U.S. 568, 580 (1967). But, because Microporous had actually sold SLI into the market place, already had the plants to make SLI in Tennessee and Austria, and actually competed and won business from Exide and was going to sell to East Penn post-acquisition, it is clearly an actual competitor in the market.

[redacted]. (PX0823 at 008, 013, *in camera*; Roe, Tr. 1382, *in camera*). Microporous's successful efforts to obtain sales in SLI, and its impact on pricing, demonstrate that prior to the acquisition, Microporous was an actual and direct competitor to Daramic and Entek in the supply of battery separators to SLI customers.

Based on what Microporous was committed to selling to equally committed customers in the SLI market, the HHI change from the acquisition as of January 2010 (when Microporous would have sold its SLI separators to current customers) would have been at least [redacted]. (*See*, Simpson, Tr. 3186 (using the projected sales from Microporous and comparing them to Daramic's own projections of Microporous's sales (e.g., PX0276 at 007, 009); CCFOF ¶¶ 301, 306). When competition is changing in the future, courts require that the analysis is forward-looking, as we have done here. *See Grumman Corporation v. The LTV Corporation*, 665 F.2d 10, 15 (2d Cir. 1981) ("the [lower] Court's assessment of the anticompetitive effect of a Grumman-Vought merger focused quite properly on the 'probable future' of the market." *Id.* at 15 (citing *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974)).[19] Thus, the increase in concentration in SLI separators is so large that it leads to a presumption of anticompetitive effects. (*Merger Guidelines*, ¶ 1.51).

B. The Relevant Geographic Market is North America

The Supreme Court has defined the relevant geographic market as the region "in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). The leading case on geographic market definition is *Philadelphia National Bank*, in which the Court held that the "proper question" to

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[19] One measure of Microporous's future impact on this market is the use of the estimated sales from a [redacted]. (PX0080 at 060, *in camera*; PX0920 at 023, *in camera*). Using these estimated sales, Microporous would have had [redacted] (PX0080 at 060, *in camera*).

ask about the geographic market definition is "not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." 374 U.S. at 357. More recently, the Eighth Circuit Court of Appeals elaborated on the Supreme Court's analysis, determining that the relevant geographic market is the area "to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition." *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *followed by Staples*, 970 F. Supp. at 1073; *see United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966) (approving of geographic markets where the merging parties competed the most). "Nonetheless, the relevant geographic market must be sufficiently defined so that the Court understands in which part of the country competition is threatened." *FTC v. Cardinal Health, Inc.*, et al., 12 F. Supp. 2d 34, 49 (D.D.C. 1998). The geographic market may also be proven by demonstrating that it is the smallest region within which a hypothetical monopolist could "profitably impose at least a 'small but significant and nontransitory' increase in price." *Merger Guidelines* § 1.21.

Under either the test of *Philadelphia National Bank* or the Merger Guidelines, the geographic market for all four products is North America. Except for sales that were scheduled to move to the new Austrian plant, almost all of Microporous's sales had historically been in North America prior to the merger, and most of its customers were in this market. Thus, the most "direct and immediate" effect of the acquisition has been felt in North America. Moreover, as the recent price increases have proven and [redacted]. (Simpson Report,

PX0033 at 006-007 (Using the Merger Guidelines and a critical loss analysis to confirm the results)).

Currently, North American flooded-battery manufacturing plants only buy deep-cycle, motive and UPS separators from Daramic and, with respect to SLI separators, Daramic and Entek. (PX0911 at 031). There is no evidence that customers located in North America have ever sourced any of the relevant products from anywhere but North America. (*See* CCFOF ¶¶ 247-252). Indeed, of the hundreds of thousands of documents produced in this matter, Daramic has not been able to point to any evidence that Asian producers are selling any of the relevant products to any North American customer. (Seibert, Tr. 4266-4267, *in camera* [redacted] .

Nor would a 5% price increase entice imports. For example, Daramic/Microporous and Entek all raised prices on all of their relevant products in North America in 2007, 2008, and 2009 and not one customer began importing separators for any of the relevant products from outside of North America. (PX0263 at 003; PX0371; PX0911 at 031; *see also* CCFOF ¶¶ 422-424, 467, 645). Significantly, in 2006, when Daramic declared force majeure and informed its North American customers that they would not receive all of their separator requirements, customers were unable to import any of the relevant products from any producer. The same was true in October 2008 when Daramic declared force majeure because of a strike at its Owensboro, KY plant: customers were unable to substitute any of the relevant products from other producers outside of North America despite a lack of complete supply from Daramic.[20]

North American battery manufacturers prefer to source their PE separators from local suppliers. Having a local source of supply reduces the time and expense needed to get the

[20] EnerSys was forced to air freight a container from Daramic's Feistritz facility at a significantly higher cost. (PX1285). This would not be a durable solution.

product to the customers, which reduces the risk of a disruption in the supply chain. (*See* PX0923 at 020-021 (Hauswald, IH at 56-58); PX0910 at 018-019 (Trevathan, Dep. at 146-152); CCFOF ¶¶ 174, 177, 185-186, 189). For example, {[redacted]} told Microporous that it had to build a PE separator plant in Europe to supply its European battery production facility, instead of continuing to source its needs from Microporous's plant in Piney Flats, TN. (PX0910 at 005 (Trevathan, Dep. at 34); *see also* CCFOF ¶ 187). If the separator manufacturer is local, it has a better opportunity to quickly troubleshoot technical problems that a customer may be having with its separators or the customer's machines. (*See* CCFOF ¶¶ 176, 178).

Separator prices are [redacted]. (Gillespie, Tr. 2998, *in camera*; *see* CCFOF ¶¶ 164, 166, 168-169). Indeed, Daramic's Roe insisted that comparing prices from these different regions was [redacted] (Roe, Tr. 1797, 1799, *in camera*; Seibert, Tr. 4252, *in camera* (Daramic tracks sales by region). Daramic prices its products locally, based on numerous factors, including local plant costs. For example, Enersys bought product from Europe and found that the prices were 20% higher there. (Burkert, Tr. 2334; *see also* CCFOF ¶ 167) [redacted] (*See* Simpson Reports, PX0033 at 005-007, *in camera* (using SSNIP (critical loss analysis) and price discrimination, PX2251 at 005-006, *in camera* (same); *Merger Guidelines*, ¶ 1.21 (using SSNIP) and ¶ 1.21 (Price Discrimination); Simpson, Tr. 3183). Because manufacturers of deep-cycle, motive, UPS, and SLI battery separators can [redacted]. (Simpson, Tr. 3183). Dr. Simpson concluded from reviewing the testimony of buyers and the

documents in this case that a hypothetical monopolist could impose a "small but significant and nontransitory" increase in price on buyers in North America. (Simpson, Tr. 3183; *Merger Guidelines*, §1.22).

Asian separator suppliers simply do not sell any products in North America. (Seibert, Tr. 4267, *in camera*; Thuet, Tr. 4379-4382, *in camera*; Weerts, Tr. 4500; Roe, Tr. 1236 (No Asian suppliers have ever supplied PE separators to North America)). As Mr. Toth admitted to the FTC staff during the investigation, the reason no Asian producers have ever competed here is that the margins "aren't high enough" for them to be competitive. (Toth, Tr. 1404). [redacted] **(Hall, Tr. 2727, *in camera*)** [redacted] **(Hall, Tr., 2734-2736, *in camera*; PX0907 at 21 (Kung, Dep. at 153, 155-156, *in camera*** [redacted] **, 176, *in camera*** [redacted] **); PX1522 at 005** [redacted] **(Hall, Tr. 2745; Gillespie, Tr. 3028-3030, *in camera*** [redacted] *see also* CCFOF ¶¶ 203, 205). [redacted] **(Gillespie, Tr. 3025 3029, *in camera*** [redacted] **)}**

Nevertheless, even though the evidence clearly demonstrates a North American market for each of the four product markets, a broader market will not change the outcome in this case. For example, with the small exception of a small number [redacted]

[redacted], there simply are no other producers of deep-cycle, motive or UPS battery separators outside of North America. (*See* CCFOF ¶ 253). For SLI battery separators, the few regional players in Asia, with their collective, single-digit market share, have never had any economic effect on prices here in North America where Microporous was competing. But even if Daramic is right that there is some kind of world-wide PE separator market, the HHI's are still staggering: post-acquisition of {[redacted]}. (Kahwaty, Tr. 5290, *in camera* (derived from PX0522 at 015)). In the world, Daramic, by far the largest producer, has more than twice the share of PE separator sales as [redacted] and dwarfs these other small suppliers. (Hauswald, Tr. 771, *in camera*, PX0522 at 015, *in camera*). In a world-wide market, as Dr. Kahwaty proposed, Microporous was still the third largest player, behind Daramic and Entek, and using his HHI's, this acquisition still resulted in a substantial lessening of competition. As Mr. Gilchrist explained, aside from Daramic and Entek, there were no other competitors that "could actually do what Microporous was doing in SLI" against Daramic and Entek. (Gilchrist, Tr. 423-434).

In sum, the evidence in this case indicates that a North American monopolist that raised prices by 5% in any of the four product markets would [redacted]. (PX0033 at 007). All the evidence in the case demonstrates a "direct and immediate" harm to customers here in North America as a result of this acquisition. *Philadelphia Nat'l Bank*, 374 U.S. at 357. Thus, the appropriate geographic market is North America.

C. Respondent Cannot Rebut Complaint Counsel's Prima Facie Case

Because Complaint Counsel has demonstrated that concentration levels are high as a result of this acquisition, the burden shifts to Daramic to rebut the presumption of a substantial lessening of competition. Respondent's only rebuttal arguments are (i) that the markets should

be one PE market; (ii) entry will restore competition; (iii) there have been no anticompetitive effects from the acquisition; and (iv) efficiencies. None of these arguments is sufficient.

First, as described above, even if Your Honor and the Commission were to accept a worldwide PE market, the HHI's are still extraordinarily high. Thus, this simply is not a defense. In addition, Daramic's remaining defenses are likewise unsupported.

1. Respondent Cannot Demonstrate that Entry into the Relevant Markets Would be Timely, Likely or Sufficient

To prevent a reduction in competition, entry "must restore the competition lost from the merger." *Chicago Bridge*, 534 F.3d at 429 ("[C]ourts have generally concluded that for entry to constrain supracompetitive prices, the entry has to be of a 'sufficient scale' adequate to constrain prices and break entry barriers."). A merger between two firms may be unlikely to lead to anticompetitive harm only if entry by new firms "would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." *Merger Guidelines* § 3. However, Respondent's claim that timely, likely, and sufficient entry will rescue this anticompetitive merger is unfounded. Based on the monopoly and near-monopoly levels of concentration in the relevant markets, Respondent has the burden of providing particularly compelling evidence of ease of entry. *Chicago Bridge*, 534 F.3d at 430, and n.10 (quoting 2A *Areeda & Hovenkamp* at ¶ 422 ("The more concentrated the market and the greater the threat posed by the challenged practice, the more convincing must be the evidence of likely, timely, and effective entry.")). Mere evidence of customers inquiring about suppliers willingness in the future to provide deep-cycle, motive, and UPS separators "falls far short of proving . . . that entry [will be] sufficient to replace the competition lost from the acquisition." *In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1102. Instead, as the Commission explained

in *Chicago Bridge*, such efforts show "little more than a refusal to throw themselves on [a supplier's] mercy." *Id.*

In this case, entry would not be timely, likely, or sufficient to counteract the anticompetitive effects of the acquisition. Furthermore, it would take many years for a new competitor to have enough of a significant market impact to restore competition – primarily because there are high barriers to entry, as Respondent's own documents confirm.

"The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future." *FTC v. Cardinal Health*, 12 F. Supp. 2d. 34, 56 (D.D.C. 1998); *Chicago Bridge*, 138 F.T.C. at 1037 n.45 (quoting 2A Areeda, Hovenkamp & Solow, Antitrust Law ¶ 420b at 60 (2d ed. 2002) ("The only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions.")). There has been no de novo entry in any of these markets in North America in the last decade. In fact, [redacted]. Microporous' own efforts to expand in motive, UPS, and SLI have taken many, many years and have been fraught with difficulties.

The fundamental reason for the lack of entry is that these markets are characterized by high barriers to entry, [redacted]. (PX0265 at 004, 011, *in camera*; *see also* CCFOF ¶ 996). Respondent has repeatedly admitted that these markets are characterized by barriers to entry,[21] including: "significant capital investment," "sophisticated production processes," "extensive customer relationships," "patent-

[21] *See, e.g.*, PX0829 at 001 (stating to Standard and Poor's "the SUBSTANTIAL technical ability, capital investment, lengthy qualification requirement, market share and other 'barriers to entry.'"); (PX0485 at 001 (handwritten notes by the Polypore CEO relating to an analyst meeting stating "Daramic . . . Barriers to Entry — 'Technology' — Global Scale/Infra[structure], Low-cost, Grades/Prod Dvlpment, Low Cost %, But Functional.").

protected technology," and the "high customer switching costs." (Gilchrist, Tr. 604, RX00741 at 015; PX0194 at 025 [redacted] (PX3015 at 017, *in camera*; Toth, Tr. 1428-1429; PX0485 at 001-002 (Toth's notes on [redacted], commenting on PX1715 at 001-003, *in camera* (notes from an investor presentation); *see also* CCFOF ¶¶ 988-995). World-wide customers, like Exide, need suppliers to have "quality," "technology," "infrastructure," "R&D," and "global" scale to meet their needs. (Gillespie, Tr. 2956-2958). [redacted] (Hauswald, Tr. 784-785, *in camera*). For example, when Daramic had a strike in Kentucky, it could not run its own plant effectively, even with other Daramic employees. (Gillespie, Tr. 2992).

Dr. Simpson also explained that [redacted] (Simpson, Tr. 3205, *in camera*). Dr. Simpson testified: [redacted]. (Simpson, Tr. 3205-3206, *in camera*). Dr. Simpson also cited [redacted] (Simpson, Tr. 3206, *in camera*). Finally, Dr. Simpson noted that [redacted][22] (Simpson, Tr. 3206,

[22] Dr. Simpson noted that [redacted]

in camera; *accord,* Gilchrist, Tr. 604, RX00741 at 015; PX0194 at 025; Hauswald, Tr. 784-785; PX3015 at 017; Toth, Tr. 1428-1429; PX0485 at 001; PX1715; (Gillespie, Tr. 2956-2958). These were exactly the same kinds of entry requirements that were upheld in *Chicago Bridge*, 534 F.3d at 437-440, and they likewise are unrebutted by Daramic here.

