UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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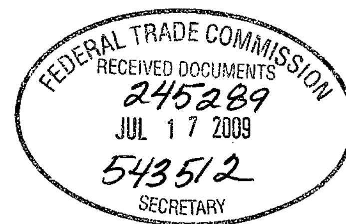

In the Matter of	)	
	)	**Docket No. 9327**
	)	
Polypore International, Inc.	)	**PUBLIC**
a corporation	)	
	)	

RESPONDENT'S POST-TRIAL BRIEF

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I. INTRODUCTION

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

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

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

II. SUMMARY OF ARGUMENT

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

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

(FOF 316, 318, 325, 332). Daramic's total worldwide sales in 2007 were {

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

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

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

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

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

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

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

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

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

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

} Complaint ¶43;

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

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

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

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

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

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

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

III. APPLICABLE LEGAL STANDARDS

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. COMPLAINT COUNSEL HAVE NOT PROVED THEIR PRIMA FACIE CASE

A. COMPLAINT COUNSEL HAVE NOT PROVED A PROPER PRODUCT MARKET

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

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

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

1. Applying the Correct Standard Proves a "PE Separators" Relevant Market

The Guidelines identify the "hypothetical monopolist test" as the method for defining a relevant market.[3] Complaint Counsel have wholly ignored the Guidelines system of economic substitutes and have offered proof only of functional substitution. (FOF 133, 139, 1201, 1352). They fail even in this incorrect application as set forth below. Applying a correct "hypothetical monopolist test" to the four markets alleged by the FTC shows that those markets are not valid relevant markets in which to analyze the acquisition. Instead, the "alternative" all PE separator market is the correct relevant market here. Complaint ¶6; (FOF 76, 77, 116, 126).

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

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

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

Mr. Whear and Mr. Brilmyer, in addition to several customers, {

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

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

Considering the characteristics of separators – primarily backweb thickness and overall product thickness – it is impossible to classify them into distinctive "buckets." (69, 70, 74). Since the only real difference between industrial and automotive separators is thickness, a separator for a UPS application may be as thin as 8 mils – a size that easily fits into SLI applications. (FOF 65). Similarly, an "industrial" separator of 11 mil thickness is just as functionally effective in a car battery as a separator of 10 mil thickness, although the extra thickness is generally not worth the additional cost. (FOF 67, 71, 244; Riney, Tr. 4497). Further, because some separator profiles are unique to individual customers, a separator manufactured for one customer's deep-cycle application may not be substituted into the same type of application for another customer. (PX1124-003; Trevethan Dep., p. 114-115; Gaugl Dep., p. 146-148; FOF 588, 691, 795, 799, 885). This turns the FTC's "functional substitution" theory on its head in that two separators produced for different

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

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

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

} (FOF 181-185).

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[4] Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995)(holding full-serve gasoline sales and self-serve sales in the same market since stations could easily convert from full-serve to self-serve); Kraft General Foods, 926 F. Supp. at 361 (holding all ready-to-eat cereals in the same product market because of production flexibility); Frank Saltz & Sons v. Hart Schaffner & Marx, 1985 WL 2510 (S.D.N.Y. 1985)(holding all men's suits in the same product market because plants could easily switch from producing low quality to higher quality suits).

a. Ace-Sil is a separate product market

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

b. Flex-Sil is a separate product market

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

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

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

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

Simply because both products can be used in 'deep-cycle' applications does not make them economically substitutable as the SSNIP test requires. (FOF 271, 278, 545-49, 550, 1201, 1338-39). See, e.g., FTC v. Swedish Match, 131 F.Supp.2d 151, 165 (D.D.C. 2000)(concluding that chewing tobacco and snuff were not in the same market despite similar uses because consumers would not switch for price reasons or in response to a SSNIP).

B. COMPLAINT COUNSEL HAVE NOT PROVED A PROPER GEOGRAPHIC MARKET

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

The relevant geographic market is the "area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies." Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). It is the area in which "antitrust defendants face competition." FTC v. Freeman Hosp., 69 F.3d 260, 268 (8th Cir. 1995)(citations omitted). Importantly, "determination of the proper geographic market . . . must involve a dynamic as opposed to static analysis of 'where consumers could practicably go, not on where they actually go." California v. Sutter Health Sys., 130 F.Supp. 2d 1109, 1120 (N.D. Cal. 2001)(citations omitted).

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

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

Throughout the trial, Complaint Counsel repeatedly focused on the "need" for local supply, yet attempted to "gloss over" the fact that { } (FOF 194-95, 443, 926, 932, 933, 936, 937, 1353; RX01530-003.) { } Id.; (FOF 933). { } cannot offer "local" supply to Austria any more than it can offer such supply to any country in Asia. Yet it ships and sells its products on every continent without disruption or impact on its ability to compete for sales of PE separators. (FOF 932, 933, 936, 937, 963, Hauswald, Tr. 1044-45; Simpson, Tr. 3335, *in camera*; { }). Likewise, Microporous, prior to the acquisition, had been operating from one small facility in Piney Flats, TN for many years, but sold its separators to customers all over the world, { } (FOF 192, 1146). Daramic, is, in fact, the only separator supplier of any type (including AGM and PVC) that operates numerous manufacturing facilities located throughout the world. (FOF 936; Gilchrist, Tr. 307; Hauswald, Tr. 859, 862; RX00677; RX01084). Asian PE separator manufacturers like { } supply separators to South America and Italy, while the { } sells to customers in Korea – neither have more than one manufacturing facility. (FOF 1049, 1109).

In 2008 Daramic exported 24 percent of its product and { } North America.[5] Thus, applying a SSNIP in North America, while holding prices in the rest of the world constant, Daramic's South American customers would switch to suppliers in Asia and Europe, while { } manufacturers. (FOF

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

1356, 1208, 1334, 1349-50; PX1833, RX01120, RX00677, *in camera*, RX01407, *in camera*). Switches by these customers alone would be significant and well outside the "critical loss" needed to sustain a profitable SSNIP. (FOF 1350-51). For { } South American customers of { } Daramic, supplies from the United States are not "local." Evidence at trial also makes clear that shipping costs, tariffs and freight "into" North America are not prohibitive to the importation of supply from other regions of the world, specifically Asia. (FOF 192, 1110, 1360-61, 1178, 1208). Shipping costs are considered to be minimal. (Thuet, Tr.4351-52, *in camera*; Roe IHT, p. 372; Hauswald IHT, pp. 74-75 Riney IHT, p. 424-39; FOF 1110, 1357).

There are several suitable Asian separator producers that could easily begin exporting materials to North America. (FOF 977-1049, 152-55). They are already exporting their products to South America and Europe, and Complaint Counsel presented no evidence to show that they could not export to North America. (FOF 493, 1049). The key to any analysis of the proper geographic market is not where consumer are turning for supply, but where they might turn in response to a SSNIP. See also Sutter Health Sys., 130 F.Supp.2d at 1124 (looking to whom consumers could practically turn if faced with anticompetitive pricing, not just those to which consumers currently turn). Much evidence was presented at trial showing that customers are turning to Asian suppliers, and could have, and in some cases intend to have, access to those suppliers for the North American market. ({ }; Thuet Dep., p. 80-82). Evidence proves that applying a 10% SSNIP to a product produced at one of Daramic's US plants, while holding the price of the same product from Daramic's Prachinburi plant constant, customers would find it economically feasible to import that product from Thailand to North America. (FOF 1111; Thuet, Tr. 721).

Further, Complaint Counsel's short-sighted focus on the VAT taxes on exports out of China caused them to ignore evidence showing not only that there are a number of viable Asian producers

outside of China, but also that it is possible to avoid some, if not all, the VAT taxes on exports, therefore erasing that handicap to exports to North America for Chinese producers. (FOF 192, 995, 1110, 1208).

Testimony and evidence at trial make it clear that the valid and proper relevant geographic market is worldwide.

C. COMPLAINT COUNSEL CANNOT MEET THEIR BURDEN OF SHOWING COMPETITIVE HARM AS A RESULT OF THE MERGER

By failing to define a relevant product and geographic market, Complaint Counsel have already failed in their proof. However, the FTC is also entirely unable, even within its own improper markets, to prove that there has been competitive harm as a result of the merger. "[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger." Guidelines § 2.0; U.S. v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990).

{

} (FOF 1362). {

} - smaller than in the worldwide calculation because Microporous exported a significant amount of its production outside of North America, so its worldwide share was more than its North American share. (FOF 192, 338-342). These calculations are only the "starting point" for analyzing the competitive effects of the merger and when additional facts are viewed in context it is evident that there is no proof of any competitive harm as a result of the merger - either now, or in the future.

1. Complaint Counsel Fail to Show Any Adverse Effects on Competition in Any of Their Alleged Individual Markets

The FTC's claims regarding anticompetitive effects in its alleged individual markets (deep cycle, motive, SLI and UPS) lack foundation because these are not relevant markets. See *supra* pp. 12-15.

a. The Alleged Deep Cycle Market

The FTC's claim that the acquisition gave Daramic a monopoly in the deep cycle segment has no basis since the evidence at trial shows that Microporous' Flex-Sil separator and Daramic's HD were not competitive and were not in the same relevant market. See *supra* pp. 12-15. The only thing that happened with the acquisition is that Microporous' competitive share was shifted to Daramic and thus it has no adverse impact.

b. The Alleged Motive Power Market

Further, since the evidence adduced at trial also shows that the alleged "motive" segment does not qualify as a relevant product market, and thus there could not have any anticompetitive effects as a result of the acquisition. (FOF 78, 970, 1288). Moreover, {

} market share in this alleged segment based on { }uncommitted entrant. (FOF 940. 968. 970. 1218. 1220. 1238). Finally, testimony and documentary evidence at trial confirm that many Asian producers of industrial separators are also in a position to supply the alleged North American market and, in fact that they may already do so indirectly through the sale of Asian industrial batteries into North America. (Thuet, Tr. 1057).

c. The Alleged SLI Market

Similarly, "SLI" fails as a relevant market. Even if it survived, Complaint Counsel's case at trial was devoid of evidence sufficient to show that Microporous, which had never had a "commercial" sale[6] of SLI material, would have begun selling SLI separators in North America "but for" the acquisition. (FOF 318, 576-582, 1336). Microporous had no contracts for the sale of SLI products at the time of the acquisition. In fact, it had <u>never</u> had a contract for the sale of any SLI product in its entire history. <u>Id</u>. The {

} in July 2007, which contemplated such sales, was going nowhere and the

[6] The only "commercial" sale of SLI separators by Microporous was made to company called Voltmaster. The material that was sold to Voltmaster was {**originally made as a sample run for JCI, but it failed JCI's tests.**} (FOF 336; PX77). Microporous was then able to sell it to Voltmaster as a "one time" sale – without any intention of producing any other SLI material going forward. (FOF 336). This cannot be considered a competitive commercial sale with Entek and Daramic.

Microporous board had directed that there be no further capital expansion without board approval. (FOF 376, 576-582, 385-412). Although { } was renewed in February 2008, conveniently in time to place it in the "black box" for Daramic's review, no action occurred prior to the acquisition that would suggest it would be any more successful than { } moving the parties forward to an agreement. (FOF 382-84, 414-419). Far from showing that Microporous was "very close" to selling SLI separators in North America in February 2008, the evidence relating to the purported { } shows instead that Microporous had little hope of securing SLI sales in North America. (FOF 382, 576-82, 383, 414-419).

