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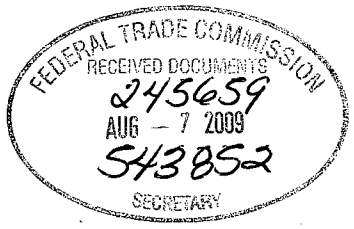

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENT'S POST-TRIAL REPLY BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

INTRODUCTION

Despite Complaint Counsel's attempts at justifying their alleged product and geographic markets, their efforts result in nothing more than trying to force four square pegs into one round hole. This alone, a necessary predicate to their claims, is enough to doom their case. See,e.g., Section 7 of the Clayton Act, 15 U.S.C. § 18 ("Section 7"); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). Additionally, however, they also ignore and distort key facts and evidence, give credence to "hopes," dreams, "beliefs" and "intentions" that have no factual support, and do not show that the effects of the acquisition in question will be to "substantially lessen competition, or tend to create a monopoly." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355 (1963). The deficiencies in Complaint Counsel's case are set out more particularly below, and in Respondent's Response to Complaint Counsel's Findings of Fact and Conclusions of Law, which gives vivid and compelling details about the misrepresentations Complaint Counsel have attempted to rely on, and shows the ultimate invalidity of all of Complaint Counsel's claims.

Complaint Counsel have relied on a myriad of biased and hostile witnesses, primarily from the Power Buyers who are the "puppet masters" of this action, and have desperately sought, without success, to prove their artificial product and geographic markets because without those markets they cannot show anticompetitive effects much less monopoly power. Similarly, Complaint Counsel have clung to the notion of Microporous as a "maverick" despite a plethora of testimony and documentary evidence showing that Microporous was a pure conformist that did nothing innovative or unique in the decades old PE separator market. Microporous' only true pioneering came in the form of its rubber separators – a product Daramic never had, and the acquisition of which is the true and legitimate reason for this merger.

Furthermore, even if the Court accepts the artificial "markets" urged by Complaint Counsel, Respondent has shown, and the evidence demonstrates, that entry would be timely, likely and sufficient to counteract any possible anticompetitive effects of this acquisition. Complaint Counsel's post-trial brief suggests that "de novo" entry does not meet the required standard, but ignores the fact that Respondent is not required to prove "de novo" entry as a counter to anticompetitive effects. There is ample proof that not only Asian suppliers, but most significantly, { ,} are poised to fill the infinitesimal gap that was created in the PE separator market (or any of Complaint Counsel's markets) by the acquisition of Microporous.

Further, the evidence categorically shows that Microporous was financially weak prior to the acquisition, with poor management and scarce future resources, showing that it would not have been a major contributor to the competitiveness of the industry even if it had remained independent. United States v. International Harvester Co., 564 F.2d 769, 776-79 (7th Cir. 1977); FTC v. Arch Coal, Inc., 329 F. Supp.2d 109, 158 (2004). This too, is sufficient to rebut any case Complaint Counsel may have made.

Complaint Counsel have also not appropriately shown that Daramic monopolized, or attempted to monopolize any relevant market, or entered into any agreements that unreasonably restrained trade, and their attempts to do so are refuted soundly by the record evidence.

Even if the Court were to find that Complaint Counsel have proved their *prima facie* case, and Respondent has not rebutted it, an outcome Respondent does not believe the evidence supports, then Complaint Counsel are not entitled to the relief they seek, which is overbroad, unsupported and punitive. Relief is intended to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the merger" (In the Matter of B.F. Goodrich Co., 110 F.T.C. 207, 345 (1988)) and complete divestiture of all acquired assets is not

required unless it is necessary to restore that lost competition. Furthermore, as Complaint Counsel well know, but have apparently chosen to ignore, courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. E.I. duPont de Nemours & Co, 366 U.S. 316, 326 (1961) ; 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."). There is significant evidence that today Microporous would look very different than it "appeared" to look on February 29, 2008. Since the acquisition, the precarious financial position of Microporous has come to light, and it is clear from testimony and documents in evidence that the global economic crisis would have exacerbated that situation. (See, e.g., RFOF 295-305; 1143-44). If complete divestiture is ordered then Microporous would be a company with three PE production lines – not one of which would be more than half full. (Id.). Even taking into account Complaint Counsel's extraordinary and unsupported request for all of Daramic's North American contracts to be dissolved, there is no evidence that Microporous would have enough business to fill its idle lines, or make enough money to service its considerable debt. (Id.)