Significantly, Daramic's own conviction that [redacted] (*See, e.g.,* PX0276 at 009; PX0174 at 003; PX0212). In short, the evidence demonstrates that no entrants can compete at "sufficient scale" and on the "same playing field" as Daramic – as the former Microporous was – and thus "eliminate the anticompetitive effects" of the acquisition. *Chicago Bridge*, 534 F.3d at 430, 442; *CB&I Initial Decision*, at 101 (entry must be "'effective in offsetting any loss of competition'") (citation omitted).

a. Entry Would Not Be Timely

The *Merger Guidelines* generally use "two years from initial planning to significant market impact" as a threshold for measuring whether entry would be timely. *Merger Guidelines* § 3.2. De novo entry into any of the relevant markets - in the form of entry at a greenfield plant site – would take well in excess of two years. Building a plant and training a workforce takes about one to two years, which assumes expertise in how to build a PE separator production line.

A de novo entrant would need years simply to develop the necessary technology to compete in the more specialized markets for UPS, motive power and deep-cycle separators, including working with customers to understand and develop product for their specific applications, obtaining product qualifications, and working around Daramic's significant

[redacted] (Simpson, Tr. 3206, *in camera*). Dr. Simpson noted that [redacted] (Simpson, Tr. 3207-3208, *in camera*).

patent/IP position. The testing requirements to gain customer approval add significantly to the amount of time it takes to enter each of the product markets. (*See generally* CCFOF ¶¶ 881, 883, 886-888). Testing for motive and UPS products typically takes two-to-three years. (Whear, Tr. 4798; Gagge, Tr. 2490-2492; Gillespie, Tr. 2973-2974; *see also* CCFOF ¶¶ 889-892). Testing for deep-cycle separators typically take 18-24 months. (Gillespie, Tr. 2934; Godber, Tr. 163; *see also* CCFOF ¶¶ 897-901, 903). Customer testing of SLI testing can last from 18-24 months. (Gillespie, Tr. 2973; RX00013 at 009). Just as Daramic spent many years[23] trying to design a battery separator that would work well in deep-cycle applications, it would be impossible for a new entrant to develop and design a deep-cycle separator from scratch and have it tested and ready for commercial sales within two years. (*See, e.g.,* PX0433 at 001; CCFOF ¶¶ 877-879).

A new entrant would also need to provide customers with products that the customer could test to ensure that it consistently met the customer's quality requirements. Testing can take a considerable time – more than a year in the case of deep-cycle, motive and UPS separators. For example, Microporous's own expansion in Tennessee took more than five years to accomplish. (Gilchrist, Tr. 323). There simply is no evidence that anyone is actually going to enter any of these markets within two years.

b. Respondent Cannot Demonstrate that Entry Into the Relevant Markets is Likely

In order to demonstrate that entry is likely, Respondent must be able to demonstrate that entry would be profitable at pre-merger prices, and such prices could be secured by the entrant. *Merger Guidelines* § 3.3. Based on the record in this case, there is no evidence of either. Rather, the market share that a new entrant would surely need to justify its investment would be sure to

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[23] Daramic's own development of its deep-cycle separator [redacted] (PX0950 at 064).

drive prices down well below pre-merger prices. That impact would make entry unattractive and therefore unlikely. This, together with the high barriers to entry, makes sufficient and timely entry unlikely.

In the deep-cycle market, Daramic now owns all the patents for using rubber additives in PE separators for suppression of antimony, as used in CellForce and Daramic HD. (PX2161; PX2166; PX1124 at 001). While other separator additives have been considered for antimony suppression, natural or synthetic rubber is the only additive known to adequately suppress antimony in deep-cycle batteries. (*See, e.g.,* PX2189 at 027). Daramic failed in its attempt to use wood lignin as an additive and switched to rubber for deep-cycle. (*See generally* PX0319). An entrant wishing to enter this market would have substantial difficulty inventing or proving the effectiveness of an antimony suppression technology that does not infringe Daramic's patents.

Even if some company decided to enter or expand into any of the four markets in North America, none could build a line, train their people, design a product, test that product and begin commercial production within two years. Neither Daramic nor Microporous ever did it, and it is even more unlikely that someone else would. *See Merger Guidelines*, ¶ 3.1 ("All phases of the entry effort will be considered" for the two-year requirement, including "planning, design . . . construction, debugging . . . and qualification requirements").

c. Respondent Cannot Demonstrate that Entry Would Be Sufficient to Overcome Anticompetitive Effects

Respondent cannot demonstrate that entry would be sufficient to restore the competition lost as a result of the merger because it must be able to point to firms that would be able "in a reasonable time frame to build a reputation for quality and reliability." *Chicago Bridge*,138 F.T.C. at 1095; *Coca-Cola,* 117 F.T.C. at 953, 960 (Entry "must be able to restore competitive pricing – *i.e.,* it must be effective in offsetting any loss of competition" resulting from the

acquisition). Daramic must also prove that these firms would "be of a sufficient scale to compete on the same playing field as [Daramic] and thus would be unable to constrain the likely anticompetitive effects." *Chicago Bridge,* 534 F.3d at 430. The uncontroverted evidence shows that no such entry is likely to be sufficient.

No potential entrants have demonstrated that they have the technology, product quality and supply capability to be taken seriously by North American customers in these markets. (*See* CCFOF ¶ 935). Indeed, Daramic documents [redacted] (PX0265 at 011; *see generally* CCFOF ¶¶ 914-918). Based upon the experience Microporous gained through learning by doing, [redacted] (PX0033 at 010). Microporous's reputation for good product design, efficiently making battery separators that met customers' needs, an engineering and business staff with the technical skill to solve problems, and customer acceptance of their products lead to a proven record and the development of relationships with battery manufacturers. (*See, e.g.*, PX0131 at 054, 056, 064; PX0910 at 024).

No potential entrants are likely to replicate the competitive presence of Microporous. (*See, e.g.*, PX0131 at 054, 056, 064; PX0265 at 012; PX0910 at 024; PX0092 at 001). Manufacturing know how is accumulated over multiple years. (*See, e.g.,* PX0131 at 054, 056, 064; PX0910 at 024; PX0092 at 001). Asian suppliers substantially lag Daramic and Microporous in these assets. (*See, e.g.*, PX0913 at 045, 046 [redacted]). For example, in assessing a small SLI battery separator manufacturer in [redacted] Daramic noted that: [redacted]

[redacted]}. (PX0216 at 001; *see also* PX0217 at 002, 003).

Daramic, however, claims that some Asian manufacturer might expand in Asia. But such an expansion will have no effect here in North America. It never has. **{(*See* Kahwaty, Tr. 5377** [redacted]} As the *Merger Guidelines*, ¶ 3.4, explain, "where the competitive effect of concern is not uniform across the relevant market, in order for entry to be sufficient, the character and scope of entrants' products must be responsive to the localized sales opportunities" – in this case, in North America. As discussed below, none of these supposed foreign competitors sells anything here. (*See* CCFOF ¶¶ 247-251). Even if they ever did, they would not restore competition to pre-merger levels.

In sum, there is no evidence that any entry would be likely, timely, or sufficient to restore competition to pre-acquisition levels.

2. Respondent's Claim of No Anticompetitive Effects Is Contrary To The Evidence

Daramic has claimed that there is no evidence of any likelihood of competitive harm from the acquisition. But the evidence is overwhelmingly to the contrary. As Your Honor Judge held in *Chicago Bridge*, Complaint Counsel is "not required to prove that anticompetitive effects have in fact occurred." (*CBI Initial Decision* at 114). Instead, the high concentration of the post-acquisition markets is sufficient to show the probability of unilateral or coordinated effects. Nevertheless, actual evidence of effects is abundant in this case. Daramic's own intent to raise prices, actual unilateral effects and the likelihood of coordinated effects are the clearest examples.

a. Daramic's Intent To Raise Prices Post-Acquisition

Daramic predicted that the result of the acquisition would be higher prices for customers, and indeed its prediction has come true. The Supreme Court has clearly said that "evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." *Brown Shoe v. United States*, 370 U.S. 294, 329 n.48 (1962) (emphasis added); *see also* 4A Phillip E. Areeda et al., Antitrust Law ¶ 964a (2d ed. 2006) ("[E]vidence of anticompetitive intent cannot be disregarded."); *Whole Foods,* 548 F.3d at 1047 (Tatel, J.). In this case, Daramic's view that acquiring Microporous would eliminate a major competitor and reduce price competition is stated repeatedly in its documents throughout a period of several years, right up until the time of the acquisition.

As early as July 2003, Daramic's head of sales, Tucker Roe, sent a memo to the President of Daramic summarizing the rationale for acquiring Microporous: [redacted] (PX0935 at 001). (*See also* PX0932). [redacted] (PX0433 at 004). [redacted]; CCFOF ¶¶ 648-652). When Daramic's former President passed the reins to Pierre Hauswald in August 2006, he left these final thoughts: [redacted]

[redacted]. (PX0167).

That the acquisition eliminated competition is more fully fleshed out in virtually all of the documents prepared either by Daramic or Daramic executives immediately prior to the acquisition. These documents project that the acquisition [redacted]. For example, in a September 2007 presentation titled "Microporous Products, L.P. Acquisition," Daramic executives write that [redacted]. (PX0275 at 012). Daramic would also have to

[redacted]

(PX0275 at 012). In analyzing the benefits of a Microporous acquisition, Hauswald told his Board that Daramic would be able to [redacted] (*Id.* at 014). With respect to the business risks associated with the Microporous acquisition, Daramic's executives expressed concern about the increasing competition with Microporous, and describes three risks, including a [redacted]. (*Id.* at 017). (*See generally* PX0276; PX0294 at 013, *in camera* [redacted]). Pierre Hauswald even told his Board that he was projecting a [redacted] (Hauswald,

Tr. 789-790, *in camera*). There is thus no doubt that Daramic's executives anticipated that the transaction would [redacted] and that this was one of the driving reasons for the transaction.

b. Post-acquisition, Daramic Has Exerted Unilateral Market Power

Once it eliminated Microporous as a threat, [redacted] Daramic has actually raised prices. {[redacted]} (Simpson, Tr. 3192-3194, *in camera*). Dr. Simpson stated that {[redacted]} (Simpson, Tr. 3193, *in camera*). {[redacted]} (Simpson, Tr. 3193-3194, *in camera*).

Daramic claims that raised prices because its costs went up. But Microporous and Daramic had experienced cost increases before and had never been able to raise prices to the extent Daramic has post-acquisition. Just because a company has cost increases does not entitle them to raise prices. Competition is supposed to set the price, not Daramic. That Daramic's excuse is baseless is clear. First, [redacted] (Seibert, Tr. 4278, *in camera*). Second, it raised prices more than {[redacted]}. (Weerts, Tr. 4511, *in camera*). Third, as Dr. Simpson analyzed, {[redacted]}. **(PX0033 at 024, *in camera*)** {[redacted]}

[redacted] **(PX0033 at 025, *in camera*)**}; *see also* CCFOF ¶¶ 797-802). In short, Exide, Enersys, and U.S. Battery all testified that they were able to reduce price increases and in many cases defeat price increases when they had competition between Microporous and Daramic. But after the acquisition, they were just "stuck." (Benjamin, Tr. 3526).

In addition, [redacted] (Simpson, Tr. 3194, *in camera*). First, [redacted] (Simpson, Tr. 3194, *in camera*). Second, for smaller battery manufacturers, Microporous [redacted] (Simpson, Tr. 3194-3195, *in camera*). Dr. Simpson testified: [redacted] (Simpson, Tr. 3194-3195, *in camera*).

c. In a Three-To-Two Merger In SLI, Coordinated Effects Are Likely

In the SLI market, in which Entek still competes, however, there is also a strong presumption of coordinated effects. Merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *Heinz,* 246 F.3d at 715. Absent extraordinary circumstances, a merger that results in an increase in concentration above certain levels "raises a likelihood of 'interdependent anticompetitive conduct.'" *PPG Indus.*, 798 F.2d 1500, 1503 (1986) (*quoting United States v. Gen. Dynamics*

Corp., 415 U.S. 486, 497 (1974); *see also FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 n.24 (11th Cir. 1991) (high concentration makes it "easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level"). "Because the FTC has established a *prima facie* case, the burden is on [Daramic] to demonstrate 'structural barriers,' unique to this industry, that are sufficient to defeat the 'ordinary presumption'" of coordination in such a "highly concentrated market." *CCC Holdings,* 605 F. Supp. 2d at 60, *quoting Heinz*, 246 F.3d at 725; *see also Merger Guidelines*, ¶ 2.1 (Coordinated Interaction).

Although Entek, the only remaining competitor in North America, may say that it is willing to compete, under the law there is a strong presumption that when there are few competitors there are less "incentives to engage in healthy competition." *CCC Holdings*, at 66. As Judge Collier recently explained in a lengthy opinion describing the law of coordinated interaction, "With only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom." *Id.* at 67.

Daramic offered nothing to defeat this presumption and did not even try to show any "structural barriers" to coordination. Rather, it has said that because Entek won one large customer, it will likely compete even more aggressively in the future. Yet, neither the law, nor economics, nor the facts support such a theory. First, absent evidence of barriers to coordination, we simply cannot take Entek's or Daramic's word that they will promise to compete more now. *See Heinz*, 246 F.3d at 721, 724-25. Second, as Dr. Simpson explains, economic theory supports the idea that the risks of coordination increase with concentration. (PX0033 at 021, *in camera*). Finally, the evidence corroborates the presumption.

For example, Daramic's Strategy Audit notes that [redacted] (PX0265 at 008, *in camera*). In comments on an earlier draft of this Strategy Audit, Tucker Roe of Daramic stated: "I would say that over the past years there has not been an aggressive rivalry among competitors but this has changed when Microporous Products entered the market and more recently seen by Entek," which implies that Microporous's entry prompted the increased rivalry. (PX0482 at 002; Roe, Tr. 1281).