Further, there is significant evidence that Microporous had taken absolutely no steps to proceed with the installation of a production line to supply SLI separators { } in Piney Flats. (FOF 385, 374-376, 1147). Additionally, the "new" line the FTC alleges was intended for Piney Flats consisted of 11 million square meters of capacity in an alleged market segment with { }. (FOF 407, 428, 943, 968, 1059, 1089, 1090, 1108, 1113, 220, 1331). The addition of such minimal capacity under such circumstances is de minimus, particularly in comparison to { }. (FOF 927). { } SLI separator business even before the JCI/Daramic contract ended, as all of Daramic's sales { } shipped to Mexico. (Roe, Tr. 1695-96, 1764). Further, since { } business from Daramic, any possible entry into an SLI market by Microporous was reduced to irrelevance in the competitive landscape. (FOF 306-309, 946-957).

d. The Alleged UPS Market

Complaint Counsel's attempt to paint a single project to produce a separator for a non-lead acid battery that was described as in its "infancy" as supporting Microporous' entry into the UPS market fails utterly. (PX0663-002, 335-365, 723, 1222-23, 1365). The FTC was entirely unable to

show any evidence at trial that Microporous "was nearing the successful conclusion of a three year project to enter [the UPS] market." FTC Br. p. 21; (FOF 355-365, 723, 1222-23, 1365).

The FTC touts Microporous as a "Maverick" in its development of its "Project LENO" for use in UPS batteries. (Robertson, Tr. 48; Simpson, Tr. 3202) However, Complaint Counsel conveniently ignore the fact that this product was intended to be used in "Gel batteries in the US and Europe for UPS." PX0663 at 002; FOF 355-365). Gel batteries are not flooded-lead acid batteries and thus have no import here. (FOF 24, 103; Godber, Tr. 147-49; Gilchrist, Tr. 429-30). Furthermore, the project was for the development of a product for use by { } not approved the product, or requested supply. (FOF 355-365, 663, 722; Brilmyer, Tr. 1901-02; McDonald Dep., p. 74; Whear Depo., p. 227). Furthermore, the DARAK replacement part of this project, contemplated Microporous shipping or producing product in Europe with no North American impact. (FOF 622, 355-365). {

} but Microporous had not even entered into "preliminary talks" with any other potential customers regarding this potential product. (McDonald IHT, 202-208, 1364.} { } actual participant in this segment with { } impact present and future competitive conditions than Microporous. (FOF 682-83, 1325, 1431). There is simply no evidence that Microporous would have entered into this alleged market and any entry would have been of minimal, if any, significance. (FOF 355-365, 622, 1364).

Complaint Counsel's argument that Microporous would have entered the SLI and UPS segments faces substantial legal hurdles as well as factual hurdles. In cases involving potential competition, the FTC requires "clear proof" of entry and looks for "subjective evidence" that entry is likely, e.g., management studies and capital expenditure plans. In re B.A.T. Industries, 104 F.T.C. 852, 926-28 (1984). There is no such evidence here. In addition, Marine Bancorp established the requirement that the would-be entrant "offer a substantial likelihood of ultimately producing

deconcentration of that market or other significant pro-competitive effects." United States v. Marine Bancorp., 418 U.S. 602, 633 (1974). In light of the size of both Daramic { } in the SLI and UPS segments, Microporous' alleged entry at the small scale available and at the high costs it faced could not have provided sufficient competitive impact to satisfy this standard.

2. COMPLAINT COUNSEL HAVE FAILED TO SHOW THAT ANTICOMPETITIVE COORDINATED INTERACTION IN THE CORRECT RELEVANT MARKET HAS OCCURRED OR IS LIKELY.

According to the Commentary on the Merger Guidelines, "Successful coordination typically requires rivals (1) to reach terms of coordination that are profitable to each of the participants in the coordinating group, (2) to have a means to detect deviations that would undermine the coordinated interaction, and (3) to have the ability to punish deviating firms, so as to restore the coordinated status quo and diminish the risk of deviations. . . . It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade." Commentary on the Horizontal Merger Guidelines at 18-19.

Moreover, the presence of sophisticated customers ("power buyers") in markets involving infrequent purchases, long-term contracts and bidding can be a substantial factor in promoting a competitive market. FTC v. Elders Grain, 868 F.2d 901, 905 (7th Cir. 1989)(sophisticated buyers may cause sellers to cheat on any price agreement); FTC v. R.R. Donnelley & Sons Co., Civ. No. 90-1619 SSH, 1990 U.S. Dist. LEXIS 11361, at 10 (D.D.C. 1990)("[T]he sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction.") In Baker Hughes Inc., , the court pointed to sophisticated buyers purchasing expensive equipment using "multiple, confidential bids for each order." (908, F2d. 986). The court there said that "[t]his sophistication . . . was likely to promote competition even in a highly concentrated market." Id.; ABA *Mergers and Acquisitions* at 159-60 ("Courts have recognized that evidence that a small number of buyers purchase most of the product in the market indicates that

sellers may not have a great deal of freedom in establishing prices and thus may be less likely to adhere to a collusive agreement. Sophisticated buyers are more likely to detect collusion and offer sellers large orders to induce defections from the agreement or to vertically integrate.");

In this case, not only have Complaint Counsel failed to prove that battery separator manufacturers could reach terms of coordination, but there is no evidence they would be able to detect or punish deviations. (FOF 1240-41, 1369, 1436). In fact, the indisputable evidence that { } of Daramic's business, { } defeats the argument of Complaint Counsel that coordinated interaction will occur. (FOF 306-09, 946-57).

Additionally, it is equally clear from the evidence adduced at trial that this industry is characterized by the strength and sophistication of the customers such that their leverage and power is more than sufficient to prevent anticompetitive coordination. (FOF 277, 358, 438, 478, 507-509, 559, 588, 603, 634, 677).

3. COMPLAINT COUNSEL HAVE FAILED TO SHOW THAT ANTICOMPETITIVE UNILATERAL EFFECTS IN THE CORRECT RELEVANT MARKET HAVE OCCURRED OR ARE LIKELY.

The Merger Guidelines describe the unilateral effects theory as follows: "A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level." Sec. 2.21. Such a price increase is possible only if a significant portion of sales in the market are "accounted for by consumers who regard the products of the merging firms as their first and second choices, and . . . repositioning of the non-parties' product lines to replace the localized competition lost through the merger [is] unlikely." Id. The court in United States v. Oracle Corp., 331 F. Supp.2d 1098 (N.D. Cal. 2004) described four factors as preconditions for a unilateral effects claim in such a product setting: (1) the products are differentiated; (2) the products "controlled by the

merging firms must be close substitutes;" (3) products produced by other firms in the market "must be sufficiently different" that a SSNIP would be profitable for the merged firm; and (4) "repositioning by the non-merging firms must be unlikely." 331 F. Supp.2d at 1117-18. Applying these principles, the court rejected the government's claim of anticompetitive unilateral effects in Oracle, finding that the government failed to prove that the products of the merging companies occupied a "product 'node' alone," i.e., "a 'node' or an area of localized competition." Id. at 1170, 1172.

As noted above, the presence of power buyers in markets can also be a substantial factor in promoting a competitive market. In Baker Hughes, the court in affirming the lower court pointed to the fact of sophisticated buyers purchasing expensive equipment using "multiple, confidential bids for each order." (908 F.2d at 986). The court said that "[t]his sophistication . . . was likely to promote competition even in a highly concentrated market." Id. The role of such purchasers was also relied upon in United States v. Country Lake Foods, Inc., 754 F. Supp. 669, 673 (D. MN 1990) where the five substantial purchasers of fluid milk in the MSP/MSA, if faced with a threatened price increase, would "negotiate a reduction or . . . seek a substitute or replacement supplier of fluid milk," if necessary "from outside dairies." *Id.*

The FTC itself has recognized that where its focus in a merger case is on the alleged dominance of the merged entity, it must show that the "merger may result in a single firm that so dominates a market that it is able to maintain prices above the level that would prevail if the market were competitive" and it must show that such increased prices are accompanied by "lower output." In the Matter of Chicago Bridge & Iron Co., Dkt. No. 9300 at 7 (Jan. 6, 2005). *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir. 1997).

The facts and evidence presented at trial cannot, and do not, support any theory that Daramic could, as a result of the acquisition of Microporous, unilaterally exercise market power to increase

prices and decrease output, resulting in "unilateral" anticompetitive effects. (FOF 1236, 1308, 1313, 1366-72). Microporous was the high cost producer in the PE market and, looking at the FTC's markets, was a real factor only in deep cycle where Daramic was not competitive. (FOF 339, 239, 569, 314, 734, 442, 1384, 1200, 1339, 120, 1298; PX0489). Microporous posed no market threat in sales of pure PE separators. (FOF 17, 127, 318, 336). Guidelines § 2.22.

Evidence at trial of { } since the acquisition underscores Daramic's lack of any market power. (FOF 306-309, 946-951). Testimony and documents before the Court make clear that { } demonstrated great competitive prowess vis-a-vis Daramic, perhaps more obviously since the acquisition than prior to February 2008. Id. Further, there was significant substantiation of the fact that {

} (FOF 428, 943-44, 964-66, 968). {

} (FOF 943-44, 946, 968,1092-93, 1220).

Among the preconditions that Complaint Counsel cannot satisfy here is that they cannot show that "repositioning of the non-parties' product lines to replace the localized competition lost through the merger [is] unlikely." Sec. 2.21. A variety of evidence at trial confirmed that {

} "reposition" its product line so as to replace any allegedly localized competition lost as a result of this acquisition. {

} (FOF 943-44, 946, 968,1092-93, 1220).

On the other hand, the evidence shows that Microporous' extremely modest PE market share { } in Complaint Counsel's North American geographic market and its high structure was

not sufficient to enhance Daramic's ability to impose unilateral effects. (RX00114, RX01119, PX0949; RX00115). The Guidelines themselves explain that a market share of { } is not likely to be of concern.[7] In short, the FTC's argument that Daramic is an effective market predator because of the acquisition has no merit. The Guidelines and case law impose several preconditions for application of the unilateral effects concept. E.g., United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

4. COMPLAINT COUNSEL HAVE BEEN UNABLE TO SHOW POST-ACQUISITION PRICE INCREASES ATTRIBUTABLE TO INCREASED MARKET POWER

Although this matter has come on for trial over 16 months after the acquisition, Complaint Counsel have been unable to show any post-acquisition price increases that can be attributed to any increased market power of Daramic. (FOF 244, 246-253, 256-57; RX01119, RX01323, RC00631, RX00677, RX01604, RX01605, RX1450). Furthermore, the evidence related to the { } does not support Complaint Counsel's case. (FOF 759-763). If Daramic must resort to the court system for interpretation of a contract, or, indeed for help raising a price which it contends is validated by significant increases in cost, that shows that it lacks market power. The fact that { } for months, and, in fact sued Daramic in { } soon after, merely reinforces Daramic's lack of power to increase prices post-acquisition. Id.

There is no evidence showing that Daramic increased prices immediately after the acquisition, or, importantly, that any post-acquisition price increase was out of line with pre-acquisition increases or was not cost justified. (FOF 244, 246-253, 256-57; RX01119, RX01323, RX00631, RX00677, RX01604, RX01605, PX1450). Furthermore, Complaint Counsel failed to provide any evidence that any post-acquisition price increases resulted from enhanced market power.

[7] "The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable." Guidelines § 2.0

Complaint Counsel made much at trial of documentation suggesting that Daramic { } prior to acquisition, but the facts amply illustrate that such fears were unfounded since Microporous was a high cost competitor. (FOF 1315, 1366, 1384). In any case, such fears are not proof of market power either pre- or post-acquisition.