Complete divestiture is not required either by law or by the circumstances of this case and there is absolutely no basis for divesting the former Microporous plant in Austria which was not a part of the acquisition as an operating facility, is not located within North America, sells no products (and was never intended to sell products) to customers in North America, and was not even owned by Microporous Products LLP, the entity regarding which the FTC seeks its extraordinary relief. There is no proof that the existence of the Feistritz plant enhanced North American competitive conditions, or that the Feistritz Plant had the effect of enabling the plant in Piney Flats to sell products either in the United States or North America that it otherwise would

not have been able to sell. In fact, the evidence is, and Complaint Counsel have done nothing to refute it, that the Feistritz Plant {

}. (See, e.g., RFOF 295-305; 1143-44). Finally, there is no basis for any of the other remedies sought by the FTC in its brief or proposed order, as set out more fully below.

Ultimately, despite Complaint Counsel's attempts to turn rumor, innuendo and "beliefs" into a case, they cannot succeed in establishing that the acquisition of Microporous by Polypore will substantially lessen competition in any of their false "markets," or in the true worldwide PE market. Competition is alive and well in the PE separator industry and thus, in addition to all the reasons set forth below,[1] and in Respondent's other briefing, the FTC's Complaint should be dismissed with prejudice in its entirety.

I. Factual Background

Complaint Counsel's entire "factual" section is nothing more than additional argument based on falsehoods, misrepresentations and unsupported statements. The repeated examples of this in Complaint Counsel's "Factual Background" section have been thoroughly and satisfactorily covered not only in Respondent's Pre-Trial and initial Post-Trial Brief, but also in its Findings of Fact and Conclusions of Law, and in its Response to Complaint Counsel's Findings of Fact and Conclusion of Law. Keeping in mind the reams of paper submitted to the Court in this matter, and the Court's admonition to the parties that "Reply briefs shall be limited to refuting issues raised by the opposing side and should not be used merely to bolster arguments

[1] Respondent will address Complaint Counsel's arguments in the order in which they were presented in Complaint Counsel's initial Post-Trial Brief pursuant to the Court's Order on Post-Trial Briefing.

made in the opening post trial briefs" Respondent will not "re-argue" its points in this reply brief. Instead, by way of example, Respondent will point out just a few of Complaint Counsel's twisted and unsupported facts:

- Illuminating the difficult task Complaint Counsel has had throughout this case in keeping their "markets" straight, Complaint Counsel's factual background starts with the completely false statement that "there is only one manufacturer of deep-cycle, motive and UPS separators" in North America today, and only two manufacturers of SLI separators." (emphasis added). However, there is plenty of evidence that a number of other companies, {

,} sell "separators," for SLI, UPS, deep-cycle and motive applications in North America. (Roe, Tr. 1207-1208; Wallace, Tr. 1975; Burkert, Tr. 2423, *in camera*; Gillespie, Tr. 2931, 2983; McDonald, Tr. 3904-05; Leister, Tr. 4031; Douglas, Tr. 4053; PX0911 (Roe, Dep. 118), *in camera*); PX0917 (Cullen, Dep. at 19-23, 202, 245-46, 251), *in camera*); RX00095, *in camera).*