And long before Microporous began expanding as a maverick, Entek and Daramic "were not aggressively competing against each other for business." (Hall, Tr. 2666-2667, 2692). Absent Microporous, Daramic and Entek had been [redacted]. **(Hall, Tr. 2873-2874, *in camera*, RX00044 at 002, *in camera*).** [redacted] ***(Id.)*** [redacted] **(Hall, Tr. 2873-2874, *in camera*)**[24] As Judge Collier explained, "[i]n a highly concentrated market, with stable market shares, low growth rates and significant barriers to entry, there are few incentives to engage in healthy competition." *CCC Holdings,* 605 F. Supp. 2d at 66.

In short, post-acquisition price increases add to the strong presumption that a merger to monopoly in three markets, and from three to two in the SLI market, will lead to anticompetitive effects. Daramic has simply failed to rebut these presumptions and the additional evidence that supports them.

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[24] [redacted] (Hauswald, Tr. 834-835, *in camera* [redacted]; Weerts, Tr. 4514, *in camera* [redacted]

3. Respondent's Claimed Efficiencies Defense Fails

Daramic attempts to rebut all the counts in the complaint with an affirmative defense of efficiencies. But its defense fails. Under the law, Daramic must prove "extraordinary efficiencies" to rebut a strong presumption of anticompetitive effects. *Heinz*, 246 F.3d at 720; *see also* Phillip E. Areeda, *et al.*, *Antitrust Law* ¶ 971f, at 44 (2d ed. 2006) (requiring "a showing of 'extraordinary'" efficiencies where the "post-merger market's HHI is well above 1800 and the HHI increase is well above 100"). Moreover, "the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *Heinz*, 246 F.3d at 721. "Delayed benefits from efficiencies . . . will be given less weight." *Merger Guidelines* § 4, n.37. Indeed, courts will not allow an efficiencies defense when the respondent cannot prove "that [its] efficiencies are verifiable" or "that the cost savings achieved through efficiencies are likely to be greater than the transaction's likely anticompetitive effects," and that they are passed through to the customers. *CCC*, 2009 WL 723031, *39 (citations omitted).

Respondent has not yet presented any comprehensive, well-documented efficiency evidence. (*See, e.g.,* PX0912 at 008, 009, 012-013 (Riney, Dep. at 63-64, 71, 104, 106, 108, *in camera*); *see also* CCFOF ¶¶ 1051-1056). Daramic's vague and unsupported claim that it might [redacted] Few former Microporous employees with expertise in rubber (*e.g.*, Gilchrist, Wimberly, Brilmyer) are still with the company. (*See* PX0912 at 014, 015 (Riney, Dep. at 89-90, *in camera*); PX0950 at 060, *in camera*). Finally, Daramic's own expert, Dr. Kahwaty [redacted]. (Kahwaty, Tr. 5249-5250, *in camera*).

* * *

In sum, the overwhelming evidence in this case is that Daramic knew it was buying Microporous to eliminate it as a competitor. The concentration levels in all the relevant markets, and even in the market Daramic proposes, are extraordinarily high. Daramic failed to rebut Complaint Counsel's prima facie case. In addition, the evidence demonstrates that a substantial lessening of competition has occurred, which is far more evidence than required under Section 7 to find a violation of the law.

III. Daramic Monopolized and Attempted to Monopolize the Relevant Markets and Entered into Agreements that Unlawfully Restrained Trade

In addition to its unlawful acquisition of Microporous, Daramic engaged in other conduct that violated Section 5 of the FTC Act. Section 5 prohibits "unfair methods of competition." 15 U.S.C. § 45(a)(1) (2006). Unfair methods of competition include, but are not limited to, any conduct that would violate Sections 1 or 2 of the Sherman Act. *See, e.g., California Dental Assn. v. FTC,* 526 U.S. 756, 762 & n.3 (1999); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well. *E.g., Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).

The evidence at trial showed that Daramic engaged in conduct that violated both Section 1 (Complaint ¶¶ 47, 50-51) and Section 2 (Complaint ¶¶ 39-46, 52-53) standards of antitrust liability. Daramic's pattern of coercive and exclusionary behavior to obtain or maintain monopoly status in several relevant markets through its exclusionary bargaining and contracting arrangements – a pattern that continues to this day – violates Section 5. In addition, Daramic's

agreement to allocate battery separator markets with Hollingsworth and Vose ("H&V") is a combination or conspiracy between potential competitors that unreasonably restrains trade.

A. Count III: Monopolization and Attempted Monopolization

The acquisition of Microporous is only the latest chapter in Daramic's long-running campaign to suppress the competitive threat that Microporous posed to Daramic's battery separator business. During 2006 and 2007, Daramic coerced, pressured, and induced customers – large and small – to enter into exclusive dealing arrangements with Daramic, and as a consequence, to accept contract terms that weakened Microporous, harmed the competitive process, and injured consumers of battery separators.

The evidence shows that Microporous presented a less potent competitive threat to Daramic than would have been the case without Daramic's exclusionary bargaining and contracting practices. (*See* CCFOF ¶¶ 1101-1103). The subsequent and unlawful acquisition of Microporous serves to obscure the full effects of Daramic's exclusive dealing strategy, but certainly does not constitute a defense to liability. *See United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) ("To some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'" (quoting 3 Areeda ¶ 650c, at 69 (1996)). As detailed below, Daramic's pre-acquisition conduct violates Section 2 of the Sherman Act as well as Section 5 of the FTC Act.

1. Legal Standard

The offense of monopolization has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business

acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *see also Microsoft*, 253 F.3d at 50.

The offense of attempted monopoly maintenance has four elements: (1) that the defendant possesses monopoly power, and (2) has engaged in predatory or anticompetitive conduct with (3) a specific intent to monopolize, and (4) a dangerous probability of maintaining monopoly power. Order Denying Respondent's Motion to Dismiss Counts II and III of the Complaint for Failure to State a Claim (December 4, 2008) at 3 (Chappell, J.); *See also Lorain Journal Co. v. United States*, 342 U.S. 143, 153-54 (1951).

2. Monopoly Power/Dangerous Probability of Maintaining Monopoly Power

As the D.C. Circuit has stated, courts "typically examine market structure in search of circumstantial evidence of monopoly power." *Microsoft*, 253 F.3d at 51. "Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers." *Id.*[25]

Daramic's pre-merger share of the North American UPS and motive separator markets was in excess of 90%; shares in both are now 100%. Market shares of this magnitude are sufficient to support a finding of monopoly power. *See, e.g., Spirit Airlines v. Nw. Airlines,* 431 F.3d 917, 935-36 (6th Cir. 2005); *Conwood Co. v. United States Tobacco Co.,* 290 F.3d 768, 783

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[25] Daramic asserts that the existence of entry barriers is not a sufficient predicate for finding monopoly power: that Complaint Counsel must make the further showing that respondent has the power literally to preclude all market entry. This is incorrect as a matter of law. In monopolization cases, as in merger cases, the relevant inquiry is whether entry would be timely, likely, and sufficient to defeat the exercise of market power. *E.g., Rebel Oil Co. v. Auto Flite Oil Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the entrant is insufficient to take business away from the predator, they are unlikely to represent a challenge to the predator's market power) (citing *Merger Guidelines*); *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366-67 (9th Cir. 1988) (minor entry and defendant's declining market share do not preclude a finding of monopoly power).

n.2, (6th Cir. 2002); *Image Technical Servs. v. Eastman Kodak Co.,* 125 F.3d 1195, 1206 (9th Cir. 1997). Daramic's share of the SLI separator market in North America was approximately 50 percent. (*See* CCFOF ¶ 305). Because of various market factors, including the fact that its principal SLI competitor has been capacity-constrained, Daramic was able to exercise monopoly power vis-a-vis certain customers in this market as well. *See United States v. Dentsply Int'l Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) ("A less than predominant share of the market combined with other relevant factors may suffice to demonstrate monopoly power."); a*ccord Fineman v. Armstrong World Indus. Inc.*, 980 F.2d 171, 201 (3d Cir. 1992).

As described above, entry into all of these markets is difficult and slow. Because barriers to entry are substantial, there exists at all relevant times a dangerous probability that Daramic's monopoly power will persist. (*See* CCFOF ¶¶ 823, 987).

Evidence concerning the relationship between Daramic and its customers bolsters the conclusion that Daramic possessed monopoly power. Daramic is able to charge supra-competitive prices, to dictate important terms of dealing, and perhaps most importantly, to coerce customers to abandon plans to purchase battery separators from competitors of Daramic. A firm that can present unwilling customers with an all-or-nothing ultimatum and then walk away with an exclusive supply contract is a firm with monopoly power.

3. Exclusionary Conduct

A firm violates Section 2 when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct. *Microsoft*, 253 F.3d at 58. Conduct may be judged exclusionary when it tends to exclude competitors "on some basis other than efficiency," *i.e.*, when it "tends to impair the opportunities of rivals" but "either does not further competition on

the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 & n.32 (citations omitted).

Exclusive dealing arrangements require a buyer to purchase products or services for a period of time exclusively or predominantly from one supplier. Exclusive dealing, by its nature, excludes (or "forecloses") rival suppliers from marketing their goods to the particular buyer. Of course not every exclusive transaction constitutes a violation of the antitrust laws. Exclusive dealing becomes a competitive problem when, as a result of this foreclosure, the ability of rivals to limit the exercise of monopoly power by the defendant is impaired. *See, e.g., Microsoft,* 253 F.3d at 68-69; *R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, 199 F. Supp. 2d 362, 387-89 (M.D.N.C. 2002), *aff'd*, 67 Fed. Appx. 810 (4th Cir. 2003).[26]

There are various permissible methods and means for establishing that a monopolist's conduct has harmed competition. In several recent cases addressing the unlawful maintenance of monopoly power through exclusive dealing, courts have employed the following analytical framework: The plaintiff bears the initial burden to show that the defendant's conduct impairs the ability of one or more significant rivals to compete effectively, and thus to constrain the exercise of monopoly power by the defendant. *Dentsply*, 399 F.3d at 187; *LePage's Inc. v. 3M*, 324 F.3d 141, 164 (3d Cir. 2003); *Microsoft*, 253 F.3d at 69; *R.J. Reynolds*, 199 F. Supp. 2d at 387. If the plaintiff successfully establishes a prima facie case of competitive harm, then the monopolist may proffer a procompetitive justification for its conduct. *See id.*

The two government cases cited above are the most relevant. In *Dentsply*, the defendant was the largest manufacturer of artificial teeth in the United States, accounting for approximately

[26] *See also* Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense For Exclusive Dealing*, 73 Antitrust L. J. 779, 786 (2006) ("From an antitrust perspective, the concern with exclusive dealing is that rivals will be excluded or marginalized to such an extent that they can no longer constrain the defendant's market power – resulting in higher prices, lower output, and diminished quality for consumers.").

75 percent of sales. Dentsply prohibited its network of authorized dealers, 23 firms in total, from also marketing the teeth of competing sellers. The government established competitive harm by showing that Dentsply had blocked rival manufacturers from access to these "key dealers," 399 F.3d at 189, which impeded these rivals from expanding to where they could pose a "real threat," *id.* at 191, to Dentsply's market power.

The *Microsoft* case is similar. Microsoft entered into exclusive dealing agreements with various computer manufacturers and Internet access providers (IAPs). These were the most efficient channels for distributing browsing software. The excluded rival, Netscape, was compelled to use more costly means for reaching consumers, such as offering free downloads on the Internet. The exclusive dealing arrangements diminished Netscape's ability to constrain Microsoft's operating system monopoly. The showing of the above facts was sufficient to establish a prima facie case of competitive harm. *Microsoft*, 253 F.3d at 71 ("Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of [Netscape's] Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly.").

The principal way in which exclusive dealing impairs the ability of competitors to constrain the market power of the monopoly firm is by increasing the costs of the competitors. In *Microsoft* and *Dentsply*, the monopolist raised the rivals' costs of distribution. Here, Daramic used exclusive contracts with end-users ("customer foreclosure")[27] to raise the cost to

[27] *See* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617, 627 (1999) ("Customer foreclosure refers to using exclusive contracts and other strategies that exclude rivals from access to a sufficient customer base. If the monopolist can reduce the sales of a competitor through the use of exclusive contracts, bundling, or other means, the rival may suffer higher costs that make it a less formidable competitor in selling to other customers.").

Microporous of manufacturing battery separators. The classic customer foreclosure case is *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). The Journal was the sole daily newspaper in Lorain, Ohio, and a monopolist in the sale of local advertising. This monopoly status was threatened by a new entrant, a local radio station. The newspaper responded by refusing to accept advertising from merchants that also advertised over the radio station. "Numerous Lorain advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use the radio." 342 U.S. at 153. The policy threatened to force the radio station into bankruptcy, which would allow the Journal to raise its prices. Further, there was no apparent efficiency justification for the Journal's exclusive dealing policy. On this record, the Supreme Court affirmed a finding of liability for attempted monopolization.

The trial record shows that Daramic was intent on securing exclusive dealing arrangements – going so far as to bully and alienate major customers – for the very reason that these contracts would weaken Microporous. (*See* CCFOF ¶¶ 1089-1090). One measure of the effectiveness of Daramic's anticompetitive campaign is this: [redacted]. (*See* CCFOF ¶ 1103).

Four key examples of Daramic's monopolistic conduct stand out:

(i) *Enersys*: In September 2006, Daramic used its 90% market share (*i.e.*, monopoly power) in motive separators to force [redacted] (*See* CCFOF ¶¶ 1124, 1141, 1144). Late in 2005, Pierre Hauswald discovered that [redacted] (PX0694; Hauswald, Tr. 1151-1152). Hauswald determined that Daramic had "leverage" to tell Enersys

that Daramic would supply them "all or nothing." (PX0694 at 001; *see also* CCFOF ¶ 1117). Hauswald ended his comments by saying that "it would be better to solve the [Microporous] case definitively." (PX0694 at 001).