Complaint Counsel's failure to support its claim of unilateral effects was further evidenced by documents and testimony substantiating Daramic's inability to increase prices since the acquisition. (FOF 253; RX00927 at 14-16). In 2008, Daramic's attempt to increase prices { } reflect its raw material cost increases was completely unsuccessful. (RX00927 at 5-16; FOF 255, 279, 282).. Similarly, in 2009 it sought a { } increase from { } was forced to settle for a { } (RX00927 at 14; Riney, Tr. 15 4948, 4952-53, *in camera*). Other customers also rejected the 2008 price increase, many rejecting any increase. (FOF 630, 678, 759, 762, 1389). Overall, the facts show that Daramic's attempt to increase prices was only partially successful, notwithstanding that these increases were entirely justified by increases in raw material costs and by contract. (RX00631; RX00677; RX011189; RX01323; RX01604; RX01605; PX1450).

Further defeating Complaint Counsel's case regarding price increases, the FTC improperly relied on cost indices rather than on evidence of Daramic's <u>actual</u> raw material costs and it improperly relied on prices Daramic has attempted to obtain from its customers rather than those it has actually obtained. (FOF 242, 253, 1255-1259, 1265, 1385).

Additionally, Complaint Counsel relied on contracts entered into pre-acquisition to show market power but, improperly analyzed those contracts against <u>other</u> pre-acquisition contracts. (FOF 1263-1269). Importantly, the evidence and testimony at trial also made clear that the three contracts used to analyze this issue { } were entered into by each of those customers <u>without regard</u> to Microporous despite the fact that Complaint Counsel allege Microporous was a competitive influence pre-acquisition. (FOF 779-782, 814, 828, 832). Any post-

acquisition price increase claim based on enhanced market power evaporates when viewed in light of these facts.

The FTC's price increase case evidences no post-acquisition anticompetitive effect. The FTC's attempt to show post-acquisition price increases in Chicago Bridge was rejected as "unreliable" and "speculative." Chicago Bridge & Iron Co., 138 F.T.C. 1392, 1552 (2003)(initial decision), *aff'd*, 138 F.T.C. 1024 (2004).

The evidence brought forth in this case is also speculative and unreliable – there is simply no proof that Daramic had market power in either the PE separator market, or in Complaint Counsel's improper "application" markets. (FOF 1288, 1316, 1386). In fact, there was both testimony and documentary evidence that Daramic's profits have declined. (FOF 278, 283, 291). Additionally, evidence that Daramic's market share has declined in the wake of loss of { } is substantial. (FOF 306, 946, 959, 1287, 1362, 1369). Such evidence supports the fact that there has been no anticompetitive effect post-acquisition. See, e.g., United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977)(post-acquisition evidence showed no anticompetitive conduct); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981)(post-acquisition evidence showed that defendant's profits and market shares declined); Vaney v. Coleman Co., 385 F. Supp. 1337 (D..N.H. 1974)(post-acquisition evidence showed that defendant lost market share); United States v. Falstaff Brewing Corp., 383 F. Supp. 1020 (D.R.I. 1974)(evidence showed decline in market share and profits).

5. COMPLAINT COUNSEL HAVE BEEN UNABLE TO SHOW THAT MICROPOROUS WAS A VIABLE POTENTIAL ENTRANT INTO SEGMENTS OF THE BATTERY SEPARATOR INDUSTRY OTHER THAN DEEP CYCLE.

The Supreme Court in United States v. Marine Bancorp., 418 U.S. 602 (1974) provided the legal standards relating both to the theory of elimination of actual potential competition and the theory of perceived potential competition. The Court affirmed the district court, which had decided

against the government on the ground that extensive state and federal regulation of banks created "legal" barriers to entry preventing National Bank of Commerce ("NBC"), a subsidiary of Marine Bancorp based in Seattle, from entering independently into the Spokane banking market located in the eastern part of the state. United States v. Marine Bancorp, 418 U.S. 602 (1974).

There, the Court identified the elements of the perceived potential competition theory, finding that a market extension merger may be unlawful if: (1) the target market is substantially concentrated, (2) the acquiring firm has the characteristics, capabilities and economic incentive to render it a perceived potential de novo entrant, and (3) the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market. 418 U.S. at 624-25. The Court found in Marine Bancorp, however, that existing participants in the Spokane banking market were aware of the regulatory barriers preventing NBC from entering that market and, therefore, its presence did not exercise any competitive impact in that market. Id. Complaint Counsel have not presented evidence sufficient to show that Microporous' presence in their "UPS," "Motive" or "SLI" markets raised it to the level of a perceived potential competitor. (FOF 360, 385, 391, 409, 723, 1222). In fact, the evidence shows that existing participants in those alleged markets, like the banks in Spokane, were aware of the limitations on Microporous with respect to entering the "application" markets and its presence did not have any competitive impact in those markets. (FOF 486, 580, 360, 723, 780-83).

Specifically, with respect to SLI, Motive and UPS, evidence shows that, although those markets were substantially concentrated, Microporous did not have the characteristics, capabilities and economic incentive to render it a perceived potential de novo entrant in any of the three markets. (FOF 1221-23, 1366). Furthermore, there is no proof that Microporous' premerger presence on the fringe of those markets tempered oligopolistic behavior on the part of existing participants in those markets. (FOF 1273, 1366).

The Court in Marine Bancorp also applied the actual potential competition theory and noted two requirements, in addition to those identified for the perceived potential competition theory: (1) "that in fact NBC has available feasible means for entering the Spokane market other by acquiring WTB; and (2) that those means offer a substantial likelihood of ultimately producing de-concentration of that market or other significant pro-competitive effects." 418 U.S. at 633. The Court found that this second requirement was not met because legal restrictions would have prevented expansion from an initial toehold acquisition. 418 U.S. at 636-37.

As for the first prong, "clear proof" that the firm would have entered the market is required. In re B.A.T. Industries, 104 F.T.C. 852, 926-28 (1984). In B.A.T. Industries, the FTC found that subjective evidence, e.g., capital expenditure plans and internal management studies, were the "best evidence" that the firm would have entered but it also relied on objective evidence, e.g., capabilities, interests and incentives to enter. 104 F.T.C. at 922, 926-28. Complaint Counsel have not met their burden with respect to this proof as it relates to Microporous' presence in these markets. (FOF 360, 385, 391, 409, 723, 1222).

Testimony and documents presented at trial show that at the time of the acquisition there was no proof, let alone "clear proof," that Microporous had a feasible means for entering the SLI and UPS markets. (FOF 360, 385, 391, 409, 723, 1222). Capital expenditure plans for expanding production in the United States had been halted almost a year before the acquisition, and there was no valid evidence that the LENO project that would allegedly allow Microporous to enter the "UPS" market was moving forward, or was even feasible from a technological standpoint. (FOF 360, 385, 391, 409, 723, 1222). Furthermore, there is no evidence that, even if Microporous had built a new line in North America for the production of SLI separators, it would have had a substantial likelihood of ultimately producing de-concentration of that market or other significant

procompetitive effects – particularly in light of {

} (FOF 1112-13, 1331).

Complaint Counsel have failed to support any claim that Microporous was a viable potential entrant into segments of the battery separator industry other than deep cycle.

V. RESPONDENT HAS REBUTTED ANY PRIMA FACIE CASE MADE BY COMPLAINT COUNSEL

A. RESPONDENT HAS SHOWN THAT ACTUAL ENTRY INTO THE RELEVANT MARKET WOULD BE TIMELY, LIKELY AND SUFFICIENT

1. ACTUAL ENTRY INTO THE RELEVANT MARKET HAS OCCURRED AND ENTRY BARRIERS ARE LOW.

The Merger Guidelines provide that "[a] merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern." Sec. 3.0. "In the absence of significant [entry] barriers, a company probably cannot maintain supracompetitive prices for any length of time." Baker Hughes, 908 F.2d at 987. The Guidelines further provide that if entry will be "timely, likely and sufficient in its magnitude," then "the merger raises no antitrust concern and ordinarily requires no further analysis." Id.

Entry may be shown by any one of the following circumstances: (1) that there has been or is threatened to be actual entry by certain firms; (2) that barriers to entry into the particular industry are low; (3) that expansion by previously existing firms either has occurred or is likely to occur; and (4) that the mere threat of entry may operate to foster competitive conditions in a market. Commentary on the Horizontal Merger Guidelines at 37; Baker Hughes, 908, F.2d at 987-89; United States v. Syufy Enter., 903, F.2d 659 (9th Cir. 1990); Waste Management, 743 F.2d at 981-84; United States v. Calmar, Inc. 612, F.Supp 1298 (D.N.J. 1985). With each of these forms of entry, the question is

whether entry would be sufficient to offset any anticompetitive effects in the market, i.e., whether entry would defeat any supracompetitive prices and whether the existence of such supracompetitive prices might eliminate or reduce the entry barriers "that existed during competitive conditions." Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 119 n.15 (1986).

a. Entry Barriers Are Low

Low barriers to entry have been found in many merger cases, e.g., Baker Hughes, 908 F.2d 981; Waste Management, 743 F.3d 976; United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993); Syufy Enterprises, 712 F. Supp. 1386. Barriers are measured by whether entry would be timely, likely and sufficient to offset any competitive harm. To be sufficient entry must offset the competition potentially lost. To be timely it must occur within two years, and to be likely it must be profitable. Guidelines §§ 3.2-3.3.

In this case, since barriers to entry are low, Daramic has no market power. (PX2110-033 ("low barriers to entry in [] SLI...")). In the absence of significant [entry] barriers, a company probably cannot maintain supracompetitive pricing for any length of time." Baker Hughes, 908 F.2d at 987.

Here, { } Daramic and Microporous have all developed and set up new production lines in 18 months or less. { }; RX00147 at 001; RX01314 at001; RX01045 at 001; Gaugl, Tr.4543, FOF 1061-1088). The equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. (Gaugl Tr. 4545-46, 4547-48; Id.) The facts show that required testing can be done concurrently with building a new facility, and within the applicable two year time frame. (RX01045 at 001; FOF 1061-62, 1070-75). Further, there was ample evidence at trial that testing is largely customer dependent. (FOF1077). Thus, if a customer wants and needs a separator qualified within a short period, it is clear from the

testimony and documents that such qualification is easily accomplished. (FOF1077-80, 1082-87; RX00115).

New entry is also likely. First, there was abundant evidence that Asian manufacturers are aggressive competitors who are already competing around the world. (FOF1106-07, 1109). Although there was evidence suggesting that there may be certain hurdles to Chinese competitors exporting product to North American, additional testimony showed not only that such hurdles can be overcome, but that they have not prevented Chinese manufacturers from exporting their material. (FOF 1109-10). Evidence supports the fact that it would be profitable for a supplier to export product from Thailand to North America, even with additional shipping costs, because of low labor rates. (Thuet, Tr. 4357-58, *in camera*; Thuet Dep., p. 80-83.)

Sufficiency need only be measured by whether a new entrant of Microporous' scale could replace the competitive effects of concern – in other words entry must only replace one small PE line in the FTC's North American relevant market. In the Matter of B.F. Goodrich Co., 110 F.T.C. 207, 345 (1988); FOF 1250-51). Furthermore, since the evidence at trial showed that {

} into the North American market to replace Microporous' impact. (FOF 425). Thus, to prove sufficient entry to offset any lost competition, Respondent need only show that a new entrant could infuse this amount of production into North America. Guidelines § 3.4.

b. Actual entry has occurred or is likely

Entry need not be *de novo* in order to counteract anticompetitive effects. Thus, a current Asian PE supplier could enter the FTC's North American market and it would only need to build one PE line to sufficiently replace the competitive effects allegedly lost in North America by the acquisition. (FOF 1250-51). This could be done in 16-18 months, and, as several of the Asian

suppliers already have product qualified at US battery manufacturers plants, qualification could be accomplished well within the two year time frame. (FOF 1074-75, 1029, 993, 989).