- Complaint Counsel's repetitive argument about Daramic's alleged "exclusionary" conduct beginning 10 years ago simply does not hold water. There is no reliable or contemporaneous evidence that Daramic's purchased Jungfer for any reason other than to increase the number of lines it operated, and because Jungfer was for sale. (Respondent's Post Trial Br. at p. 56). Daramic did not "immediately shut it down" but operated the Jungfer facility in Austria for four years before moving the machinery to Asia, where its needs were greater. (PX0905 (Gaugl, Dep. at 69), *in camera);* PX0533 at 002). The lawsuit between Microporous and Daramic, which Complaint Counsel attempt to paint as happening on the heels of the Jungfer purchase in 2001, was brought in 2006 for breach of contract, related to the sale of SLI

separators in Europe only, and survived both a 12(b)(6) and summary judgment motion by Microporous. (RFOF 267; PX2237; PX2235 at 11, *in camera*).

- Likewise, Complaint Counsel's arguments related to the Cross Agency Agreement between Daramic and H&V are no more valid today than they were prior to trial, and Complaint Counsel have provided the Court no evidence sufficient to suggest that the agreement was anything but legitimate. Complaint Counsel's sole basis for their claim are {

}.

(PX0923 (Hauswald, Dep. at 21-24), *in camera*). Complaint Counsel ignore significant testimony from { ,} and the contemporaneous documents, which show that the agreement was entirely legitimate. (See Respondent's Pre-Trial Brief at p. 34, fn. 76; Respondent's Post-Trial Br. at pp. 60-63; RFOF 974, 1123-1132). Importantly, Complaint Counsel base their claim on the idea that Daramic "learned" that H&V might enter the PE market, and then sought the agreement. However, the only H&V interest in PE that Complaint Counsel can show is a letter written on June 19, 1999 to Exide regarding the sale of the Corydon facility and there is no evidence that Daramic had any knowledge or "learned" of that letter prior to this proceeding. (PX0726; PX1368). When the firm Exide had engaged to sell the Corydon facility put together its "comparative" offers – there is no mention of any "offer" from H&V. (PX0726). Further, the H&V/Daramic agreement was not signed until March 23, 2001 – almost two years after Exide agreed to sell the Corydon facility to Daramic – hardly a swift reaction to an alleged threat – particularly when, once Daramic had purchased Corydon, the alleged threat no longer existed. (Complaint Counsel Post-Trial Brief p. 7; PX0727). Beyond this one letter, there is no evidence that {

}. (PX0925 (Porter, Dep. at 25-26, 170-174), *in*

camera; FOF 1124)). The two are not, and never have been, competitors and the Cross Agency Agreement was a legitimate sales joint venture. (See Respondent's Post Trial Br. at pp. 60-63; RFOF 1123-1132, 1480-1486; Respondent's Response to CCFOF 1167 - 1196).

- Complaint Counsel have clung throughout the trial, and before, to notions that are not supported by the facts in evidence. For instance, there is significant proof that Microporous was entirely unable to support business for JCI in 2004 not only because its product failed to pass JCI's tests, but because it did not have the capacity to supply JCI with PE separators. (Respondent's Post Trial Br. at pp. 21, 39-41; RFOF 486-490; Respondent's Response to CCFOF 526-527, 543-545, 554-555, 560, 562, 569, 584, 588, 590). The fact that JCI – an enormous multinational corporation – chose to enter into an arms length contract (and there is no evidence that JCI ever claimed that the 2004 agreement with Daramic was not an enforceable contract) in 2004, is completely immaterial to the effect of the Microporous acquisition today and going forward. (Respondent's Post Trial Br. at pp. 21, 39-41; RFOF 486-490; Respondent's Response to CCFOF 526-527, 543-545, 554-555, 560, 562, 569, 584, 588, 590).

- The repeated "rumors" of Microporous' expansions and entry proved to be incorrect time and again. (PX0758 at 017, *in camera;* PX0694 at 002 ("We got confirmation that Amerace plans to build a line in Tscheckoslovakia [sic], inside the building [for] . . . Enersys.") These rumors and speculation, and the fact that they were repeated internally at Daramic, cannot be sufficient to show that the acquisition of Microporous by Daramic is anticompetitive.