In September 2006, Enersys told Daramic again that it was about to enter into an agreement to purchase motive separators from Microporous. (Axt, Tr. 2128-2129, 2148, 2166, 2146, *in camera*) It had received a far better price from Microporous. (*Id.* 2121-2122). Enersys told Daramic that their offer was [redacted]. (*Id.* at 2146) Shortly afterwards, on September 20, 2006, Roe reported Enersys' decision to his CEO, Bob Toth. (PX0456 at 001-002). Did Daramic respond with a more competitive offer? No. Toth said: "Seems like we should pull our offer and force a decision. [W]e should play hard ball here." (*Id.*)

And hard ball was played: Daramic first weighed its {"[redacted]"}. (PX0852 at 001, *in camera*; Roe, Tr. 1355-1357, *in camera*; *see also* CCFOF ¶ 1145). Within two weeks, Daramic claimed a force majeure and notified EnerSys that their allocation of separators during the force majeure would be in the ten percent range. (PX0487; PX0911 (Roe, Dep. at 203-204); *see also* CCFOF ¶¶ 1146-1147). The force majeure threatened to [redacted]" (Axt, Tr. 2128-2129, 2146, *in camera*, 2148, 2166; *see also* CCFOF ¶ 1156). But Daramic's Pierre Hauswald then told Enersys' Larry Axt directly that [redacted] the Daramic contract and [redacted]. (*Id.* at 2147, *in camera*).

The "force majeure" was simply a tactic in Daramic's monopoly playbook. The truth was that Ticona, Daramic's PE producer indeed had a shortage of PE in Europe, but that the

[redacted] (Hauswald, Tr. 1136, *in camera*; *see also* CCFOF ¶ 1148). [redacted] (Hauswald, Tr. 1137-1138, *in camera*; PX0473 at 006). [redacted] (PX0473 at 005, *in camera*). Instead, as Mr. Hauswald and Mr. Roe admitted, the European Ticona silica shortage [redacted] (Gilchrist, Tr. 414-415, 611, 621, *in camera*; *see also* CCFOF ¶ 1151).

The evidence demonstrates that, although there was some shortage of PE in Europe, no one had any shortage in North America. Microporous also bought its silica from Ticona and "was not affected at all" by Ticona's silica shortage. (Trevathan, Tr. 3655). No other customers except Enersys and C&D – both of which were negotiating with Daramic for a contract – had such a low allocation of products from Daramic due to the supposed force majeure. (Roe, Tr. 1804; Gillespie, Tr. 2985 (Exide had no shortage); *cf.* PX1048 (promising 80-100% supply to Exide) with PX1207 (promising 10-50% to Enersys).

Yet, using this pretended shortage in North America as a threat, Daramic parent company's CEO, Bob Toth, told Enersys's CEO, John Craig, that Daramic could give Enersys "a hundred percent supply," despite the supposed force majeure, if Enersys signed a "long-term contract." (Craig, Tr. 2556). Toth then threatened Craig that Daramic would "stop shipping product within two weeks if you don't sign a long-term contract." (*Id.* at 2557, 2559-2560; *see also* CCFOF ¶¶ 1157, 1159). This threatened half of Enersys's two billion dollar company.

After Daramic "held a gun" to Enersys' head, Enersys signed the contract, and the force majeure just "went away," and Enersys had all the supply the needed. (*Id.* at 2562-2563, 2570). As a result, Enersys had to [redacted] (Axt, Tr. 2148; *see also* CCFOF ¶¶ 1158, 1160).

(ii) *MP Plan*: When Microporouss' plans to supply Enersys were thwarted, Microporous went in search of contracts to fill out the company's production lines. Daramic learned of this development, and devised a counter-strategy (dubbed the "MP Plan"). (PX0258; PX0255, *in camera*; PX0911 (Roe Dep. 173-174)). Daramic's plan was to approach the customers most likely to contract with Microporous (Crown Battery, Douglas Battery, and East Penn Battery) and offer each an "all-or-nothing" proposition: that is, contract with Daramic exclusively or near exclusively, and on a long-term basis, or no battery separators will be available from Daramic. (Roe, Tr. 1285-1286; 1291-1292; PX0258 at 001-002; *see also* CCFOF ¶¶ 725-727, 747). In the end, [redacted]. (Balcerzak, Tr. 4104; RX00994, *in camera*; PX2058, *in camera*; PX0637 at 002-009; RX01519; *see also* CCFOF ¶¶ 728-734).

(iii) *Exide*: In 2007, [redacted] (Gillespie, Tr. 3011-3012, 3016 *in camera*; PX1028 at 041-046, 058-060, *in camera*). Further, Daramic informed Exide that [redacted] (PX1050, *in camera*; Bregman Tr. 2901-2902, *in camera*). Instead, Daramic [redacted]. (Gillespie, Tr. 3011-3012, 3016 *in camera*; PX1028 at 041-046, 058-060, *in camera*).

(iv) FIAMM: In late 2007, Daramic was involved in negotiations with {[redacted]} (Roe, Tr. 1345-1346, *in camera*). {[redacted]} automotive battery manufacturer in Europe. (Roe, Tr. 1345, in camera; PX0215 at 002, *in camera*). Daramic's sales personnel learned that {[redacted]} (Roe, Tr. 1352, *in camera*; PX0222 at 04, *in camera*). Daramic grew concerned because {[redacted]} would be [redacted] (PX0215 at 003, *in camera*; *see also* CCFOF ¶ 744). Yet again, Daramic concluded {[redacted]} (PX0214, *in camera*). Daramic then {[redacted]}. (Roe, Tr. 1345-1346, *in camera*; *see also* CCFOF ¶ 745).[28]

With these exclusionary tactics and contracts, Daramic succeeded in its aim of impairing Microporous's effectiveness as a competitor. *See LePage's*, 324 F.3d at 161 (exclusionary conduct caused plaintiff to lose sales, and as a result its "manufacturing process became less efficient"). As Dr. Simpson, the FTC's economics expert, testified {[redacted]} (Simpson, Tr. 3227, *in camera*), and Daramic successfully used this tactic to harm Microporous and thus customers.[29] In sum, but for Daramic's exclusive dealing, and without the acquisition, Microporous would

[28] Microporous's European business was expanding in a way that would have given it more competitive clout both worldwide and in North America. Thus, this attack on its European expansion had an effect in North America as well.

[29] Dr. Simpson further testified that: {[redacted] (Simpson, Tr. 3227, *in camera*). {[redacted] (Simpson, Tr. 3227, *in camera*). {[redacted] (Simpson, Tr. 3227-328, *in camera*).

today be in a much improved position to constrain Daramic's ability to charge supra-competitive prices.

Daramic claims that this showing of competitive harm is insufficient for three reasons: (1) exclusive dealing did not entirely eliminate Microporous from the market; (2) the challenged contracts are not entirely exclusive; and (3) Complaint Counsel did not show the precise percentage of all the separator markets that have been foreclosed through exclusive dealing. Each of these arguments is without merit and contrary to precedent.

First, in a monopoly maintenance case, it is ***not*** necessary to prove that a rival has been entirely excluded from the market. It is instead sufficient to show that competition has been harmed. The rationale is found in basic economics and reflected in the law: raising the rival's costs creates a price umbrella that enables the monopolist to raise its own prices. Thus, Microsoft was held liable where its primary rival, Netscape, was impaired but not eliminated. *Microsoft*, 253 F.3d at 60 (Microsoft's conduct kept rival browsers from gaining a "critical mass of users"). Dentsply was also held liable where its multiple rivals were impaired but not eliminated. *Dentsply*, 399 F.3d at 191 ("'Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.") (*quoting* Herbert Hovenkamp, *Antitrust Law* ¶ 1802c at 64 (2d ed. 2002). Snuff manufacturer U.S. Tobacco was held liable for monopoly maintenance when its principal rival was impaired but not eliminated. *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 781-82 (6th Cir. 2002) (absent anticompetitive conduct, the monopolist's market share would have declined at a faster rate).

Second, in a monopoly maintenance case, it is also ***not*** necessary to show that the challenged agreements are completely exclusive; near exclusivity will suffice. More precisely, and as discussed above, the relevant requirement is that the foreclosure be sufficient to impair the

competitive effectiveness of the monopolist's rivals. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 454-55 (1922); *Microsoft*, 253 F.3d at 68 (Microsoft required IAPs to keep shipments of Netscape's browser under 25%); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2006 U.S. Dist. LEXIS 29977 at *18-19 (C.D. Cal. March 22, 2006) (sustaining jury verdict that competitors being forclosed from great than 34% of the market was substantial); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 60 F. Supp. 2d 502, 510-11 (M.D.N.C. 1999).

Third, in a monopoly maintenance case, it is ***not*** necessary to show that any particular percentage of the market has been foreclosed. Certainly, a substantial foreclosure number supports the inference that a rivals' ability to constrain the exercise of market power has been impaired. But alternative evidence of actual or likely competitive harm will suffice. Thus, the opinion in *Microsoft* does not specify what percentage of the distribution market was foreclosed by exclusive dealing. *Microsoft*, 253 F.3d at 70. Significantly, the *Microsoft* court observed that Microsoft's exclusionary conduct violated Section 2 "even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a §1 violation." *Id.* The opinion in *Dentsply* does not reference any percentage of the distribution market that was foreclosed by exclusive dealing. *Dentsply*, 399 F.3d at 185 (Dentsply's exclusive network included 23 of the "hundreds of dealers" in the market). The opinion in *Conwood* does not reference any percentage of the distribution market that was affected by the monopolist's anticompetitive conduct. *LePage's*, 324 F.3d at 157. Finally, the opinion in *LePage's* states that the defendant entered into exclusive dealing arrangements with "large customers," but does not reference any percentage of the distribution market that was foreclosed. *Conwood*, 290 F.3d at 783. The reason for these results is that any wrongful conduct that maintains a monopoly is a violation of the Sherman Act.

4. Specific Intent

Unlike monopolization, for which a mere intent to do the act is sufficient, attempted monopolization requires proof that the defendant had a specific intent to destroy competition or build monopoly. *See, e.g., Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 932 (6th Cir. 2005), *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 100-101(2d Cir. 1998); *see also* ABA Section of Antitrust Law, *Antitrust Law Developments* at 309 (6th ed. 2007). Specific intent may be proven by direct evidence. Alternatively, where the defendant's conduct is sufficiently egregious, specific intent to monopolize may be inferred from conduct alone. *E.g., Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993) (Unfair or predatory "conduct may be sufficient to prove the necessary intent to monopolize."); *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 411 F.3d 1030, 1042 (9th Cir. 2005).

Daramic's bargaining tactics toward its customers were so egregious, coercive, and hostile as to support an inference that the company's true purpose was to maintain its monopoly power. This inference is confirmed by direct evidence showing that Daramic intended, [redacted] to exclude Microporous from the battery separator industry. (PX1793 at 001-003, *in camera*; PX0215 at 002, *in camera*); s*ee supra* Part III.A.3 (describing Daramic's monopolistic conduct).

5. No Legitimate Justification for Daramic's Monopoly Conduct

When a prima facie case of competitive harm monopolization has been established, the burden of going forward shifts to the respondent to proffer a procompetitive justification for the challenged conduct. *Dentsply*, 399 F.3d at 196; *Microsoft*, 253 F.3d at 59. The types of efficiencies that are cognizable are those that offer the prospect of lower prices, greater output, or other benefits to consumers.

Daramic asserts that its exclusive dealing arrangements allowed the company to reduce its risks by reserving or committing capacity to individual customers. This explanation is legal and economic nonsense. Any contract for a specific and definite volume would enable Daramic to allocate its capacity. The benefits of advance planning are not furthered by Daramic's demand that customers forgo purchases from alternative suppliers.

With regard to Enersys, Daramic contends that the invocation of force majeure was legitimate. This is contrary to the evidence. But even if accurate, this does not justify Daramic's conduct. A force majeure event results in scarcity, and may excuse Daramic from complying with its obligation to supply product to Enersys for the short time of supposed scarcity. But still unexplained (and unjustified) is Daramic's decision to exploit the scarcity of product in 2006 so as to extend its exclusive contract with [redacted] Daramic's using the scarcity of its monopoly product to leverage future orders, to be delivered when the scarcity has passed and competing sources of supply have developed, is not efficient.

B. Count II: Unreasonable Restraint of Trade

In addition to the monopolization and attempted monopolization conduct described above, Daramic also entered into agreements in unreasonable restraint of trade. In 2000-2001, it became apparent to Daramic that Hollingsworth & Vose ("H&V"), then a producer of absorptive glass mat ("AGM") battery separators for sealed lead-acid batteries, was interested in entering the PE separator industry. (Hauswald, Tr. 640; PX0169 at 001; PX0035 at 005-006; *see also* CCFOF ¶¶ 1168, 1170-1178). In order to block this competitive threat, Daramic approached H&V and proposed an "alliance" between the two companies. (PX0169 at 001; Hauswald, Tr. 640-641, 643). From the outset, the core of this arrangement was a set of mutual promises to [redacted]. (PX0169 at 001; PX0094 at 002-003, *in camera*; PX0035 at

005-006; PX2150 at 001, *in camera*; PX1356 at 001). Specifically, [redacted]

(Hauswald, Tr. 636-637; PX0094 at 002-003, *in camera*).

Once this sweeping non-compete restriction was agreed upon, the parties then discussed where in the world they might benefit from each other's "representation." (Roe, Tr. 1746, 1811). Because both H&V and Daramic {[redacted]}. (PX0917 at 015-016 (Cullen, Dep. at 59-60, *in camera*); PX0925 at 031 (Porter, Dep. at 126-127, *in camera*); PX0094 at 013, *in camera*). But by the time {[redacted]}, (PX0158, *in camera*) this "global alliance" of market leaders had [redacted]. (Roe, Tr. 1810-1811; PX0014, *in camera*). [redacted] (PX0923 at 030 (Hauswald, IH at 280, *in camera*)). In fact, the Vice President of Sales and Marketing for Daramic – one of the architects of the agreement – conceded that the parties could put on customer appreciation events together without any such agreement. (Roe, Tr. 1811-1812).

Daramic's conduct violates Section 1 of the Sherman Act as well as Section 5 of the FTC Act. Liability may be founded upon an abbreviated analysis that focuses on the inherently suspect nature of the challenged restraint, or instead based on a full rule of reason analysis that takes account of Daramic's substantial market power. *See PolyGram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005) ("If, based upon economic learning and the experience of the

market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed unlawful . . .").