Testimony and documents show that several Asian separator manufacturers are considered to be equal to their North American counterparts in terms of quality, technology and capability. (FOF 977-1052). Many Asian products have been globally approved and have already been qualified by North American battery makers. (FOF 1074-75, 1029, 993, 989). The facts illustrate that Microporous had an infinitesimal "competitive presence" in PE separators in North America with only { } (RX01120, *in camera*). The loss of such a minor presence can easily be replaced by the entry of any one of a number of Asian firms. (RX01120; FOF 1105-1111).

c. Expansion by previously existing firms either has occurred or is likely to occur

Expansion by pre-existing firms is considered "entry" as established in Baker Hughes where the court noted that two companies had entered the market and were "poised for future expansion." 908 F.3d at 988-89. The Merger Guidelines also refer to "repositioning" by existing firms as a form of entry, i.e., where "rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines." Sec. 2.212.

The special case of potential expansion and/or repositioning { } is crucial here. { } (FOF 1112-1113, 932, 938, 934, 943-45, 969, 947). Section 2.212 of the Guidelines provides that "[a] merger is not likely to lead to unilateral elevation of prices of differentiated products if, in response to such an effect, rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines." Id. This is directly on point here. {

} (FOF 1112-1113, 932, 943-45, 969, 947). Certainly, its ability and capacity are sufficient to curtail any possible anticompetitive effects of the merger given Microporous' minute presence in any competitive market in North America. (FOF 943-45). Given these factors, "the merger is not likely to lead to a unilateral elevation of prices." Guidelines § 2.212.

The Guidelines also note that "where it is costly for buyers to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers they consider. (Guidelines §2.212). If either of the merging firms would be replaced in such buyers' consideration by an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral elevation of prices." Id. *Baker Hughes* also took note of threatened entry, saying that "a number of firms competing in Canada and other countries had not penetrated the U.S. market, but could be expected to do so if [the acquisition led to higher prices]." 908 F.2d at 988-89. These situations mirror the circumstances illustrated at trial in this matter. Not only was there testimony from a number of {

} (FOF 598-99, 501, 680-709).

Importantly in this case, entry sponsored by large customers also counts in the Court's assessment of Respondent's rebuttal case. "[L]arge, sophisticated buyers can counteract potentially anticompetitive post-merger behavior by encouraging entry. A 'power buyer' may subsidize new entry or incumbent expansion in order to increase market output or lessen the likelihood of seller coordination. The power buyer itself may become a seller via vertical integration with an existing producer." ABA, Mergers and acquisitions: Understanding the Antitrust Issues at 196 n.27 (3d ed. 2008) (hereinafter, "ABA, Mergers and acquisitions").

Given the size and strength of the buyers in this industry, it easily lends itself to "sponsored entry." {

}. (RX00239; McDonald Dep., p. 34-36; Gilchrist Dep., p. 100-21; FOF 480, 491).

Complaint Counsel were also unable to put forth any evidence showing that there are intellectual property impediments to entry with a PE/rubber product. Testimony and documents show unequivocally that several other additives for PE separators for antimony suppression exist, and that another competitor { } could produce a PE/rubber deep-cycle separator easily with a small capital cost in approximately six-months or less. (RX00676; PX2174; FOF 1078, 1092,-93). In fact, there was evidence that {

} (FOF 809, 1235, 962). {

} excess capacity, there was adequate evidence that other separator manufacturers can, and will, invest the capital and time to produce these separators for the low-end deep-cycle products in order to fill idle lines. (RX01120; RX00061, *in camera* {

)}.

B. RESPONDENT HAS SHOWN THAT SOPHISTICATED CUSTOMERS IN THE BATTERY SEPARATOR INDUSTRY HAVE PROMOTED ENTRY AND OTHERWISE HAVE THE ABILITY TO PREVENT ANTICOMPETITIVE EFFECTS.

As was pointed out above, a "'power buyer'" may subsidize new entry or incumbent expansion in order to increase market output or lessen the likelihood of seller coordination." ABA, Mergers and Acquisitions at 196 n.27. The facts adduced at trial show that {

} Moreover, "power buyers" have the ability to forestall anticompetitive practices. The Baker Hughes court found just such effects where the customers were large and demanded multiple bids on projects. Baker Hughes, 908 F.2d at 986.

The behavior of the four "power buyers" in this case is strong evidence of their ability to forestall anticompetitive practices.

1. JCI

Johnson Controls (JCI) is the largest battery manufacturing company in the world, with over { } in the lead-acid automotive battery market, and producing more than 120 million lead acid batteries in 2008 with sales over 38 billion dollars in sale. (Hall, Tr. 2793; RX00034 at 004, 13; RX01187 at 003). JCI also manufactures about 2 to 3 percent of its production in the form of deep-cycle golf cart batteries. (Hall, Tr. 2665).

Under supply agreements with JCI, Daramic supplied separators for SLI and golf cart applications to JCI until December 31, 2008. (Hauswald, Tr. 754). As of today JCI does not buy a single separator from Daramic, having instead entered into a long-term supply contract with { } (Hall, Tr. 2715-2716; RX00053, *in camera*; RX00052, *in camera*; RX00072, *in camera*; Hall, Tr. 2747, *in camera*).

Without even looking at the behavior of the other buyers, it is clear that JCI alone is powerful enough to have { } in the market in order to counteract any possible anticompetitive effects of Daramic's acquisition of Microporous. (Hall, Tr. 2715-2716; RX00053, *in camera*; RX00052, *in camera*; RX00072, *in camera;* Hall, Tr. 2747, *in camera*). Ironically, { } meaning that, considering the significant { } Microporous would have been relegated to practical oblivion by January 1, 2009.

Evidence shows that part of {

} (RX00040 at 05-08, *in camera*). JCI has been able to do this remarkably effectively. {

}

{

}

It is axiomatic that a "power buyer" that can cause {

} is well positioned to control the competitive aspects of its supplier's markets. (RX00184, *in camera*, Toth, Tr. 1535-36; Hauswald, Tr. 909, *in camera*, FOF 961). {

} (Toth, Tr. 1535; Weerts, Tr. 4447, in camera; Hauswald, Tr. 1118).

Further, { } (RX00041; RX00066 at 002-003, *in camera*; RX00070 at 05-06, *in camera*; Hall, Tr. 2670). It has succeeded in this goal, {

} (RX00032, in camera; RX00041; RX00045 at 002, Hall Tr. 2809, in camera).

{

(RX00055; Hall, Tr. 2838-2839, in camera). There is no evidence that Microporous' presence in the separator marketplace would have had any impact on JCI or its business. Microporous never had a contract with JCI for the use of CellForce or PE separators prior to the time of the acquisition and discussions for any possible supply by Microporous to JCI were terminated in June 2007 and never resumed. (Gilchrist, Tr. 504, 562, *in camera*; RX00047).

Simply put, no evidence adduced by Complaint Counsel in the entire five weeks at trial is sufficient to overcome the fact that JCI, and the other power buyers, have the ability to prevent any anticompetitive effects of the acquisition.

2. Enersys

EnerSys too has the power and ability to manage the competitive marketplace for battery separators that it uses. Its power is such that it "rallied" its other "power buyer" competitors to oppose the acquisition of Microporous despite the fact that there has been no impact on its own business. The evidence also showed that Daramic has understood from EnerSys that it doesn't believe the contract between the two companies is "worth the paper it was written on." (Toth Tr. at 1512; Axt Tr. at 2167-68, *in camera*). The testimony and documents at trial make it abundantly clear that EnerSys' purchase of separators has not been affected by the acquistiion and that it has the

power and ability to promote the entry of other suppliers, and, thus to avoid any anticompetitive effect of the merger.

EnerSys is the largest manufacturer of industrial batteries in the world, with annual sales in 2007 of $2 billion. (Craig Tr. 2557, 2561; Burkert Tr. 2421-23, *in camera*). Its negotiation strategy includes { } (Axt Tr. 2230-31, 2244, *in camera*).

Under the various EnerSys-Daramic contracts, { } (RX 964 at 002, *in camera*). As with Daramic's other customers, { } (Seibert Tr. 4213-17, *in camera*; RX831; RX773; RX606; RX1549; RX590; RX768 *in camera*; Burkert Tr. 2436, *in camera*; RX768, *in camera*; RX1032; Burkert, Tr. 2438, *in camera;* Seibert, Tr. 4195, 4215-16, *in camera*; Axt, Tr. 2215-16, *in camera;* Seibert, Tr. 4216, *in camera;* Burkert, Tr. 2434, 2464-65, *in camera*; Seibert Tr. 4216-17, *in camera*; PX2264 *in camera*; Seibert, Tr. 4217, *in camera*).

{ } (RX207, *in camera*; Burkert, Tr. 2424, *in camera*; RX241; RX220 at 008, *in camera*; Burkert, Tr. 2428, *in camera*; Burkert, Tr. 2429, 2431; RX221, *in camera*; RX1349 at 002 *in camera*; RX953 at 001, 005, *in camera*; RX953 at 003, *in camera*).

The evidence presented at trial also shows that { } (RX210; Axt, Tr. 2245-46, *in camera;* Axt, Tr. 2246, *in camera*; RX210; RX228, *in camera).* This is further evidence of EnerSys' strength as a power buyer.

Testimony and evidence also show that EnerSys has available to it {

} (Burkert, Tr. 2311, 2446, 2448, *in camera*; Gagge, Tr. 2514, *in camera*; RX201; Burkert, Tr. 2448, *in camera*).

Further, it is clear that {

} (Burkert, Tr. 2311, 2446, 2448, *in camera*; Gagge, Tr. 2514, *in camera*; RX201; Burkert, Tr. 2448, *in camera*). Further, as evidenced at trial, {

} (Gagge, Tr. 2514, *in camera*).

Additionally, {

} (Axt, Tr. 2272, *in camera;* Burkert, Tr. 2449-51, *in camera*; RX239, *in camera*; RX193; RX203, *in camera;* RX199 *in camera;* Axt, Tr. 2277, *in camera*; Burkert, Tr. 2456, *in camera*; RX223, *in camera*; Burkert, Tr. 2450, *in camera*). Documentary evidence shows that {

}

(RX1203, *in camera;* RX195; RX194 {

} (RX222 *in camera*).

EnerSys has also {

} (RX197 *in camera*; Burkert, Tr. 2445, *in camera*; Axt, Tr. 2273, *in camera*; Berkert, Tr. 2445, *in camera*).

{

}

Evidence adduced at trial also showed that {

} (Burkert, Tr. 2451, *in camera*; PX1262; RX199, *in camera*; RX239, *in camera;* Berkert, Tr. 2456, *in camera*). {

} (Gagge, Tr. 2512, *in camera*; Axt, Tr. 2288, 2183, *in camera*; PX1280; RX215).

These actions show EnerSys is not at the mercy of its suppliers, and, in fact, has the power and leverage sufficient to sponsor and promote entry into the North American battery separator industry such that the merger of Microporous and Dararmic has had, and will have, no anticompetitive effect.