- Complaint Counsel's contrived story that the PE force majeure was false and that Daramic {

}

(Respondent's Post Trial Br. at p. 58-59; RFOF 554, 636-559).. First, there is not one shred of evidence that { } so. (Axt, Tr. 2207, *in camera* { }. Complaint Counsel has not cited to any document that supports its bold statement, because it cannot. Furthermore, not once, in any of its briefing has Complaint Counsel bothered to address the fact that Daramic's decisions during the force majeure were based on legal support for how to allocate supply during such an event. See e.g., Cliffstar Corp. v. Riverbend Products, Inc., 750 F.Supp. 81, 13 UCC2d 392 (W.D.N.Y., 1990).

- Complaint Counsel's attempts to paint Daramic's failure to quote 50% of the RFP from Exide as some sort of exclusionary behavior similarly falls short. Not one company to which Exide submitted its RFP quoted everything that Exide asked them to quote, and Mr. Gillespie himself stated that it was up to the suppliers to "decide what or any portion they wanted to quote on." (Gillespie, Tr. 2965). Daramic was not required to quote anything to Exide, { }

(Complaint Counsel's Post-Trail Brief at p. 8). Complaint Counsel's unsupported statement that Daramic "took steps" to prevent Exide from shifting part of its business to Microporous is perplexing considering Daramic's contract extends through the end of 2009, and thus Exide had absolutely no right under that contract to shift any PE business to Microporous in 2007. Furthermore, there is no evidence that the failure of { } (RFOF 310, 518, 530; Respondent's Post Trial Br. at pp. 45-47; Respondent's Responses to CCFOF 604-623).

- Complaint Counsel's statement that Microporous had "agreed to supply Exide with SLI separators" is completely false and entirely unsupported. The non-binding MOU on which Microporous and Exide had made almost no progress in seven months, did not even articulate whether Exide would purchase SLI or industrial separators from Microporous if the parties could come to terms, both could get the support of their boards of directors, Microporous could get capital support and the Microporous product could pass all the tests. (RFOF 413-420; 574-580; PX0056 at 002-3; Trevathan, Tr. 3611, 3758-59; RX00010; RX00661 at 001, *in camera*; RX00009; RX00399; Gillespie, Tr. 3075-76, 3081; RX00403; McDonald, Tr. 3843, 3846-47; RX00283; PX1766; RX00283 (a "strong bet" Microporous will not expand for Exide or East Penn in the US)).

- Respondents' merger planning documents do not make the effects of the acquisition more or less competitive. And it is worth nothing that Complaint Counsel rely more on them than on the facts showing what has happened in the industry since the acquisition. Daramic's "worst case" predictions prior to the acquisition, with only rumor and speculation as to Microporous' plans, do not support Complaint Counsel's claims. To the extent that Respondent made such predictions, they were wrong – as evidenced by the fact that Microporous was in much worse financial condition than had been acknowledged to Daramic, and the fact that Microporous had failed to secure any contract for its two new lines in Austria, beyond the {

} (Respondent's Post Trial Br. at pp. 69-71; RFOF 295-305). Further, there is no evidence that Microporous would have undertaken any additional expansion in the United States. (RX00283 (expansion in Europe "only option for further expansion with IGP at the helm").

- Complaint Counsel have not, and cannot, point to any evidence that Daramic has "forced customers to pay substantially higher prices." (Complaint Counsel's Post Trial Brief at p. 10). First, the findings they rely on – and the underlying 'support' for those findings – do nothing more than state that Daramic "announced" an increase in prices for 2009. There is no support for the premise that it achieved the announced increases, or in many cases, any increase at all. (RFOF 251, 253, 256-57, 556-57, 632, 634, 1255; Respondent's Post Trial Br. at pp. 27-30; Respondent's Response to CCFOF 615, 619, 638, 642, 645). Furthermore, Complaint Counsel ignore the fact that Microporous had "announced" price increases for all of its products prior to the acquisition as well – several of those announced increases were rescinded by Daramic as a result of the synergies it was able to achieve once it acquired Microporous. (RFOF 347-352, 416, 561-562, 1280, 1373-1377).