1. Legal Standard

Three elements must be established in order to prove a Section 1 violation: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

Daramic does not deny the existence of an agreement with H&V that restricts the types of separators that each company may sell. Daramic admits that its conduct is in and affects interstate commerce. (RX01589 at 003). Accordingly, with regard to Count II of the Complaint, the only issue to be decided is whether the challenged agreement unreasonably restrains competition.

2. The Daramic/H&V Market Division Agreement Unreasonably Restrains Competition

Complaint Counsel bears the initial burden of showing that the agreement between Daramic and H&V likely had a deleterious effect upon consumers. Then the burden of production shifts to the Respondent to advance a pro-competitive justification for the challenged restraint. If Complaint Counsel shows that the challenged restraint is not reasonably necessary to achieve the Respondent's pro-competitive justifications, or that those objectives may be achieved in a manner less restrictive of competition, then the defense fails. This basic framework is employed in both *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2004) (inherently suspect restraint) and *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003) (full rule of reason analysis).

Given Daramic's dominant market position, a restraint affecting even a subsidiary dimension of rivalry can result in significant harm to consumers. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (market power is a "surrogate for detrimental effects"); *Capital Imaging Assoc. v. Mohawk Valley Medial Assoc.*, 996 F.2d 537, 547 (2d Cir. 1993); *RDK Truck Sales and Service Inc. v. Mack Trucks, Inc.*, 2009 U.S. Dist LEXIS 43245 at 14 (E.D. Pa. May 19, 2009) ("[C]ourts typically allow proof of defendant's market power to act as a proxy for evidence of detrimental anticompetitive effects.").

Of course, H&V is not simply impeded from competing with Daramic in some minor way. Instead, the parties have agreed to the complete exclusion of H&V from each of the PE battery separator markets. It is a fundamental principle of Section 1 law that a market division agreement is inherently suspect, which is to say, presumptively anticompetitive even absent a showing of market power. *E.g., Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (horizontal market division is "unlawful per se"); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (same). Antitrust law's long-standing hostility to market division agreements is rooted in uncontroversial economic analysis. A horizontal agreement to forgo all competition is likely to result in higher consumer prices, lower output, and reduced allocative efficiency. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1064 (11th Cir. 2005).[4]

Daramic's response to this showing of competitive harm is to deny that H&V would have entered any of the PE battery separator markets in the absence of the parties' market division

[4] As Judge Posner explains: "The analogy between price-fixing and division of markets is compelling. It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them." *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995). *Accord* H. Hovenkamp, XII *Antitrust Law* ¶ 2030a at 174 (1999) ("Naked horizontal market division agreements enable the participants to reduce output in their assigned territorial, product, or customer area, thus raising the price above the competitive levels.").

agreement. The evidence establishes, however, {[redacted]}. (PX1368 at 001-002; PX0925 at 009-010 (Porter, Dep. at 37-38, *in camera*)). It was H&V's bid for the Exide PE assets that triggered Daramic's efforts to block H&V from expanding into Daramic's market. (PX0169 at 001; PX0035 at 005; *see also* CCFOF ¶1191). This is sufficient to establish H&V as a bona fide potential rival.

In sum, the evidence establishes that Daramic induced H&V to agree not to compete in several markets – markets that have long been dominated by Daramic. The burden now shifts to Daramic to advance a cognizable and plausible efficiency justification. In this regard, Daramic asserts that the non-compete agreement was reasonably necessary to guard against the misuse by H&V of confidential information supplied by Daramic as part of a supposed joint venture. (Respondent's Pretrial Brief at p.34).

There are two critical defects to this argument. First, Daramic and H&V were not engaged in a legitimate joint venture. H&V made no sales on behalf of Daramic, and Daramic's sales of H&V products were trivial. (Roe, Tr. 1810-1811; PX2145 at 001-002; PX0014, *in camera*). The parties' collaboration was insubstantial, and merely an excuse for eliminating competition. *Cf. Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (market division agreement judged per se illegal notwithstanding trivial licensing arrangement between parties); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979) (market allocation agreement judged per se illegal where contemplated collaboration was not implemented). As for testimony that Daramic and H&V jointly hosted "customer appreciation nights" and shared

booth space at annual industry conventions, (Roe, Tr. 1811-1812; RX00370 at 002), this is not a serious foundation for a market allocation agreement.

Second, Daramic has offered no evidence that the company shared with H&V during their collaboration any of its (i) trade secrets, know-how or other intellectual property related to PE manufacturing; or (ii) internal pricing plans or marketing strategies related to future PE sales; (iii) the disclosure of which would have required a worldwide non-compete agreement from 2001 through 2014 to protect against potential misuse by H&V. To the extent that legitimate confidentiality concerns might have arisen, the parties had less restrictive means to deal with them. (PX0094 at 007-008, in camera; PX1356 at 001).

At this point, moreover, the agency relationship has ceased. Only the non-compete survives. And absent any pro-competitive justification for such an agreement, we respectfully suggest that it be enjoined and terminated.

IV. Complete Divestiture and a Cease and Desist Order Are Necessary to Restore and Protect Competition

It is well-settled that the "Commission has wide discretion in its choice of a remedy" so long as the remedy has a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13, (1946); *see also Chicago Bridge,* 138 F.T.C. at 1161, n.566. Furthermore, "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961) (footnote omitted); *see also Chicago Bridge*, 534 F.3d at 441. As explained by the Commission, "In Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.'" *In re B.F. Goodrich Co.*, 110 F.T.C. 207, 345 (1988), (quoting *In re RSR Corp.*, 88 F.T.C. 800, 893 (1976)). The Clayton Act

requires that upon a finding of a Section 7 violation, "the Commission . . . shall . . . order . . . such person to cease and desist from such violations, and divest itself of the . . . assets, held." 15 U.S.C. § 21(b) (Emphasis added).[30]

Daramic's expert, Dr. Kahwaty, [redacted] (Kahwaty, Tr. 5432, *in camera*). [redacted] (Kahwaty, Tr. 5262-5263). This makes no sense.

A full and complete remedy must restore Microporous to the competitive position it had but for Daramic's wrongful conduct. (*See* CCFOF ¶ 1197). Prior to the acquisition, Microporous had become a worldwide, competitive threat to Daramic and Entek. In a fair remedy, the customers deserve that a restored Microporous should not be anything less. Thus, any remedy must, at a minimum, divest all the plants and facilities that Microporous had at the time of the acquisition, including the Piney Flats and Microporous facilities and production lines, and the Feistritz, Austria plant. (*See* CCFOF ¶ 1198). The record here supports relief including, but not limited to, an order that will 1) divest a new entity, referred to here as "Newco," as a fully independent and viable competitor in all of the relevant markets to the same degree that

[30] *See also* Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), allowing the Commission to "issue . . . an order requiring such . . . Corporation to cease and desist from using such method of competition or such act of practice."; *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957) (Commission is authorized "to enter an order requiring the offender to 'cease and desist' from using such unfair method[s].").

Microporous competed or would likely have competed in those markets but for the acquisition, and 2) require Daramic to cease and desist in its anticompetitive conduct.[31]

A. Complete Divestiture Restores the Entity That Would Have Existed But For the Merger and Allows it to Compete on an Equal Footing with Daramic

As the Commission has held, "[i]n Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.'" *In re B.F. Goodrich Co.*, 110 F.T.C. 207 at 345 (1988), (quoting *In re RSR Corp.*, 88 F.T.C. 800, 893 (1976)). "Ordinarily, a presumption should favor total divestiture of the acquired assets as the best means of accomplishing this result . . . ." *In re RSR Corp.*, 88 F.T.C. at 893 (citation omitted), *aff'd* 602 F.2d 1317 (9th Cir. 1979). "Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Consistent with these principals, the Proposed Order requires a total divestiture.

Moreover, only through a total divestiture, including the Feistritz facility, can it be assured that Newco will be as competitive in North America and have as much a chance to be viable as a competitor as Microporous was. In this case, as in *Chicago Bridge*, Daramic's violation "is the acquisition of a previously viable and independent entity capable of competing on an equal footing." *Chicago Bridge & Iron Company N.V. v. FTC*, 534 F.3d 410, 441 (5th Cir. 2008). In *Chicago Bridge*, the antitrust violation related solely to the construction of cryogenic tanks. *Id.* The Commission, however, also required divestiture of the water plant division and other assets "necessary to enable the separate entity to compete ... on an 'equal footing.'" *Id.* The Fifth Circuit affirmed holding "[t]he Commission's divestiture of the water plant division

[31] To remedy the anticompetitive effects of the merger and Respondent's other illegal acts, the Notice of Contemplated Relief provided that the Commission may order such relief against Respondent as is supported by the record and is necessary and appropriate.

along with the cryogenic tank division is consistent with and relevant to creating a viable competitor, because the water department provides a consistent revenue stream to complement sporadic tank sales." *Id.* Similarly, the divestiture here should effectively reconstitute a viable competitor that can compete on an "equal footing" with Daramic.

1. Divestiture of the Piney Flats, Feistritz and Microporous Facilities and Production Lines is Necessary to Restore Competition

As a part of the total divestiture of Microporous, divestiture of the Feistritz, Austria plant is necessary to allow the new company to serve as a viable competitor. The Feistritz plant has two lines capable of producing both CellForce and PE separators for automotive SLI. (Gilchrist, Tr. 312-313).

The Feistritz plant is critical to give the acquirer a "global footprint" to locally supply the world-wide demand of customers in the North America market. (Gilchrist, Tr. 309-310 (testifying to importance of a global footprint); Hauswald, Tr. 713-714). As Microporous's former CEO testified, it is [redacted]. (Gilchrist, Tr. 525). He explained how important is was for Microporous to have a global footprint in order to compete for the large customers. (Gilchrist, Tr. 593-601 (world-wide expansion was a "key element").

Daramic's Hauswald also admitted that having worldwide facilities gives a competitor in these markets a "competitive advantage" and reduces the supply-chain risks to customers. (Hauswald, Tr. 722, 726-727, 807, *in camera* {[redacted]}; PX0206 at 004; Hauswald, Dep. 68; *see also* CCFOF ¶ 1202). Daramic advertises to its customers that it can give them local supply from a global company,

and considers this to be a market advantage. (Hauswald, Tr. 711, 722, 1319-1319; PX0582 at 018).

Both Daramic and Entek, the two other competitors to Newco in the U.S. market, possess a global footprint. (Gilchrist, Tr. 310-311). Also, having multiple locations gives customers security, should one plant stop operating. (Gillespie, Tr. 2993 (lessons from the Daramic strike); Gaugl, Tr. 4602 ("continuity of supply" important)). Customers state they prefer a supplier with multiple plants so that an outage in one facility will not result in a complete disruption of supply. (Godber, Tr. 225-226, *in camera*; Toth, Tr. 1440-1441).

Two of the key world-wide customers for Microporous were instrumental in moving the company towards a global footprint: Enersys and Exide. For Enersys, it was critical that its suppliers have more than one plant, because half of its revenue depended on the source of separator supply. (Axt, Tr. 2129; *see also* CCFOF ¶ 1209). [redacted] (Axt, Tr. 2144, 2152; RX00207 at 10, *in camera*). Exide and Microporous also agreed that Microporous would have a second plant in Europe to meet Exide's worldwide needs. (Gillespie, Tr. 2969-70). It was also critical to Microporous's ability to compete that it could shift production to Europe for Enersys, so that it could open up more production capacity in North America and expand its business there. (Trevathan, Tr. 3721, 3774). Microporous determined that it if wanted to be a "major supplier," to companies like Enersys, it needed to "become a global player." (Gilchrist, Tr. 309-311). That is why it expanded into Austria. (*Id.*)

For Trojan, the Microporous expansion in Austria meant that it could switch more Flex-Sil to CellForce in the United States, which would giveit a "cost advantage" and a backup source

of supply if anything happened to the U.S. plant. (Godber, Tr. 224-228; *see also* CCFOF ¶¶ 1213-1215). Microporous had completed the construction of the Austrian plant before the acquisition, and that plant was producing product within a week of the deal. (Gilchrist, Tr. 334-335).

Therefore, by enabling Newco to serve European demand for CellForce from Feistritz, Newco will have more CellForce capacity available at its U.S. Piney Flats facility to supply to U.S.-based customers. This will permit Newco to compete more effectively with Daramic in the U.S. in several of the relevant markets and benefits customers. (*See, e.g.,* Godber, Tr. 224-225, 226-227 (with more CellForce products available in the U.S., Trojan Battery planned to switch an additional five to ten percent of its purchases from Flex-Sil to the less expensive CellForce, saving roughly 10 percent.)).

The Feistritz plant also will give the acquirer the scale necessary to compete with Daramic. Scale to supply entire plants is important to the large battery manufacturer customers. (Gillespie, Tr. 3052; Enersys, Tr. 2129-2130; Hauswald, Tr. 806-807, *in camera*). (At the time of the acquisition, Microporous was supplying large battery manufacturers. (Hauswald, Tr. 934, *in camera*); *see also* CCFOF ¶ 1205). Scale is also important for a new company, because it will need the scale to make it "sustainable in the long run." (Gillespie, Tr. 3053). Finally, scale provides a cost advantage due to significant economies of scale. (Simpson, Tr. 3225-3226, 3229, 3233, *in camera* (citing PX0241); Gillespie, Tr. 3053; Hauswald, Tr. 821-825; Toth, Tr. 1443 (citing PX0476, *in camera*). Even Daramic [redacted]. (Hauswald, Tr. 726-727; PX0194 at 030 [redacted]; Toth, Tr. 1434 (referring to PX0483 at 013)).

Daramic may not avoid divestiture of the Feistritz plant merely because it is located outside of Complaint Counsel's asserted geographic market of North America. A total divestiture can clearly include assets outside the parts of a company in which an antitrust violation is found, "especially where, as here, total divestiture is necessary to restore effective competition." *Chicago Bridge*, 534 F.3d at 441 (citing *OKC Corp. v. FTC*, 455 F.2d 1159, 1163 (10th Cir. 1972)).

Total divestiture of Microporous's plants must also include the "line in the box" discussed at the hearing. Microporous purchased that line to service its Enersys contract and Daramic chose to discontinue installation of the line due to the acquisition. (Gilchrist, Tr. 374). (line had been destined for Tennessee). Absent the acquisition, Microporous would have installed this additional line, which must be returned to restore competition to what it would have been but for the merger. Daramic must also return any pieces of that line which it transferred out of Daramic's facilities.