3. Exide

{ }, is {

.} (Gillespie, Tr. 2930; 2957; 3093; Gillespie, Tr. 3052, *in camera*). Exide sold almost

$3.7 billion worth of automotive, truck, motorcycles, recreational vehicles, golf cart, boats, forklift and network batteries in fiscal 2008 and {

} (RX01186 at 27, 57; Gillespie, Tr. 2929; RX01186 at 006-7; Gillespie, Tr. 2930).

Despite Exide's checkered financial history, it too has been able to use its size and leverage to "manage" the competitive marketplace of its suppliers. It has also promoted entry and has the power and sophistication to prevent any possible anticompetitive effects of the acquisition.

This power is demonstrated by the evidence showing that even though Exide entered into a {

} (PX0726; PX0728, PX0835, *in camera;* RX00976, *in camera*; *in camera* RX00977, *in camera*; RX01517, *in camera;* RX01285; RX00342 at 033, *in camera*; RX01281, *in camera*; RX00979, *in camera*; RX01282, RX01283, RX01284, RX01285; Gillespie, Tr. 3102, *in camera;* Gillespie, Tr. 2985, 3095, 3100, 3112; Gillespie, Tr. 3073, 3100-3103, *in camera*; RX00537, *in camera*; RX00019, *in camera*; Gillespie, 3101-3103, *in camera*; RX00019, *in camera*; Gillespie, 3101-3103, *in camera*; Gillespie Tr. 3070).

{

}

(Gillespie, Tr. 3020).

{

} (Gillespie Tr. 2695; 3124-3126, *in camera*). {

} (Gillespie,

Tr. 3122-23, *in camera*).

Furthermore, {

} (Gillespie Tr. 2962). {

} (RX00303-002, *in camera*).

{

} (Gillespie Tr. 3022-24, 3041, *in camera*). {

} (Gillespie, Tr. 3034, *in camera*).

At the time of the Acquisition, Exide had not started working with Microporous on testing or approving Microporous' industrial PE material and had never even tested Microporous' proposed SLI separators prior to mid-2007. (Gillespie, Tr. 2974; Gillespie, Tr. 3083). {

} (Gillespie Tr. 3053-54, *in camera*). Despite this, {

} (RX00009; RX00399; Gillespie, Tr. 3075-76; PX1018 at 004; PX1018 at 002-3; PX1096; McDonald Tr. 3838; PX1018 at 002-3; Gilchrist, Tr. 400, 486-87, *in camera*; McDonald, Tr. 3836-3837, 3839; PX0512; PX0396 ;PX0396; Gillespie Tr. 3081, 3095).

The evidence again is clear that Exide has the means, leverage and power to subsidize new entry or incumbent expansion.

VI. RESPONDENT HAS SHOWN THAT EFFICIENCIES THAT HAVE BEEN IMPLEMENTED SINCE THE ACQUISITION DEMONSTRATE THAT MICROPOROUS WAS A HIGH COST OPERATION BEFORE THE ACQUISITION OCCURRED.

The Merger Guidelines recognize that efficiencies may result from mergers and state that "[t]he Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." Sec. 4. "Cognizable efficiencies" are defined as "merger-specific efficiencies that have been verified and do not arise from anticompetitive reduction in output or service." *Id.* The Guidelines go so far as to praise one kind of efficiency that evidence shows has been realized in this case: "efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal cost of production, are more likely to be susceptible to verification, merger-specific, and substantial, and are less likely to result from anticompetitive reductions in output." Guidelines § 4.

Specifically, Daramic {

(Riney, Tr. 4971-73, *in camera*; Hauswald, Tr. 1063-64; FOF 430). Evidence shows that following

the acquisition, Daramic began shifting the production of its HD product to the former Microporous Piney Flats facility thereby locating all products using a rubber additive in one facility. (PX0910; Trevathan Dep., p. 102). Additionally, Daramic was able to utilize the Piney Flats facility during the strike in Owensboro in order to continue supplying customers by shifting HD production at that time as well. (Hauswald, Tr. 1073-74). {

} (Riney, Tr. 4963, *in camera*; Gaugl, Tr. 4572-73)

Testimony and evidence also showed at trial that Daramic has realized approximately { } for the Piney Flats and Feistritz facilities. (Riney, Tr. 4972, *in camera*; FOF 431). {

} (Riney, Tr. 4972-73, *in camera*; Hauswald, Tr. 1062-64; FOF 432). {

} (Riney, Tr. 4972, *in camera*; Hauswald, Tr. 1062-64). {

} (Riney, Tr. 4973, *in camera*; Hauswald, Tr. 1062-64). And finally, Daramic has sought to {

} (Riney, Tr. 4973, *in camera*; FOF 432). Altogether, Daramic expects to achieve approximately {

}, many of which are already evident. (Graff, Tr. 4863, *in camera*; FOF 270).

The Eighth Circuit Court of Appeals held in the *Tenet Health Care* case that "the district court should . . . have considered evidence of enhanced efficiency in the context of the competitive effects of the merger." *United States v. Tenet Health Care Corp.*, 186 F.3d 1045, 1054 (8th Cir. 1999). It held that there was evidence that the merged hospital could offer better medical care than either of the merging hospitals could alone and that it would "be able to attract more highly qualified physicians and specialists and to offer integrated delivery and some tertiary care." *Id.*

The efficiencies that have been realized in this case since the acquisition demonstrate that the Microporous facility at Piney Flats, Tennessee was a high cost operation. (FOF 1315, 1366, 1384). The loss of a high cost operation would not have had an adverse effect on competition in any alleged product market and the efficiencies that Daramic has realized, and will continue to realize, are beneficial to the marketplace and to the consumers in it. (FOF 1384-1385).

Price reductions and significant efficiencies have already been generated and demonstrated by the acquisition. Daramic {

} (RX00537; RX00538; RX00689; PX0223; PX1054; Gillespie, Tr. 3121, *in camera*).

Daramic has also implemented programs to make Piney Flats and Feistritz more efficient, better able to monitor their scrap usage, better able to use recycled material, improve their extraction and extrusion techniques and reduce the use of solvent, among others. (FOF 273-275, 433-435, 1385). The annualized savings on raw materials alone are { } (Riney Dep., p. 46; FOF 276, 436).

In light of the discussions herein showing that no competitive harm has resulted, or is likely to result, from the acquisition, any and all efficiencies achieved are directly pro-competitive. The efficiencies are merger specific, verifiable and not the result of reductions in output or service. Guidelines § 4.0. Moreover, the efficiencies here will result in marginal cost reductions. (Riney Dep., p. 200-201; FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8th Cir. 1999)(enhanced efficiencies should be considered "in the context of the competitive effects of the merger"); Country Lake Foods, 754 F. Supp. at 674, 680 (efficiencies involving lower plant and transportation costs and "other savings" found as "further evidence that the proposed acquisition will enhance competition")).

VII. RESPONDENT HAS SHOWN THAT IF THE ACQUISITION HAD NOT OCCURRED, MICROPOROUS WOULD NO LONGER BE AN EXISTING COMPETITIVE ENTITY OR, AT BEST, WOULD NOT BE A VIABLE COMPETITIVE ENTITY

Without having to resort to a failing firm defense, there is strong authority for the proposition that financial weakness, deteriorating financial health, scarce future resources and/or poor management of the acquired company weighs against a finding that the acquisition would have an adverse effect on competition. See, e.g., United States v. General Dynamics Corp., 415 U.S. 486, 503-04 (1974); Lekto-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981); Kaiser Aluminum & Chemical Corp. v. FTC, 652 F.2d 1324, 1341 (7th Cir. 1981); United States v. International Harvester Co., 564 F.2d 769, 776-79 (7th Cir. 1977). These factors may demonstrate that the acquired company would not have been a major contributor to the competitiveness of the industry if it had remained independent. *Id.*

In Arch Coal, the court found that the acquired company was a "relatively weak competitor." FTC v. Arch Coal, Inc., 329 F. Supp.2d 109, 158 (2004). The acquired firm "face[d] high costs, ha[d] low reserves, ha[d] at best uncertain prospects for loans or new reserves, [was] in a weakened financial condition, and ha[d] no realistic prospects for other buyers." *Id.* The court concluded that the acquired firm's "past and future competitive significance in the . . . market ha[d] been far overstated" in light of its "weak competitive status." *Id.*

A. Microporous was in a Precarious Financial Position that Would have been made Worse by the Current Economic Climate

At the time of the acquisition Microporous was in a highly leveraged position following the building of the Feistritz plant and it had at least one, if not two, separator productions lines that were destined to be empty by early 2008. (RX00996; RX00999; Seibert Dep., p. 150-152; PX2300; (Heglie, IHT at 72-73); Trevathan, Tr. 3610, 3628-31; FOF 395). The Microporous board had lost faith in management, particularly Mike Gilchrist, and had mandated that the success of Feistritz be "proven" before any additional funds would be expended. (RX00401; RX00244; RX00248; PX2300

(Heglie, IHT 58); PX2301 (Heglie, Dep. at 161); FOF 392, 401). As Eric Heglie stated in his Investigational Hearing, "I think we generally discovered through our ownership that we had philosophical differences with Mike Gilchrist and the management team." (PX2300 (Heglie, IHT 59); FOF 401). A large part of these differences related to IGP's focus being "a lot more driven by financial results and return on investment for different growth areas that we were contemplating" as opposed to management lack of focus "on the return on investment and on the numbers or at least the risks associated with those numbers." (PX2300 (Heglie IHT, 60); FOF 401).

Furthermore, Microporous did not have a good grasp of its actual costs for producing separators and had low margins on a number of products. (FOF 300, 422). The Microporous Board was concerned about Microporous' financial situation given this exposure and questioned Gilchrist's financial acumen and his credibility. (PX2300 (Heglie IHT, 60); RX00244 at 003; FOF 404). Microporous was in fierce negotiations over proposed price increases with its largest customer, {

} (RX00560; RX00559; RX00565; PX0396). Several members of the upper management team were seriously concerned with the ultimate viability of Microporous as a stand alone company in light of the European expansion path on which it had embarked. (Trevethan Dep., p. 77; Trevathan Tr. at 3628; FOF 398, 400).

Evidence at trial showed that at the time of the acquisition in February 2008, there were no contracts or MOUs in place on the second line in Feistritz, and that if the facility was operating alone, without production having been transferred by Daramic from Potenza, it would have a { } (Gaugl, Tr. at 4569, 4571; Riney, Tr. at 4962, 4969, *in camera*; Gilchrist, Tr. at 502, *in camera*; Hauswald, Tr. at 922, *in camera*; FOF 1144). { } (Riney, Tr. at 4969, *in camera*).

Furthermore, the capacity being utilized at Feistritz today includes { } of production that was moved by Daramic from its Potenza plant when that plant was closed. (Hauswald, Tr. at 922, *in camera*; Gaugl, Tr. at 4572-73; FOF 308, 1144). If Daramic had not closed its Potenza plant and shifted that production to Feistritz, { } (FOF 1144). This would not be sufficient to sustain a company with considerable debt, mounting raw material costs and no long term contracts for its excess capacity. (FOF 386, 398, 408, 422, 427).

Microporous also had considerable capital exposure and was significantly leveraged at the time of the acquisition. (PX2300 at 11-12 (Heglie IH, p. 72-73)). As of December 31, 2007, Microporous was saddled approximately $46,139,000 in debt. (PX0078 at 021; Gilchrist, Tr. 549). This debt included the $5.4 million used to purchase the turn-key PE line from Jungfer in 2001 as well as the monies expended in 2007 for the Feistritz expansion. (PX0078 at 021; Gilchrist, Tr. 550).