Total divestiture of the Piney Flats and Feistritz facilities will provide Newco with lines producing Flex-Sil, Ace-Sil, CellForce and automotive SLI separators. Microporous's primary source of revenue came from Flex-Sil sales, and gave Microporous the income and scale to expand and compete in other types of separators. The Ace-Sil line provides separators to Enersys, a primary customer of the Feistritz facility and is used as the primary component of CellForce. The plant in Tennessee was primarily a rubber plant for Flex-Sil and Ace-Sil, which also was the component for CellForce, which was made in the adjoining building at the plant. The two buildings never operated "independently." (Gaugl, Tr. 4641).

[redacted] (*See* Kahwaty, Tr. 5262-5263, *in camera*). The

evidence shows this is demonstrably incorrect. [redacted] (*Id.*) [redacted] (*see* Kahwaty, Tr. 5571, *in camera*), [redacted][32]

Along with the production facilities, Daramic must divest all customer contracts associated with the divested plants at Piney Flats and Feistritz. (*See* CCFOF ¶ 1218). This will give the acquirer a base of business from day one to aid in its viability and gain experience in the market. *See* Gillespie, Tr. 3053 (Exide stating desirability of divesting customer contracts to Newco). Those contracts will include contracts supplied with automotive separators, a market in which Microporous was beginning to compete at the time of the acquisition. (*See* Gilchrist, Tr. 346-348). Divestiture of these contracts is appropriate as they are necessary to restore effective competition. *See Chicago Bridge,* 534 F.3d at 441.

2. The Remaining Provisions of Paragraph II of the Proposed Order Will Further the Creation of a Viable Competitor

Paragraph II contains other provisions typically found in an order for divestiture in order to create a viable competitor. Respondent would be required to divest to Newco any assets removed after the acquisition, (Paragraph II.C), to turn over to the acquirer all confidential business information related to Microporous, (Paragraph II.G), not to interfere with Newco's ability to employ the current and former employees of Microporous, (Paragraphs II.D. and II.E), and to give assistance to Newco as needed to enable the acquirer to take over the business, (Paragraph II.F.4). This divestiture must include the original R&D and technology departments that Microporous had. Microporous believed that it was "imperative" to have a R&D and testing

[32] Under the proposed order, Daramic may remove from Piney Flats the equipment that Daramic added, if any, to enable the Piney Flats PE CellForce line to manufacture Daramic HD. Likewise, contracts associated solely with Daramic HD are not subject to divestiture.

laboratory in order to be competitive. (Gilchrist, Tr. 327-328; Axt, Tr. 2109-2110 ("technical expertise" is important; Gillespie, Tr. 3051-3052, *in camera* [redacted]).

In addition, Daramic must covenant not to sue the acquirer over any technology Microporous had prior to the acquisition. By the same token, Daramic may receive a similar assurance from the acquirer. At this point, Daramic has owned Microporous for well over a year. It has had ample time to examine Microporous's intellectual property portfolio and files, and determine the weaknesses in Microporous's positions. There would be no effective way to purge this information from the minds of Daramic's personnel, and it would be an adverse effect from the merger to allow Daramic to use this knowledge post-divestiture in any action it might bring against the acquirer. In these circumstances, the only appropriate response is to require each party to stand down from any enforcement action related to pre-acquisition products.

The Proposed Order also provides for the appointment of a Monitor Trustee, (Paragraph III), to make sure that respondent complies with the requirements of the Order, and a Divestiture Trustee, (Paragraph IV), in case respondent does not divest within the required time frame. Paragraph V of the Proposed Order requires respondent to maintain the viability and competitiveness of Microporous pending divestiture. These are standard provisions in Commission divestiture orders. *See, Chicago Bridge*, 138 F.T.C. at 1024.

3. A Cease and Desist Order is Necessary to Prevent Respondent's Further Anticompetitive Behavior

In addition to the merger-specific relief requested, Complaint Counsel requests an order that requires Daramic to cease and desist from any other practice that is found to be an unfair method of competition or an unreasonable restraint of trade in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C.

§ 45. This order should require Daramic to cease and desist from conduct, agreements, and attempts to enter agreements that are in restraint of competition, and any activity deemed an unfair method of competition, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Daramic.

Paragraph VI of the Proposed Order requires respondent to undo the H&V Agreement and to refrain from entering into similar agreements in the future. The Proposed Order also prohibits respondent from engaging in conduct that inhibited customers from also using alternative suppliers. These provisions are necessary to ensure that Daramic does not resume its anticompetitive conduct after the divestiture. These provisions are narrowly tailored to attack the anticompetitive conduct engaged in by respondent, while allowing it to engage in appropriate competitive behavior. "[T]he Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of law and ensure against its repetition . . . ." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986) (citations omitted).

Paragraph VII of the Proposed Order allows customers to reopen, and renegotiate or terminate, contracts entered into by Daramic in the exercise of market power. This provision is necessary to prevent respondent from continuing to reap the benefits of its unlawful conduct. *See In re N. Tex. Specialty Physicians*, 140 F.T.C. 715, 775 (2005), *aff'd* 528 F.3d 346 (5th Cir. 2008); *see also* Gillespie, Tr. 3053, *in camera* [redacted]. As Microporous's former CEO testified, customers [redacted] (Gillespie, Tr. 3053, *in*

camera). Specifically, customers of products in the relevant markets may renegotiate contracts entered into after Daramic's acquisition of Microporous. Customers of Daramic motive and UPS separators in the U.S. may also reopen and renegotiate their contracts to counteract Daramic's monopolization conduct. Finally, the contracts Microporous entered into before the acquisition may be reopened and renegotiated only to the extent those contracts were amended or prices renegotiated or increased after the acquisition.

Paragraph VIII of the Proposed Order prohibits Daramic from introducing any battery separator using cross-linked rubber for a period of two years. This technology was exclusively Microporous's before the acquisition, and will be divested pursuant to the Order. Although it therefore would be a violation of the Order for Daramic to utilize the Microporous intellectual property after the divestiture, it may be difficult to later prove that any precise technology later used by Daramic was not developed independently. Such development by Daramic, however, would take time, and we can presume that any such introduction within a short period after the divestiture would be based improperly on Microporous technology. Accordingly, a flat ban for two years is appropriate. "[R]espondent[] must remember that those caught violating the Act must expect some fencing in." *Hosp. Corp. of Am.*, 807 F.2d at 1393 (7th Cir. 1986) (citation omitted).

V. Conclusion

For the reasons stated above, as is fully supported by the evidence at trial, Daramic's acquisition of Microporous and its anticompetitive conduct are illegal. The public deserves a complete remedy to restore competition and prevent further harm to competition. A proposed order is attached.

Dated: July 17, 2009

Respectfully submitted,

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

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

PROPOSED ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions shall apply:

A. "Acquirer" means any Person approved by the Commission pursuant to this Order to acquire Microporous.

B. "Acquisition" means the acquisition of all of the outstanding shares of Microporous by Respondent Polypore pursuant to a Stock Purchase Agreement dated February 29, 2008.

C. "Acquisition Date" means February 29, 2008.

D. "Battery Separator(s)" means porous electronic insulators placed between positively and negatively charged lead plates in flooded lead-acid batteries to prevent electrical short circuits while allowing ionic current to flow through the separator.

E. "Books and Records" means all originals and all copies of any operating, financial or other books, records, documents, data and files relating to Microporous, including, without limitation: customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, Customer Approvals and Information; accounting records; credit records and information; correspondence; research and development data and files; production records; distributor files; vendor files, vendor lists; advertising,

promotional and marketing materials, including website content; sales materials; records relating to any employees who accepts employment with the Acquirer; educational materials; technical information, data bases, and other documents, information, and files of any kind, regardless whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media;

provided, however, that where documents or other materials included in the Books and Records to be divested with Microporous contain information: (1) that relates both to Microporous and to Polypore's Retained Assets or its other products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to Microporous; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Polypore provides the Acquirer with the above-described information without requiring Polypore to divest itself completely of information that, in content, also relates to its Retained Assets or its other products or businesses.

F. "Commission" means the Federal Trade Commission.

G. "Confidential Business Information" means any non-public information relating to Microporous either prior to or after the Effective Date of Divestiture, including, but not limited to, all customer lists, price lists, distribution or marketing methods, or Intellectual Property relating to Microporous and:

1. Obtained by Respondent prior to the Effective Date of Divestiture; or,

2. Obtained by Respondent after the Effective Date of Divestiture, in the course of performing Respondent's obligations under any Divestiture Agreement;

Provided, however, that Confidential Business Information shall not include:

1. Information that Respondent can demonstrate it obtained prior to the Acquisition Date, other than information it obtained from Microporous during due diligence pursuant to any confidentiality or non-disclosure agreement;

2. Information that is in the public domain when received by Respondent;

3. Information that is not in the public domain when received by Respondent and thereafter becomes public through no act or failure to act by Respondent;

4. Information that Respondent develops or obtains independently, without violating any applicable law or this Order; and

5. Information that becomes known to Respondent from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.

H. "Contracts" means all contracts or agreements of any kind related to Microporous, and all rights under such contracts or agreements, including: Microporous Customer Contracts, leases, software licenses, Intellectual Property licenses, warranties, guaranties, insurance agreements, employment contracts, distribution agreements, product swap agreements, sales contracts, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, and non-disclosure agreements.

I. "Customer" means any Person that is a direct or indirect purchaser of any Battery Separator.

J. "Customer Approvals and Information" means, with respect to any Microporous Battery Separator(s):

1. All consents, authorizations and other approvals, and pending applications and requests therefore, required by any Customer applicable or related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any Battery Separator; and,

2. All underlying information, data, filings, reports, correspondence or other materials used to obtain or apply for any of the foregoing, including, without limitation, all data submitted to and all correspondence with the Customer or any other Person.

K. "Daramic Battery Separator(s)" means any Battery Separators manufactured or sold by Respondent as of the day before Acquisition Date, and any Battery Separators manufactured or sold by Respondent after the Acquisition Date that do not utilize any Microporous Intellectual Property other than Shared Intellectual Property.

L. "Direct Cost" means the cost of direct material and direct labor used to provide the relevant assistance or service.

M. "Divestiture Agreement" means any agreement(s) between Respondent (or between a Divestiture Trustee appointed under this Order) and the Acquirer approved by the Commission, that effectuate the divestiture of Microporous required by Paragraphs II. or IV. of this Order, to accomplish the purpose and requirements of this Order, as well as all amendments, exhibits, attachments, agreements and schedules thereto, including, but not limited to, any Technical Assistance Agreement or Transition Services Agreement.

N. "Divestiture Trustee" means a Person appointed pursuant to Paragraph IV. of this Order to accomplish the divestiture of Microporous.

O. "Effective Date of Divestiture" means the date on which the divestiture of Microporous to an Acquirer pursuant to the requirements of Paragraph II. or IV. of this Order is completed.

P. "Employee Information" means the following, to the full extent permitted by applicable law:

1. A complete and accurate list containing the name of each Microporous Employee;

2. With respect to each such employee, the following information:

a. The date of hire and effective service date;

b. Job title or position held;

c. A specific description of the employee's responsibilities related to Microporous Battery Separators; *provided, however,* in lieu of this description, Respondent may provide the employee's most recent performance appraisal;

d. The base salary or current wages;

e. The most recent bonus paid, aggregate annual compensation for Respondent's last fiscal year and current target or guaranteed bonus, if any;

f. Employment status (i.e., active or on leave or disability; full-timne or part-time); and

g. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to

similarly situated employees; and

3. At the proposed Acquirer's option, copies of all employee benefit plan descriptions (if any) applicable to the relevant employees.

Q. "Feistritz Plant" means all property and assets, tangible and intangible, owned, leased, or operated by Respondent and located or used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any one or more of the Microporous Battery Separators at the former Microporous facility in Feistritz, Austria, at any time between the Acquisition Date and the Effective Date of Divestiture, including, but not limited to:

1. All real property interests (including fee simple and leasehold interests), including all rights, easements and appurtenances, together with all buildings, structures, facilities (including R&D and testing facilities), improvements, and fixtures, including, but not limited to, all Battery Separator production lines (including the two (2) production lines for polyethylene (PE) and/or CellForce Battery Separators);

2. All Tangible Personal Property;

3. All governmental approvals, consents, licenses, permits, waivers, or other authorizations, to the extent assignable; and

4. Inventories existing as of the Effective Date of Divestiture.

Provided, however, that the definition of "Feistritz Plant" shall not include any assets used solely to manufacture Daramic Battery Separators.

R. "Force Majeure Event" means whatever events, actions, occurrences or circumstances have been identified or specified as constituting "force majeure" or a "force majeure event" in a contract or agreement between the Respondent and a Customer for the supply of Battery Separators.

S. "Governmental Entity(ies)" means any federal, provincial, state, county, local, or other political subdivision of the United States or any other country, or any department or agency thereof.

T. "H&V Agreement" means the Cross Agency Agreement dated March 23, 2001, between Daramic, Inc. and Hollingsworth & Vose Company, and all amendments (including, but not limited to, the Renewal dated March 23, 2006), exhibits, attachments, agreements, and schedules thereto.

U. "Intellectual Property" means Patents, Manufacturing Technology, Know-How,

and Trade Names and Marks.

V. "Inventories" means:

1. All inventories, stores and supplies of finished Battery Separators and work in progress; and,

2. All inventories, stores and supplies of raw materials and other supplies related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any Battery Separators.

W. "Jungfer Technology" means all Intellectual Property owned or licensed by Respondent as a result of its acquisition of Separatorenerzeungung GmbH ("Jungfer") on November 16, 2001.

X. "Know-How" means all know-how, trade secrets, techniques, systems, software, data (including data contained in software), formulae, designs, research and test procedures and information, inventions, processes, practices, protocols, standards, methods (including, but not limited to, test methods and results), customer service and support materials, and other confidential or proprietary technical, technological, business, research, development and other materials and information related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of Battery Separators, and all rights in any jurisdiction to limit the use or disclosure thereof, anywhere in the world.

Y. "Line in Boxes" means all property and assets, tangible and intangible, related to any capacity expansions proposed, planned or under consideration by Microporous as of the Acquisition Date, including, but not limited to, all engineering plans, equipment, machinery, tooling, spare parts, and other tangible property, wherever located, relating to a proposed, planned or contemplated capacity expansion to be accomplished through installation of an additional Battery Separator production line at the Piney Flats Plant.

Z. "Manufacturing Technology" means all technology, technical information, data, trade secrets, Know-How, and proprietary information, anywhere in the world, related to the research, development, manufacture, finishing, packaging or distribution of Battery Separators, including, but not limited to, all recipes, formulas, formulations, blend specifications, customer specifications, equipment (including repair and maintenance information), tooling, spare parts, processes, procedures, product development records, trade secrets, manuals, quality assurance and quality control information and documentation, regulatory communications, and all other information relating to the above-described processes.

AA. "Microporous" means Microporous Holding Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, _with its offices and principal place of business as of the Acquisition Date located at 100 Spear Street, Suite 100, San Francisco, CA 94111, and its joint ventures, subsidiaries, divisions, groups, and affiliates (including, but not limited to, Microporous Products, L.P. and Microporous Products, GmbH) controlled by Microporous Holding Corporation, and all assets of Microporous Holding Corporation acquired by Respondent in connection with the Acquisition, including, but not limited to:

1. All of Respondent's rights, title and interest in and to the following property and assets, tangible and intangible, wherever located, and any improvements, replacements or additions thereto that have been created, developed, leased, purchased, or otherwise acquired by Respondent after the Acquisition Date, relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators:

    a. the Piney Flats Plant;

    b. the Feistritz Plant;

    c. the Line in Boxes;

    d. Microporous Intellectual Property;

    e. Contracts; and

    f. Books and Records; and

2. All rights to use Shared Intellectual Property pursuant to a Shared Intellectual Property License;

BB. "Microporous Battery Separator(s)" means all Battery Separators in which Microporous was engaged in research, development, manufacture, finishing, packaging, distribution, marketing or sale as of the Acquisition Date, and all Battery Separators distributed, marketed or sold after the Acquisition Date using any Microporous Trade Names and Marks.

CC. "Microporous Copyrights" means all rights to all original works of authorship of any kind, both published and unpublished, relating to Microporous Battery Separators and any registrations and applications for registrations thereof and all rights to obtain and file for copyrights and registrations thereof.

DD. "Microporous Customer Contracts" means all open purchase orders, contracts or agreements or Terminable Contracts for Microporous Battery Separators or for Battery Separators being supplied from the Piney Flats Plant or the Feistitz Plant at any time between the Acquisition Date and the Effective Date of Divestiture except for Daramic Battery Separators.

EE. "Microporous Employee(s)" means any Person:

1. Employed by Microporous as of the Acquisition Date;

2. Employed at the Piney Flats Plant at any time between the Acquisition Date and the Effective Date of Divestiture; or

3. Employed at the Feistritz Plant at any time between the Acquisition Date and the Effective Date of Divestiture.

FF. "Microporous Intellectual Property" means all rights, title and interest in and to all:

1. Microporous Patents;

2. Microporous Manufacturing Technology;

3. Microporous Know-How;

4. Microporous Trade Names and Marks;

5. Microporous Copyrights; and

6. All rights in any jurisdiction anywhere in the world to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach, or otherwise to limit the use or disclosure of any of the foregoing.

GG. "Microporous Know-How" means all Know-How relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

HH. "Microporous Manufacturing Technology" means all Manufacturing Technology relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

II. "Microporous Patents" means all Patents relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

JJ. "Microporous Trade Names and Marks" means all Trade Names and Marks relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous, including, but not limited to, all rights to commercial names, "doing business as" (d/b/a/) names, service marks and applications for or using the words: "Microporous," "Amerace," "CellForce," "FLEX-SIL,""ACE-SIL;" and all rights in internet web sites and internet domain names using any of the above.

KK. "Monitor Trustee" means a Person appointed with the Commission's approval to oversee the divestiture requirements of this Order, including Respondent's compliance with the Order's requirements.

LL. "Patent(s)" means all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, substitutions, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto, anywhere in the world.

MM. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.

NN. "Piney Flats Plant" means all property and assets, tangible and intangible, owned, leased, or operated by Respondent and located or used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any one or more of the Microporous Battery Separators at the former Microporous facility in Piney Flats, Tennessee, at any time between the Acquisition Date and the Effective Date of Divestiture, including, but not limited to:

1. All real property interests (including fee simple and leasehold interests), including all rights, easements and appurtenances, together with all buildings, structures, facilities (including R&D and testing facilities), improvements, and fixtures, including, but not limited to, all Battery Separator production lines (including the three (3) production lines for Ace-Sil, Flex-Sil, and polyethylene (PE) and/or CellForce Battery Separators), pilot lines and test lines;

2. All Tangible Personal Property;

3. All governmental approvals, consents, licenses, permits, waivers, or other authorizations, to the extent assignable; and

4. Inventories existing as of the Effective Date of Divestiture.

Provided, however, that the definition of "Piney Flats Plant" shall not include any assets used solely to manufacture Daramic Battery Separators.

OO. "Polypore" or "Respondent" means Polypore International, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Polypore International, Inc. (including, but not limited to, Daramic, LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

PP. "Releasee(s)" means the Acquirer, any entity controlled by or under common control with the Acquirer, and any licensees, sublicensees, manufacturers, suppliers, and distributors of the Acquirer ("affiliates"); and any Customers of the Acquirer or of affiliates of the Acquirer.

QQ. "Retained Asset(s)" means:

1. Any property(ies) or asset(s), tangible or intangible:

   a. That were owned, created, developed, leased, or operated by Polypore prior to the Acquisition; or

   b. That relate(s) solely to any Polypore product, service or business except what is included in the definition of Microporous under this Order; and

2. Polypore's right to use, exploit, and improve Shared Intellectual Property; *provided, however*, that Polypore shall have no right to hinder, prevent, or enjoin the Acquirer's use, exploitation, or improvement of Shared Intellectual Property, or to use without the Acquirer's consent any improvements after the Effective Date of Divestiture to the Shared Intellectual Property by the Acquirer.

RR. "Retention Bonus" means the compensation provided for each of the Microporous Employees.

SS. "Shared Intellectual Property" means any Intellectual Property that is a Retained

Asset or that has been used by Respondent in connection with a Retained Asset that was also used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous at any time between the Acquisition Date and the Effective Date of Divestiture.

TT. "Shared Intellectual Property License" means: (i) a worldwide, royalty-free, perpetual, irrevocable, transferrable, sublicensable, non-exclusive license to all Shared Intellectual Property owned by or licensed to Respondent for any use, and (ii) such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary to enable the Acquirer to utilize the licensed rights.

UU. "Tangible Personal Property" means all machinery, equipment, spare parts, tools, and tooling (whether customer specific or otherwise); furniture, office equipment, computer hardware, supplies and materials; vehicles and rolling stock; and other items of tangible personal property of every kind whether owned or leased, together with any express or implied warranty by the manufacturers, sellers or lessors of any item or component part thereof, and all maintenance records and other documents relating thereto.

VV. "Technical Services Agreement" means the provision by Respondent Polypore at Direct Cost of all advice, consultation, and assistance reasonably necessary for any Acquirer to receive and use, in any manner related to achieving the purposes of this Order, any asset, right, or interest relating to Microporous.

WW. "Terminable Contract(s)" means all contracts or agreements and rights under contracts or agreements between the Respondent and any Customer(s) for the supply of any Battery Separator in or to North America (including the entirety of any contract or agreement that includes in the same contract or agreement the supply of Battery Separators both inside and outside North America) in effect at any time between the date the Order becomes final and the Effective Date of Divestiture; *provided, however,* that "Terminable Contracts" does not include any contracts or agreements between Microporous and any Customer(s) for the supply of any Battery Separator that was entered into prior to the Acquisition Date, except to the extent such contract or agreement was amended or modified, including changes to the pricing terms, after the Acquisition Date; *provided further, however,* that such amended or modified portion of such contract or agreement shall be considered a "Terminable Contract."

XX. "Trade Names and Marks" means all trade names, commercial names and brand names, all registered and unregistered trademarks, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), trade dress, logos, service marks and applications,

geographical indications or designations, and all rights related thereto under common law and otherwise, and the goodwill symbolized by and associated therewith, anywhere in the world.

YY. "Transition Services Agreement" means an agreement requiring Respondent Polypore to provide at Direct Cost all services reasonably necessary to transfer administrative support services to Acquirer of Microporous, including, but not limited to, such services related to payroll, employee benefits, accounts receivable, accounts payable, and other administrative and logistical support.

II.

IT IS FURTHER ORDERED that:

A. Not later than six (6) months after the date the divestiture provisions of this Order become final, Respondent shall divest Microporous, absolutely and in good faith, and at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner, including pursuant to a Divestiture Agreement, that receives the prior approval of the Commission.

B. Respondent shall comply with all terms of the Divestiture Agreement approved by the Commission pursuant to this Order, which agreement shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement shall not reduce, limit or contradict, or be construed to reduce, limit or contradict, the terms of this Order; *provided, however,* that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondent under such agreement; *provided further, however,* that if any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

C. Prior to the Effective Date of Divestiture, Respondent shall:

1. Restore to Microporous any assets of Microporous as of the Acquisition Date that were removed from Microporous at any time between the Acquisition Date and the Effective Date of Divestiture, other than Battery Separators sold in the ordinary course of business and Inventories consumed in the ordinary course of business;

2. To the extent any fixtures or Tangible Personal Property have been removed from the Feistritz Plant, the Piney Flats Plant or the Line in Boxes after the Acquisition Date and not returned or replaced with equivalent assets, such fixtures or Tangible Personal Property shall be returned and restored to good working order suitable for use under normal operating conditions or replaced with equivalent assets;

3. Secure at its sole expense all consents and waivers from Persons that are necessary to divest any property or assets, tangible or intangible (including, but not limited to, any Contract), of Microporous to the Acquirer; *provided, however,* that in instances where (i) Microporous Battery Separators are sold together with Daramic Battery Separators under the same Terminable Contract, Respondent shall only be required to obtain such consents and waivers from the Customer as necessary to divest that portion of the Terminable Contract pertaining to Microporous Battery Separators; or (ii) any Contracts (including, but not limited to, supply agreements) are utilized in connection with the manufacture of Microporous Battery Separators and Daramic Battery Separators under the same Contract, Respondent shall only be required to obtain such consents and waivers from the other contracting party as necessary to divest that portion of the Contract pertaining to Microporous Battery Separators; *provided further, however,* that if for any reason Respondent is unable to accomplish such an assignment or transfer of Contracts, it shall enter into such agreements, contracts, or licenses as are necessary to realize the same effect as such transfer or assignment; and

4. Grant to the Acquirer a Shared Intellectual Property License for use in connection with Microporous as divested pursuant to this Order.

D. Respondent shall take all actions reasonably necessary to assist the Acquirer in evaluating, recruiting and employing any Microporous Employees, including (at the Acquirer's option), but not limited to, the following:

1. Not later than thirty (30) days before the execution of a Divestiture Agreement, Respondent shall: (i) provide the Acquirer with a list of all Microporous Employees, and Employee Information for each Person on the list; (ii) provide any available contact information, including last known address for any Person formerly employed as a Microporous Employee whose employment terminated prior to execution of a Divestiture Agreement; (iii) allow the Acquirer an opportunity to interview any Microporous Employees personally, and outside the presence or hearing of any employee or agent of Respondent; and, (iv) allow the Acquirer to inspect the personnel files and other documentation relating to such

Microporous Employees, to the extent permitted under applicable laws;

2. Respondent shall: (i) not directly or indirectly impede or interfere with the Acquirer's offer of employment to any Microporous Employee(s); (ii) not directly or indirectly attempt to persuade, or offer any incentive to, any Microporous Employee(s) to decline employment with the Acquirer; (iii) remove any contractual impediments and irrevocably waive any legal or equitable rights it may have that may deter any Microporous Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent; *provided, however,* that Respondent may enforce confidentiality provisions related to Daramic Battery Separators; and,

3. Respondent shall: (i) continue to extend to any Microporous Employees, during their employment prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits; (ii) pay a Retention Bonus to any Microporous Employee(s) to whom the Acquirer has made a written offer of employment who accepts a position with the Acquirer at the time of divestiture of Microprous.

E. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not:

1. directly or indirectly solicit or induce, or attempt to solicit or induce, any Microporous Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer; or

2. hire or enter into any arrangement for the services of any Microporous Employee who has accepted an offer of employment with, or who is employed by, the Acquirer;

provided, however, Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; (ii) hire any Microporous Employee whose employment has been terminated by the Acquirer; or (iii) hire a Microporous Employee who has applied for employment with Respondent, provided that such application was not solicited or induced in violation of this Order.

F. Respondent shall include in any Divestiture Agreement related to Microporous the following provisions:

1. Respondent shall covenant to the Acquirer that Respondent shall not join, file, prosecute or maintain any suit, in law or equity, either directly or indirectly through a third party, against the Acquirer or any Releasees under Intellectual Property that is owned or licensed by Respondent as of the Effective Date of Divestiture, including, but not limited to, the Jungfer Technology, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution, offer to sell or sale of Microporous Battery Separators;

2. Upon reasonable notice and request from the Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondent to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Microporous Intellectual Property or Shared Intellectual Property; and

3. At the option of the Acquirer:

   a. A Technical Services Agreement, *provided, however,* the term of any Technical Services Agreement shall be at the option of the Acquirer, but not longer than two (2) years from the Effective Date of Divestiture.

   b. A Transition Services Agreement, *provided, however,* the term of the Transition Services Agreement shall be at the option of the Acquirer, but not longer than two (2) years from the Effective Date of Divestiture;

Provided, however, that Respondent shall not (i) require the Acquirer to pay compensation for services under such agreements that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation(s) under such agreements because of a material breach by the Acquirer of any such agreement in the absence of a final order by a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which any Acquirer would be entitled to receive in the event of Respondent's breach of any such agreement.