Add to all of the above the global recession that is a stark reality today, the continued viability of Microporous as a stand alone entity is seriously in question. Over 72 percent of Microporous' sales in 2007 were to the golf car industry which, today, is in a downturn unmatched in twenty years and trending along with the general automobile industry. (RX01120; Godber, Tr. 280). Further, as more and more car manufacturers worldwide lay off workers and reduce production it is highly unlikely that Microporous – a new entrant into an old business in Europe – would be able to fill its new lines with SLI type separators, particularly when { } Daramic { } millions of square meters of excess capacity in Europe and the United States. (Weerts, Tr. at 4459-60, *in camera*; Hauswald Dep., p. 60; FOF 943, 1089). Daramic's North American and Asian excess capacity is also significant. (FOF 1108, 1331). The "CellForce" line at Piney Flats is {

} (FOF 425, 1108; Thuet, Tr. at 4338).

Microporous' financial frailty is further evidenced by the fact that immediately after the acquisition, {

} (Riney Depo., p. 229:3-230:231:20; Riney, Tr. 4961, *in camera*; RX01562). {

} (Riney, Tr. 4961, *in camera*). {

} (Riney, Tr. 4961, *in camera*). {

} (Riney, Tr. 4961, *in camera*).

{

} (Riney, Tr. 4962-63, *in camera*).

All of these facts taken together show that Microporous was not a healthy, competitively viable company engaged in 'maverick' competition, but an overextended weak rival that knew, with the tremendous debt it was carrying because of the Feistritz expansion, and the lack of any contracts to fill its lines, that its viable days are numbered. Although the Piney Flats facility had demonstrated over many years that it could be viable on its own, the addition of the Feistritz "millstone" around its neck, put it in a precarious position notwithstanding the economic status of the world today. Thus,

rather than cause anticompetitive harm, the acquisition of Microporous by Polypore preserved a potentially failing company and its assets.

VIII. COMPLAINT COUNSEL HAVE FAILED TO SHOW THAT DARAMIC HAD OR HAS MONOPOLY POWER IN ANY ALLEGED MARKET.

A. Complaint Counsel Have Not Shown That Daramic Had Monopoly Power

The FTC alleged that Daramic had monopoly power in its alleged UPS and motive markets, but no proof sufficient to support his claim was offered at trial. Monopoly power is "the power to control prices or exclude competition." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). Evidence through both testimony and documents show that Daramic had neither.

As set forth above, and in ample evidence, it is clear that Daramic has not previously, and certainly does not today, control prices in Complaint Counsel's alleged UPS and motive power markets. Daramic {

} (RX000927 at 005-16, *in camera*; FOF 253). The evidence shows that the customers for these products have sufficient power and leverage to negotiate prices rather than have them dictated to them. Further, there are other manufacturers of these products throughout the world, further reducing any effect Daramic could have in these improperly alleged markets. (FOF 977-1060). It is also clear from testimony that these separators are generally simply thicker, or differently patterned than any other PE separator, thus Daramic has no ability to constrain prices because any one of its competitors could simply purchase a relatively inexpensive tool and begin production of these separators. (FOF 1066, 1093, 1098).

The evidence is also overwhelming that Daramic also lacks the power to exclude competition. On January 1, 2009, Daramic lost { } business from {

} which added production lines to supply { } (FOF 306, 491, 495). Furthermore, as a result of current economic conditions, {

}

{ } FOF 943, 1089). "[E]xcess capacity in the hands of a rival is always a threat to a producer that wishes to raise its prices." United States v. UPM-Kymmene Oyj et al., No. 03 C 2528 (N.D. Ill., 7-25-03). Entry conditions are such that other producers could also feasibly commence production of PE UPS and motive battery separators in short order. (FOF 1066, 1093, 1098). { } (FOF 970, 991, 1024).

Since the evidence supports the fact that Daramic lacked "the power to control prices or exclude competition," it also shows that Daramic lacked monopoly power in the FTC's alleged markets or in the PE separator market. (FOF 1288, 1316, 1386-1387).

IX. COMPLAINT COUNSEL HAVE FAILED TO SHOW THAT DARAMIC ENGAGED IN EXCLUSIONARY CONDUCT.

A. The FTC Has Not Shown the Extent of Any Exclusionary Conduct by Daramic

Complaint Counsel cannot show that Daramic engaged in exclusionary conduct. Although it was unclear through trial, which specific conduct of Daramic Complaint Counsel objected to as being "exclusionary," it was clear that no conduct adduced through evidence rises to the level of "exclusionary behavior." Complaint Counsel seemed to suggest that Daramic's "first" exclusionary act was the purchase of the Jungfer facility in 2001 in order to "shut it down." (Gilchrist, Tr. 320-21). Complaint Counsel fail to acknowledge that Jungfer was in bankruptcy at the time Daramic acquired it and it was not shut down for almost 5 years following its acquisition. (Gaugl Dep., 69). Similarly, Daramic's purchase of Corydon was {

} (FOF 519, 522-526). The lawsuit brought by Daramic against Microporous for breach of contract in 2006, related to the sale of SLI separators in Europe only. (FOF 267; PX2237). Daramic's claims in that case passed the scrutiny of the courts on both a

12(b)(6) motion to dismiss and a motion for summary judgment – a strong indication that the claims were valid and justified.

Furthermore, the evidence showed that the contracts that Complaint Counsel allege are "exclusionary," are not. Specifically, the contract signed between { } and Daramic in 2006 was not exclusive and in fact, { } (RX00983; FOF 621, 1272). In fact, { } for significant production. (RX00965; RX00957). Importantly, in 2006 and 2007, the time at issue here, Microporous had no excess capacity for the products { } in the United States. (PX0920 (Gilchrist IHT., p.46-48)). Thus, Microporous could not have been foreclosed from taking on { } business during that time by Daramic because it was not capable of doing so. Id.

Similarly, the { } (FOF 445-451; Hall, Tr. at 2670). The contract negotiated between { } Daramic in { } took many months to negotiate and it is clear that Microporous was neither being considered { } for supply at this time, and when it had been previously considered, its product had failed JCI's specifications. (FOF 445-451, 486; Hall, Tr. at 2670, 2695-96). Thus, Microporous cannot have been, and was not, excluded by any actions attributable to Daramic.

The long term contracts entered into by Daramic with { } are also not "exclusionary." For instance, { } was entered into as part and parcel of the { }, and was entered into prior to the time that Microporous even had a PE line. Furthermore, at the time { } (FOF 526, 551-56).

Likewise, the { } Daramic entered into in January 2008, is not exclusive and allows purchase of up { } separators from another supplier, and was entered into during a time that Microporous had no excess capacity so could not have supplied product to { } (PX0637-002). Further, { } testified at trial that it did not consider Microporous and entered the contract with Daramic because it contained good terms and pricing. This is not an exclusionary contract. (FOF 773, 775, 779, 782). Neither the { } contract, nor the { } contract were exclusionary either since both { } (Balcerzak, Tr. at 4106-08, *in camera*; Douglas, Tr. at 4063, 4067, *in camera*; FOF 814, 832).

Complaint Counsel also made much at trial of the allegedly "fake" force majeure to force { } hand in signing the 2006 contract. However the evidence at trial, beyond the self-serving statements of EnerSys and Mr. Gilchrist (who by his own admission does not like Daramic), overwhelmingly shows that the force majeure was real. (Gillespie, Tr. at 2985, 3095; FOF 554, 636). The force majeure letters from { } Daramic's largest supplier of PE was certainly not fake, nor were emails and documents showing that other customers, and even Microporous, had confirmed that the force majeure was real. (FOF 639; PX1806; PX1805; PX0911 (Roe Dep, p. 197-200)). Daramic declared a force majeure to all its customers allocating its own limited supply fairly and according to legal guidelines. Id. See also, Cliffstar Corp. v. Riverbend Products, Inc., 750 F.Supp. 81, 13 UCC2d 392 (W.D.N.Y., 1990)(concluding that allocating 31% to some buyers, but greater than 85% to others was reasonable as a matter of law as the seller based allocation on proper factors like customer loyalty, past performance, buyer needs and the seller's projections of potential future sales to the buyer). Furthermore, as Mr. Trevathan confirmed, the amount of UHWMPE that Daramic purchases and requires for its facilities is at least 10 times more than the PE supply required for Microporous even now (with two PE lines more than it had at the time of the force majeure).

Thus the fact that Mr. Gilchrist testified that Microporous was not affected by the decrease in PE supply is completely inconsequential. (FOF 638; Trevathan, Tr. at 3646).

Furthermore, there was no evidence at trial showing which of the FTC's alleged markets were foreclosed to Microporous by these allegedly exclusionary contracts. This is contrary to the leading authorities, including the D.C. Circuit, which spoke precisely to this point in Microsoft, saying "it is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure" United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001). Further, "[t]he share of the market foreclosed is important because, for the contract to have an adverse effect upon competition, 'the opportunities for other traders to enter into or remain in that market must be significantly limited.' Id., quoting Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 328 (1961). Similarly, the Seventh Circuit Court of Appeals stated that the plaintiff in an exclusive dealing case "must prove . . . that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition." Roland Machinery Co.., 749 F.2d at 394. See also Dentsply, 399 F.3d at 191 ("[t]he test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."); Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997) quoting Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 45 (1984)(O'Connor, J. concurring) ("'Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.").

Complaint Counsel's case did not, and could not, achieve liftoff unless it could show the relevant markets and the extent of alleged foreclosure in each. It was unable to do that at trial, or through any evidence and thus any such claim must fail.

X. THE H&V AGREEMENT HAD NO ANTICOMPETITIVE EFFECTS.

A. The Cross Agency Agreement Between H&V and Daramic was a Legitimate Sales Joint Venture Between the Companies

The FTC's claim that the 2001 Cross Agency Agreement ("Agreement") between Daramic and H&V "unlawfully restrained trade" is without foundation and Complaint Counsel have adduced no evidence at trial supporting their claim.

Pursuant to the Agreement, { } (PX0925 (Porter Dep., pp. 106-107, 156, 168, *in camera)*; RX00688, *in camera*; FOF 1123). The companies also planned potential sharing of technologies and development of new products at the outset of the Agreement. (PX0925 (Porter Dep., pp. 106-107; 156; 168, *in camera*; Roe, Tr. at 1746-47; FOF 1123).

Daramic makes PE separators and H&V makes AGM separators – the two are not competitive according to evidence elicited repeatedly at trial by Complaint Counsel. (PX0925 (Porter Dep., p. 25-26; FOF 1124). Daramic had no plans to produce AGM separators and { } (PX0925 (Porter Dep., pp. 170-174, *in camera*). Complaint Counsel have produced no evidence in documentary or testamentary form that supports the idea that Daramic had plans to produce AGM separators,{ } (FOF 1124). In fact, contrary to Complaint Counsel's position, { } (Whear, Tr. at 4837, *in camera*). { } (Whear, Tr. at 4837, *in camera*; RX00688, *in camera*). Accordingly, since Daramic and H&V were not actual or potential competitors in the AGM and PE market, the non-compete provisions in the H&V Agreement cannot have had any adverse effect on competition and imposed no restraint of trade. (FOF 1124, 1130-32).

A fact ignored by Complaint Counsel is that one of the primary motivations for the Agreement was to allow Daramic and H&V to compete with a similar agreement between Entek and Dumas, another AGM producer and a competitor of H&V. (PX0925 (Porter Dep., p. 110); FOF 1125). Entek and Dumas {

} (Id.)