G. Respondent shall:

1. submit to the Acquirer, at Respondent's expense, all Confidential Business Information;

2. deliver such Confidential Business Information as follows: (i) in good faith; (ii) as soon as practicable, avoiding any delays in transmission of the respective information; and (iii) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor Trustee (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information (other than as necessary to comply with the following: (i) the requirements of this Order; (ii) the Respondent's obligations to the Acquirer under the terms of any Divestiture Agreement; or (iii) applicable law);

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer, the Monitor Trustee, or the Commission;

6. Respondent shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not expressly permitted by this Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondent's computers or computer networks; and

7. Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order; or, (ii) to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to provide accounting, information technology and credit-underwriting services, to provide legal services associated with actual or potential litigation and transactions; and to monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements.

H. The purpose of the divestiture of Microporous is to create an independent, viable and effective competitor in the markets in which Microporous was engaged at the time of the Acquisition Date, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after this Order becomes final, Respondent shall retain a Monitor Trustee, acceptable to the Commission, to monitor Respondent's compliance with its obligations and responsibilities under this Order, consult with Commission staff, and report to the Commission regarding Respondent's compliance with its obligations and responsibilities under this Order.

B. If Respondent fails to retain a Monitor Trustee as provided in Paragraph III.A. of this Order, a Monitor Trustee, acceptable to the Commission, shall be identified and selected by the Commission's staff within forty-five (45) days after this Order is final.

C. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee selected under Paragraph III.A or III.B. of this Order:

1. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee pursuant to the terms of this Order in a manner consistent with the purposes of the Order and in consultation with Commission's staff.

2. Within ten (10) days after the Commission's approval of the Monitor Trustee, Respondent shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondent's compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by Respondent, the Monitor Trustee shall sign a confidentiality agreement prohibiting the use, or the disclosure to anyone other than the Commission (or any Person retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order), of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee, for any purpose other than performance of the Monitor Trustee's duties under this Order.

3. The Monitor Trustee shall serve until the expiration of period for Customers to seek reopening and renegotiation or termination of

Terminable Contracts as provided in Paragraph VI. of this Order; *provided, however*, that the Commission may modify this period as may be necessary or appropriate to accomplish the purposes of the Order.

4. Subject to any demonstrated legally recognized privilege, the Monitor Trustee shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor Trustee may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to Microporous assets. Respondent shall cooperate with any reasonable request of the Monitor Trustee and shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent's compliance with the Order.

5. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or hers services, subject to the approval of the Commission.

6. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor Trustee's gross negligence or willful misconduct. For purposes of this Paragraph III.C.6., the term "Monitor Trustee" shall include all Persons retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order.

7. Respondent shall provide copies of reports to the Monitor Trustee in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission.

8. The Monitor Trustee shall report in writing to the Commission (i) every sixty (60) days from the date the Monitor Trustee is appointed, (ii) at the time a divestiture package is presented to the Commission for its approval,

and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this order.

D. The Commission may, among other things, require the Monitor Trustee and each of the Monitor Trustee's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor Trustee's duties.

E. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee in the same manner as provided in this Paragraph.

F. The Commission may on its own initiative, or at the request of the Monitor Trustee, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.

G. Respondent shall cooperate with the Monitor Trustee appointed pursuant to this Paragraph in the performance any duties and responsibilities under this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested, absolutely and in good faith, Microporous within the time period or in the manner required by Paragraph II. of this Order, then the Commission may at any time appoint a Divestiture Trustee to divest Microporous to an Acquirer and in a manner, including pursuant to a Divestiture Agreement, that satisfies the purposes and requirements of this Order.

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order, Respondent shall consent to the appointment of a Divestiture Trustee in such action. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and

divestitures and may be the same Person as the Monitor Trustee appointed under Paragraph III. of this Order. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement ("Divestiture Trustee Agreement") that, subject to the prior approval of the Commission transfers to the Divestiture Trustee all rights and powers necessary to effect the relevant divestiture, and to enter into any relevant agreements, required by this Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph IV. of this Order, Respondent shall consent to, and the Divestiture Trustee Agreement shall include, the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest relevant assets or enter into relevant agreements pursuant to the terms of this Order and in a manner consistent with the purposes of this Order.

2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the Divestiture Trustee Agreement described in this Paragraph IV. of this Order to divest relevant assets pursuant to the terms of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture, or believes that divestiture can be achieved within a reasonable time, such period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to Microporous or related to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities. At the option of the Commission, any delays in divestiture or entering into any agreement caused by Respondent shall extend the time for divestiture under this Paragraph IV. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee Agreement shall prohibit the Divestiture Trustee, and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants from disclosing, except to the Commission (and in the case of a court-appointed trustee, to the court) Confidential Business Information; *provided, however*, Confidential Business Information may be disclosed to potential acquirers and to the Acquirer as may be reasonably necessary to achieve the divestiture required by this Order. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.

5. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made to, and a Divestiture Agreement executed with, an Acquirer in the manner set forth in Paragraphs II. of this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with this Order. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required by this Order is consummated, and the Divestiture Trustee has provided an accounting for all monies derived from the divestiture and all expenses occurred.

7. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph, the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph IV.E.6. of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain Microporous.

9. The Divestiture Trustee shall report in writing to the Commission every two (2) months concerning his or her efforts to divest and enter into agreements related to Microporous, and Respondent's compliance with the terms of this Order.

F. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV. of this Order.

G. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.

H. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Divestiture Trustee Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Trustee Agreement, any modification of the Divestiture Trustee Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that:

A. From the date this Order becomes final until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the full economic

viability, marketability, and competitiveness of Microporous, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of Microporous and assets related thereto except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining Intellectual Property, Contracts, Trade Names and Marks, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture.

B. Respondent shall maintain the operations of Microporous in the ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets included within Microporous). Among other things as may be necessary, Respondent shall:

1. Maintain a work force at least as equivalent in size, training, and expertise to what was associated with Microporous prior to the Acquisition Date;

2. Assure that Respondent's employees with primary responsibility for managing and operating Microporous are not transferred or reassigned to other areas within Respondent's organizations except for transfer bids initiated by employees pursuant to Respondent's regular, established job posting policy;

3. Provide sufficient working capital to operate Microporous at least at current rates of operation, to meet all capital calls with respect to Microporous and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;

4. Make available for use by Microporous funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets of Microporous;

5. Use best efforts to preserve and maintain the existing relationships with Customers, suppliers, vendors, private and Governmental Entities, and other Persons having business relations with Microporous; and

6. Except as part of a divestiture approved by the Commission pursuant to this Order, not remove, sell, lease, assign, transfer, license, pledge for collateral, or otherwise dispose of Microporous, *provided however,* that nothing in this provision shall prohibit Respondent from such activities in the ordinary course of business consistent with past practices.

VI.

IT IS FURTHER ORDERED that:

A. Respondent shall allow all Customers with Terminable Contracts the right and option unilaterally to reopen and renegotiate or to terminate their contracts, solely at the Customer's option, without penalty, forfeiture or other charge to the customer, and consistent with the requirements of this Order including the following:

1. No later than ten (10) days from the date this Order becomes final, Respondent shall notify all Customers with Terminable Contracts of their rights under this Order and, for each such Terminable Contract, offer the Customer the opportunity to reopen and renegotiate or to terminate their contract(s). Respondent shall send written notification of this requirement and a copy of this Order and the Complaint, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

2. No later that ten (10) days from the Effective Date of Divestiture, Respondent shall send written notification of the Effective Date of Divestiture to all customers with Terminable Contracts, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

3. A Customer may exercise its option to reopen and renegotiate or terminate any Terminable Contract by sending by certified mail, return receipt requested, a written notice to Respondent either to: (i) the address for notice stated in the Contract; or, (ii) Respondent's principal place of business at any time prior to five (5) years after the Effective Date of Divestiture. The written notice shall identify the Terminable Contract that will be reopened or terminated, and the date upon which any termination shall be effective; *provided, however,* that: (a) a Customer with more than one Terminable Contract who sends written notice with regard to less than all of its Terminable Contracts shall not lose its opportunity to reopen and renegotiate or terminate any remaining Terminable Contracts; (b) any

Customer who reopens and renegotiates a Terminable Contract prior to the Effective Date of Divestiture shall have a further opportunity to reopen and renegotiate or terminate such Terminable Contract after the Effective Date of Divestiture at any time prior to five (5) years after the Effective Date of Divestiture; (c) Respondent shall not be obligated to reopen and renegotiate or terminate, as the case may be, a Terminable Contract on less than thirty (30) days' notice; and (d) any request by a Customer to reopen and renegotiate or terminate a Terminable Contract on less than thirty (30) days' notice shall be treated by Respondent as a request to reopen and renegotiate or terminate, as the case may be, effective thirty (30) days from the date of the request.

4. Respondent shall not directly or indirectly:

   a. Require any Customer to make or pay any payment, penalty, or charge for, or provide any consideration relating to, or otherwise deter, the exercise of the option to reopen and renegotiate or terminate or the reopening and renegotiation or termination of any Terminable Contract; or

   b. Retaliate against, or take any action adverse to the economic interests of, any Customer that exercises its right under the Order to reopen and renegotiate or terminate any Terminable Contract;

provided, however, that Respondent may enforce Contracts, or seek judicial remedies for breaches of Contracts, based upon rights or causes of action that accrued prior to the exercise by a Customer of an option to terminate a Contract.

5. Respondent shall include in the Divestiture Agreement a requirement that the Acquirer shall allow all Customers with Terminable Contracts for Microporous Battery Separators the right and option unilaterally to reopen and renegotiate or to terminate their contracts, solely at the Customer's option, without penalty, forfeiture or other charge to the Customer, and consistent with the requirements of this Paragraph of the Order as if the Terminable Contract remained with Respondent. Respondent shall include in the Divestiture Agreement a requirement that all Customers with Terminable Contracts for Microporous Battery Separators shall be third party beneficiaries of this provision of the Divestiture Agreement, with the right to enforce this provision independent of, and apart from, Respondent.

provided, however, that nothing in this Order will affect the rights and responsibilities under any Terminable Contract for any Customer who fails to notify Respondent or the Acquirer, as the case may be, within the time

allotted in this Paragraph.

VII.

IT IS FURTHER ORDERED that Respondent shall not, directly or indirectly, take or threaten to take any coercive, retaliatory or deterrent actions, financial or non-financial, against or directed at a Customer based on that Customer's purchase of, or consideration to purchase, any volume or amount of Battery Separators from a Person other than Respondent, including, but not limited to, the following:

A. Refusing to supply or otherwise conditioning the sale of Battery Separators to a Customer based on that Customer's purchase of, or consideration to purchase, any Battery Separators from a Person other than Respondent;

B. Suspending, delaying or terminating the supply of Battery Separators to a Customer, or threatening to do so;

C. Entering into or enforcing any agreement or other arrangement, express or implied, that prevents or restricts a Customer from purchasing Battery Separators from a Person other than Respondent;

D. Auditing a Customer's purchases of Battery Separators to determine the extent of purchases from non-Respondent sources;

E. Retaliating against a Customer for exercising any of the options or rights provided for Customers under Paragraph VI of this Order; or

F. Invoking a Force Majeure Event to suspend or terminate the supply of Battery Separators to any Customer(s) unless such Force Majeure Event is *bona fide;* Respondent shall bear the burden of establishing the existence of such Force Majeure Event at the request of any Customer adversely affected by it, and shall take commercially reasonable steps to address or correct any disruption and restore supply to such Customer(s) as expeditiously as possible.

VIII.

IT IS FURTHER ORDERED that:

A. Respondent shall:

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, it being understood that nothing in the H&V Agreement, currently or as amended in the future, or the Amendment shall be construed to reduce any obligations of the Respondent under this Order. The Amendment shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Amendment shall constitute a failure to comply with this Order. The Amendment shall not be modified, directly or indirectly, without the prior approval of the Commission.

B. Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied, with any Person currently engaged, or that might potentially become engaged, in the development, production, marketing or sale of any Battery Separator, to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with Battery Separators, or otherwise to restrict the scope or level of competition related to Battery Separators.

Provided, however, that it shall not, of itself, constitute a violation of this Paragraph for Respondent to enter into a *bona fide* and written joint venture agreement with any Person to manufacture, develop, market or sell a new Battery Separator, technology or service, or any material improvement to an existing Battery Separator, technology or service, in which both Respondent and the other Person contribute significant personnel, equipment, technology, investment capital or other resources, that prohibits such Person from selling products or services in competition with the joint venture in geographic markets in which the joint venture does business or competes for a reasonable period of time. *Provided further, however*, that Respondent shall, within ten (10) days after execution, file a true and correct copy of such joint venture agreement with the Commission.

IX.

IT IS FURTHER ORDERED that, for a period of two (2) years from the Effective Date of Divestiture, Respondent shall not advertise, market or sell any Battery Separator utilizing cross linked rubber anywhere in the world.

X.

IT IS FURTHER ORDERED that, no later than ten (10) days from the date on which this Order becomes final, Respondent shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibilities for any of Respondent's obligations under this Order.

XI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger or consolidation of Respondent; or

C. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XII.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Effective Date of Divestiture, and thereafter every sixty (60) days until the Respondent has fully complied with the provisions of Paragraphs II., III., IV., V., and VI. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Monitor Trustee and Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with the relevant provisions of this Order.

B. Respondent shall include in its compliance reports, among other things required by the Commission, a description of all substantive contacts or negotiations for the divestiture required by this Order, the identity of all parties contacted, copies of all material written communications to and from such parties, and all reports and recommendations concerning the divestiture, the Effective Date of Divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.

C. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and annually until expiration or termination of

Respondent's obligations under the Order, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall deliver a copy of each such report to the Monitor Trustee.

XIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to any matter contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

B. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

XIV.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2009, I filed *via* hand delivery an original and two copies of the foregoing public version of Complaint Counsel's Post-Trial Brief with:

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

I hereby certify that on July 17, 2009, I served *via* electronic mail and hand delivery two copies of the foregoing public version of Complaint Counsel's Post-Trial Brief with:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, H-106
Washington, DC 20580
oalj@ftc.gov

I hereby certify that on July 17, 2009, I served *via* electronic mail delivery and first class mail two copies of the foregoing public version of Complaint Counsel's Post-Trial Brief with:

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