{

} (Id.) H&V and Daramic's joint activities included significant joint marketing, promotional efforts and joint exhibits at trade shows and conventions – { } (PX0925 (Porter Dep., pp. 126-128, *in camera)*; FOF 1126).

The record shows that the Agreement promoted the businesses of both companies. Daramic represented H&V primarily {

} (PX0917 (Cullen Dep., pp. 314-315, *in camera*; FOF 1128). Daramic received {

} (RX00381, *in camera*; FOF 1129). {

} (PX0917 (Cullen Dep., pp. 59-60, 63-64, 124-28, 130-32, *in camera)*; FOF 1129).

{

} (FOF 1130). {

} (PX0925 (Porter Dep., p. 66 ({

} These exchanges promoted and facilitated the venture's activities. {

} (FOF 1130).

In Texaco Inc. v. Dagher, a joint sales venture case the Court endorsed (without applying it) the historical "ancillary restraints" method for assessing collateral restraints in joint ventures. 547 U.S. 1 (2006) The Court said that the doctrine requires a court to determine whether it confronts "a naked restraint of trade . . . or one that is ancillary to the legitimate and competitive purposes of the business association." 547 U.S. at 7. Here the non-compete does not rise to the level of an ancillary "restraint" since it had no trade restraining effect, but even if it did, the non-compete was ancillary to the Agreement's legitimate purposes.

Ancillary restraint analysis was also used by the court in Polk Brothers, Inc. v. Forest City Enterprises, 776 F.2d 185 (7th Cir. 1985). There court found no violation where two potential retail competitors agreed not to sell competing products in order to facilitate joint ownership of a retail outlet. It held that this ancillary restraint was valid because it might "contribute to the success of a cooperative venture that promises greater productivity and output." 776 F.2d at 189. Here, the argument is even stronger, as the non-compete in Polk Brothers prevented competition while the non-compete here prevented no competition whatsoever.

Like the agreement in Polk Brothers, the Agreement was a legitimate and productive "cooperative venture" which (1) had no effect of limiting or restraining competition between the two companies and/or (2) was reasonably ancillary because it "promote[d] the success of this more extensive cooperation." 776 F.2d at 189.

XI. RESPONDENT HAS SHOWN THAT COMPLAINT COUNSEL'S RECOMMENDATIONS REGARDING RELIEF ARE OVERBROAD, INAPPROPRIATE AND PUNITIVE.

A. Punitive Relief Is Not Permissible

As shown above, it would have been impossible for the acquisition of Microporous by Daramic to have enhanced any market power of Daramic in the PE separator market in North America given that Microporous had a mere {**1.6%**} of that market. The FTC has not demonstrated to the contrary. The subject of relief is governed by well-known principles: (1) Divestiture is "an equitable remedy designed to protect the public interest." U.S. v. E.I. duPont de Nemours & Co., 366 U.S. 316, 326 (1961). It must be based on facts "and economic theory as applied to such facts." Crowell, Collier & MacMillian, Inc., 361 F.Supp. at 991. The "key" to an antitrust remedy is a determination of the measures needed to effectively restore the competition that was lost and eliminate the effects of the acquisition. See In the Matter of Chicago Bridge & Co., Dkt. No. 9300 at 7 (Op. of Comm'n)(Jan. 6, 2005). Relief is intended to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." In the Matter of B.F. Goodrich Co., 110 F.T.C. at 345 ; (2) Complete divestiture of all acquired assets is not required unless necessary to restore the competition lost. See, e.g., RSR Corp. v. FTC, 602 F.2d 1317, 1325-26 (9th Cir. 1979); United States v. Waste Management, 588 F. Supp. 498, 514 (S.D.N.Y. 1983), rev'd on other grounds, 743 F.2d 976 (2d Cir. 1984); and (3) Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." E.I. du Pont de Nemours & Co., 366 U.S. at 326; See also In re Grand Union Co., 102 F.T.C. 812 (1983)("The Supreme Court . . . has ruled that punitive relief is inappropriate in a civil antitrust proceeding.").

B. The Divestiture Relief Sought by Complaint Counsel is Overbroad, Inappropriate and Punitive

The relief sought by the FTC is unsupportable in many respects. Complaint Counsel have failed to consider what Microporous would look like today if it had not been acquired by Polypore. As noted above, Microporous was in a precarious financial position at the time of the acquisition and its survival was far from clear. (FOF 386-87, 394, 395, 399, 400-01, 406-08, 421-429). Moreover,

the global economic crisis is unprecedented, and it is beyond dispute that the world today absent the acquisition – embroiled as it is in recession with intense pressure on the automotive industry and the suppliers to that industry – would not look like the world on February 28, 2008, the day before the acquisition. (Id.; FOF 720-721). Relief sufficient to restore competition to the state in which it existed prior to, and would have continued to exist but for, the acquisition must be based on a view of the reality today, not the view through rose-colored glasses that Complaint Counsel would have the Court wear.

Complaint Counsel also previously called for this Court to include a separate Polypore PE facility in the divestiture. FTC Pre-Trial Br., p. 37. There is no support for such a drastic remedy as there is no set of circumstances in which Microporous would have had more than one PE line in operation in North America at the time of the acquisition, currently, or at any time in the foreseeable future. (FOF 386-387, 390-396, 400, 407-409, 421-429). No evidence or testimony supports the idea that Microporous would have had another PE line in operation in North America, let alone that it would have had an entire additional "facility." Id. Daramic operates two facilities in North America, one in Owensboro, Kentucky and one in Corydon, Indiana – both operate more lines than Piney Flats. Required divestiture of either of these facilities could not be viewed as anything but punitive.

Complaint Counsel have also made no viable case at trial for divestiture of the Ace-Sil or Flex-Sil production lines. They have acknowledged that Ace-Sil did not compete with any Daramic product.[8] (FOF 114-116). Similarly, Flex-Sil is not part of the FTC's PE market, and has been incorrectly included in the FTC's improperly delineated application specific markets. (FOF 106, 121, 123-126). It does not effectively compete with any Daramic product, including HD. Thus there

[8] Although Ace-Sil dust is used in the manufacturing process of CellForce an appropriate 'remedy' to restore competition to the status it was in prior to the Acquisition would be to have the buyer of the Piney Flats PE line enter into a contract to purchase Ace-Sil (in original, scrap or dust form) in an arms-length negotiation.

are no horizontal, vertical or potential anticompetitive concerns with regard to Flex-Sil, and no basis to seek its divestiture.[9] Id.

Finally, complete divestiture is not required either by law or by the circumstances of this case where a partial divestiture would satisfy entirely the FTC's concerns. (FOF 1401-1405). Complaint Counsel cannot obtain complete divestiture unless it proves, not just assumes, that such a remedy would be necessary to restore the competition allegedly lost through the acquisition. Since it cannot do that, the complete divestiture it seeks is not appropriate and is overbroad and punitive. If the Court finds the acquisition violated Section 7, a partial divestiture would remedy the claimed competitive harm.

The appropriate remedy to restore competition in the FTC's defined relevant geographic market is to divest the PE line at Piney Flats only. The only product Microporous produced that was legitimately competitive with Daramic product inside North America was approximately { } CellForce sold into North America from that line each year. (FOF 339, 1329). The fact that another PE production line in the United States had been under consideration by Microporous does not show that it would have come to fruition, or that it was competition 'lost' as a result of the acquisition. (FOF 1139, 1145-47, 1149). The evidence at trial made clear that the addition of a second PE line at Piney Flats had been suspended at the time {_____} backed out of a deal with Microporous in June 2007 – long before the merger was contemplated, and was never resumed. (FOF 1145-47). The Microporous Board had not approved a second U.S. line, and had, in fact, mandated that there were to be no new projects or capital expenditures until Microporous could prove the viability of the Feistritz operation. (PX2301 (Heglie Dep., pp. 73; 156); PX2300 (Heglie IHT p. 185); RX00752; FOF 387-95). Adding those facts to the current economic climate and the significant leveraged position of Microporous (and its failure to execute contracts for production in

[9] The Ace-Sil and Flex-Sil production lines are located in a building that is entirely separate from the PE separator line at Piney Flats. Thus the physical divestiture of the PE portion of the plant could easily be accomplished without affecting the Ace-Sil and Flex-Sil lines. (FOF 333-335).

Austria) confirm that such an expansion would not have occurred.[10] (PX0910 (Trevethan Dep., p. 76-77); Trevathan Tr. 3610, 3628-31; Riney Tr. 4962, 4969-70; RX00283; FOF 386-409, 427).

C. There is no Basis for any Required Divestiture of the Feistritz Plant

The FTC seeks divestiture of the former Microporous plant in Austria (the "Feistritz Plant"). For the reasons set forth below, divestiture of the Feistritz Plant is unnecessary, inappropriate under the facts and, significantly, outside the jurisdiction of the FTC.

First, the Feistritz Plant was not a part of the acquisition as an operating facility since it was not in operation as of February 29, 2008. (FOF 337).

Second, the Feistritz Plant is not located within North America, the relevant geographic market alleged by the FTC, and was not even owned by Microporous Products LLP, the entity regarding which the FTC seeks its extraordinary relief. (Trevathan, Tr. at 3571-72; RX1227, pp. 2, 39, Exh. A; RX1228; RX1229, p. 47; RX1572).

Third, inclusion of the Feistritz plant with U.S.-based assets that could be subject to a divestiture order would make no contribution to the "viability" of Microporous or any acquiring company. In fact, Gilchrist admitted during the hearing that the Feistritz Plant was not necessary for Microporous to be viable, and that Microporous for years had manufactured and shipped separators out of Piney Flats to Europe and Asia. (Gilchrist, Tr. at 511, 540-41).

Fourth, the Feistritz Plant, which came online between March and June 2008, does not sell products to customers located in North America or the United States. (Gaugl, Tr. at 4643; FOF 1138).

Fifth, the FTC has not shown that operation of the Feistritz plant enhanced North American (or United States) competitive conditions, the United States being the jurisdiction for which the FTC

[10] Additionally, Microporous had obligations to repay grants to the Austrian government that had been negotiated and those obligations would have added further financial stress to Microporous going forward.

has authority to act regarding maintenance of competitive conditions.[11] More specifically, there is no evidence that opening of the Feistritz Plant had the effect of enabling the plant in Piney Flats, Tennessee, to sell products either in the United States or North America that it otherwise would not have been able to sell. (FOF 1139).

There is no dispute that the plant was not in operation as of February 29, 2008. (Gaugl, Tr. 4603; Gilchrist, Tr. 374-75). The Feistritz Plant did not commence operation until March 2008 and did not become fully operational until June 2008. (Id.) Thus, when Daramic acquired Microporous it did not acquire an operating plant in Feistritz, but only non-operating assets. (FOF 337). Divestiture should not be required of a business that was not part of the acquisition.[12]

The Feistritz Plant is also obviously not located within the North American geographic market alleged by Complaint Counsel. Indeed, since the FTC generally alleges that production facilities outside North America are incapable of competing effectively in North America (Complaint ¶ 16; FOF 1141; RX01572 at 004-005), it is wholly disingenuous to simultaneously urge divestiture of the Feistritz Plant. The FTC has, of course, urged that if Respondent's claim of a global market is accepted, then this objection would be eliminated. (Kahwaty, Tr. at 5519). However, when asked about this at the hearing, Dr. Kahwaty replied that it would be {

} (Kahwaty, Tr. at 5519, *in camera*). Thus, even if Respondent's global geographic market is accepted, the

[11] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004)("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.") (emphasis in original); U. S. Department of Justice & Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (1995)("Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved." "[W]ith respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvements Act ("FTAIA") applies to foreign conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce.") Adoption of the predecessor of the FTAIA by Congress in 1982 included amendment of the FTC Act to comply with the terms of the 1982 statute. 15 U.S.C. § 45(a)(3)(A).

[12] ABA Section of Antitrust Law, *Mergers and Acquisitions* at 607 n.181 (3d ed. 2008), citing "*Reynolds Metals Co. v. FTC*, 309 F.2d 223, 231 (D.C. Cir. 1962); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222-23 (N.D.N.Y. 1978); *United States v. Ford Motor Co.*, 315 F. Supp. 372, 379-80 (E.D. Mich. 1970), *aff'd*, 405 U.S. 562 (1972); *Union Carbide Corp.*, 59 F.T.C. 614, 657 (1971)(reversing hearing examiner order that acquiring company divest plant built after the illegal acquisition on theory that order exceeded the return to status quo mandate of divestiture)."

"competitive effects story does not support any required divestiture of the Feistritz Plant as amply shown at trial.

Specifically, testimony at the hearing showed that although Microporous {

} (Gilchrist, Tr. at 528-31, *in camera*). In fact, evidence was presented to the Court, that if anything, the Feistritz Plant {

} (FOF 1143).

It is undisputed that at the time of the acquisition in February 2008, {

} (Gilchrist, Tr. at 502). The Microporous Board was concerned about Microporous' financial situation given this exposure and questioned Gilchrist's financial acumen. (Heglie, Depo. at 91-93, 149-53). The Feistritz Plant today is no where near full and is only where it is because Daramic closed its Potenza plant of { } and relocated production to Feistritz. (Hauswald, Tr. at 922, *in camera*; Gaugl, Tr. at 4572-73).

Whatever may have been the circumstances as of February 2008, it is quite clear today that adding Feistritz to a divestiture package would only create serious viability issues for the "newco" and would add to the difficulty of accomplishing divestiture. Feistritz is now operating at diminished capacity and 2009 forecasts were that, considered as a free-standing entity, Feistritz would have { } (Gaugl, Tr. at 4569, 4571; Riney, Tr. at 4962, 4969; FOF 1144). Moreover, without the addition of the transferred Potenza orders, the capacity level at Feistritz would only be about { } (Gaugl, Tr. 4572-73; FOF 1144). This is the level at which Feistritz would be operating had the merger not occurred. Including Feistritz operating at { } of capacity with a { } would create an extremely unattractive divestiture package. In addition, divestiture would also result {

} (Riney, Tr. at 5020-22; FOF 1144).

Nor is there evidence to support any claim that the Feistritz plant has indirectly added to output or otherwise promoted competitive conditions in the U.S. or North America. While the CellForce line at Piney Flats was apparently operating at or near full capacity in 2005, there was discussion of expanding that capacity (Trevathan, Tr. 3582) and an expansion plan was momentarily considered, that plan was terminated in 2007, never revived and the Piney Flats CellForce line is now operating at { }. (Trevathan, Tr. 3647; Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615; FOF 1145).

At the time of the acquisition, apparently some { } of the PE line at Piney Flats was being exported to Europe and sold to { } (Trevathan, Tr. 3774; Gaugl, Tr. 4555; FOF 1146). The plan, which was implemented, was for the { } product to be produced at the Feistritz plant when it came online. The numbers noted above show that the CellForce line at Piney Flats did not add to its customer base after the transfer of { } of its production to Feistritz. The transfer to Feistritz theoretically enabled Piney Flats to produce more product for U.S. and North America sales, but that production did not occur and that has never been the reality. (FOF 1146).

Various plans had been considered regarding the addition of production facilities in Europe and at Piney Flats by Microporous over the years. (FOF 1147). Ultimately, one line of the facility at Feistritz was to be used to supply { } in Europe. (FOF 395, 1147). Although Microporous began making purchases of "long-lead" equipment for three lines initially (two in Austria and one in Piney Flats), consideration of adding the "third" line in Piney Flats was based on conversations first with { } for the production of SLI material in the US. (FOF 1147). Ultimately, however, { } terminated its interests in purchasing product from Microporous and entered into an agreement with { }, in May or June 2007, at which time the equipment purchase was

put "on hold." (RX00047; FOF 1147). Despite various discussions with { } the equipment orders were never resumed and no work was done by Microporous for any US expansion for { }. (FOF 1147). The equipment that had already been purchased was put in boxes and, as of June 2009, it was still sitting in those boxes located in Feistritz and Piney Flats. (Gaugl, Tr. 4558-65; Trevathan, Tr. 3598-3615; FOF 1147).

Trevathan testified that producing the { } products at Feistritz freed up capacity at Piney Flats (Trevathan, Tr. 3721) and "helped Microporous expand its business in the United States." (Trevathan, Tr. 3773). He said that "we would be able to go out to customers and bring in incremental volume." (Trevathan, Tr. 3774). But he was never asked and never testified that Microporous actually obtained new business in the U.S. that made use of the freed-up capacity. And, while Gilchrist testified that Microporous "had more offers for business than [it] was going to be able to handle" (Gilchrist, Tr. 344) after the { } business was transferred to Feistritz, he was unable to identify any customers pertinent to such business. (Gilchrist, Tr. 503; FOF 1148).

In short, there is no credible evidence that the capacity at Piney Flats that became available as a result of the Feistritz plant was actually put to use producing product for U.S. or North American customers. And there is certainly no credible evidence that that capacity was necessary to enable Piney Flats to supply all of its customers. (FOF 1149).

Accordingly, there is no basis for any requirement that the Feistritz plant be divested.

D. Any Competitive Harm From the Merger Could Be Addressed Through Divestiture of Microporous' PE Line in Piney Flats

As noted above, no evidence has been presented to this Court that Daramic's acquisition of the ACE-SIL® product line from Microporous has had any anticompetitive effect. (FOF 1151). Accordingly, there is no basis for its request that the ACE-SIL® production line be divested.

Further, {

}. (FOF 1152). Thus, {

} (FOF 1152). A divestiture of Daramic HD would be easier to accomplish than a divestiture of a CellForce production facility, as there would be no lingering issue of obtaining the ACE-SIL® dust. Divestiture of the PE line with the ability to make Daramic HD would produce the same competitive effect and avoid the issue of obtaining the ACE-SIL® dust by the acquiring company that it would need to make CellForce. (FOF 1153).

If there were some competitive concern about the alleged motive market segment, such concern could be adequately addressed by divestiture of the PE line in Piney Flats designed to produce straight PE separators and also having the ability to produce either CellForce or HD. That capacity would replicate the capacity of Microporous PE line pre-merger. (FOF 1154).

Evidence has been presented to this Court that a divestiture of the PE line at Piney Flats is feasible. The Piney Flats facility is actually comprised of two plants: a rubber plant and a PE plant. The rubber and PE plants are housed in separate facilities and have separate entrances and loading bays. (Gilchrist Tr. at 311-14, 539; Hauswald Tr. at 999-1000; FOF 1155).

E. The Other Relief Sought is Punitive and Unnecessary

There is no factual or economic basis for any of the other remedies sought by the FTC in its brief. Among other things, the FTC seeks:

(a) Assignment of contracts to the new entity, recession of contracts and assignment or licensing of all intellectual property and know-how associated with the relevant markets. The wording of this extraordinary remedy would suggest that Complaint Counsel believe that Daramic should be required to license or assign its own IP and know-how for the products the FTC alleges fall within their relevant markets (to the extent they able to identify such products). To that extent, this requested relief is clearly punitive and should not be allowed.

(b) <u>The provision of services that are currently provided by Daramic to the former Microporous locations</u>. The FTC cannot justify a request for relief that would require Daramic to provide services to a new competitive company that it did not provide to Microporous prior to the acquisition. Daramic has, as noted above, provided services after the acquisition to the former Microporous locations to make them more efficient, better able to monitor their scrap usage, increase the use of recycled material, improve their extraction and extrusion techniques and reduce the use of solvent, among others. To restore competition to the state it would otherwise have been today cannot include forcing Daramic to provide services to make any new company more efficient and competitive than it would have been but for the transaction. This again is a punitive remedy and is inappropriate.

(c) <u>The rescission of non-compete agreements between Polypore and its employees</u>. Polypore employs thousands of people in three different companies. Complaint Counsel appear to claim that it is entitled to a remedy whereby any and all non-compete agreements Polypore has with

any of its current and/or former employees are rescinded. This goes well any possible beyond legitimate relief.

(d) A covenant not to sue the divested entity for its use of PE technology. Again, any such relief could not be justified. In fact, a full divestiture of the former Microporous should **require** that the settlement of the previously pending arbitration between Microporous and Daramic be rescinded. This settlement was part of the consideration for the acquisition. If Microporous were to be reconstituted with the Feistritz plant, then the state of the competitive landscape prior to, and but for, the acquisition includes that arbitration. To also suggest that Daramic be required to give up its constitutional and statutory rights to protect its intellectual property and trade secrets should Microporous attempt to use them in violation of the law, is outrageous and should be denied.

(e) Relief Related to the H&V Agreement. Complaint Counsel have failed to prove any violation of Section 5 of the FTC Act regarding the agreement between H&V and Daramic. Although the agreement between H&V and Daramic was a legitimate joint venture, it has been terminated and no relief is necessary.

(f) No exclusionary Contract Relief is Necessary. Complaint Counsel failed to prove that Daramic had monopoly power. In addition, Microporous was not excluded from any separator business because it either lacked production facilities or capacity at the time in question or evidence relating to the customers indicates that they would not have purchased from Microporous in any event. No relief is necessary.

XII. SUMMARY AND CONCLUSION

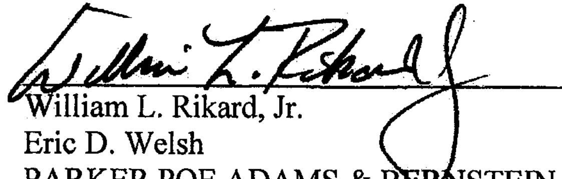
As set forth above, Respondent has not violated Section 5 of the F.T.C. Act or Section 7 of the Clayton Act and the Court need not impose any remedy. However, should the Court find that a violation has occurred, the divestiture remedy sought by Complaint Counsel is extreme and inappropriate and should not be ordered. The FTC has not met its burden of proving that its

proposed remedy is proper, or that such a remedy would restore the allegedly "lost" competition in any of its relevant markets. When viewed through the lens of today's economic realities, Complaint Counsel's proposed remedy is more likely to harm competition than help it. Respondent has proposed a number of remedies which would restore any competition the Court finds has been lost without the danger inherent in Complaint Counsel's proposed remedy.

For the reasons set forth herein, Respondent respectfully requests that Complaint Counsel's claims be dismissed with prejudice, and that judgment be rendered in Respondent's favor.

Dated: July 17, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2009, I caused to be filed via hand delivery and electronic mail delivery an original and two copies of the foregoing ***Respondent's Post-Trial Brief [PUBLIC RECORD]***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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I hereby certify that on July 17, 2009, I caused to be served one copy via electronic mail delivery and four copies via hand-delivery of the foregoing ***Respondent's Post-Trial Brief [PUBLIC RECORD]*** upon:

The Honorable D. Michael Chappell
Administrative Law Judge
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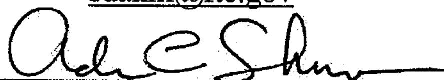

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