- Complaint Counsel's "factual" statement related to Microporous' entry into the SLI business is riddled with inaccuracies and misrepresentations. Complaint Counsel do not even cite to any authority for the claim that Microporous had not secured commercial sales of PE "because of Daramic's efforts" or that Microporous had caused SLI separator pricing to go down. (Complaint Counsel's Post Trial Brief at p. 10). Complaint Counsel also ignore the fact that {

}. (RX00124 at 004, *in camera*). This "oversight" is particularly ironic when viewed in light of Complaint Counsel's statement that Daramic "classified" Microporous as an emerging competitive threat – exactly the way { } views the Asian competitors, yet Complaint Counsel ignore their existence. (Complaint Counsel's Post Trial Brief at p. 10; RFOF 1052-1060). Furthermore, it is amazing that Complaint Counsel suggest that Microporous 'competed' to supply {

} (Complaint Counsel's Post Trial Brief at p. 10; RFOF 377, 580-82).

- Complaint Counsel's deliberate misrepresentation on p. 10 of their brief can also not go without comment. Complaint Counsel state, without any support, that Microporous had an *agreement* to sell the separator it developed for the UPS market that would have given it half that market. There is simply no basis for this claim. There was no agreement and Complaint Counsel cannot point to any "agreement." The findings they cite do not even remotely support this statement. (Complaint Counsel Post Trial Br. at p. 10). Not only did Microporous not have an "agreement" to sell {

} – which is not even within Complaint Counsel's alleged product "market." (RFOF 355-365). {

} This is but one blatant example of Complaint Counsel's attempts to build a case that is unsupported by the facts in evidence.

- Finally, Complaint Counsel's attempts to change the standard for entry to require that a new competitor have entered the North American market in order for Daramic's entry argument to succeed must be noted. As the Court knows, and as the law makes clear, this is not the standard for entry. Nor, as Complaint Counsel repeatedly attempts to suggest in other parts of its brief, is "de novo" entry required. Daramic can show, and the evidence supports, what is

required, and that is that there is evidence that entry will be timely, likely and sufficient to counteract any anticompetitive effects of the acquisition in question. (RFOF 1061-1122).

II. Daramic's Acquisition of Microporous was Not Illegal

Complaint Counsel have not demonstrated a prima facie case because they have failed to delineate proper product and geographic markets, thus no "presumption" can be made that the acquisition will substantially lessen competition. United States v. Baker Hughes, Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990); see also FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C. Cir. 2001); FTC v. University Health, Inc., 938 F.2d 1206, 1218 (11th Cir. 1991). Consequently, there is no burden to shift to Respondent. Even if Complaint Counsel had met their burden, there is ample evidence showing that Complaint Counsel's improperly calculated market-share statistics[2] do not give an accurate account of the probable effects on competition in any claimed market and are not enough for Complaint Counsel to simply rest their case. Baker Hughes, 908 F.2d at 992 ("The Herfindahl-Hirschman Index cannot guarantee litigation victories."); see also United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) (" "[e]vidence of past production does not as a matter of logic, necessarily give a proper picture of a company's future ability to compete."). As the Supreme Court in Brown Shoe noted, market statistics are important, but "only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger." Brown Shoe Co. v. United States, 370 U.S. 294, 322 n. 38 (1962). An examination of the particular markets at issue, particularly the significant evidence showing Microporous' minor presence and the number of current competitors already part of, or poised to enter, each of Complaint Counsel's alleged markets, shows that this acquisition was

[2] Dr. Simpson's HHI calculations are significantly flawed. He fails to take uncommitted entrants into account.

inconsequential to the future of the PE separator, or indeed Complaint Counsel's improperly alleged "deep cycle," "motive," "UPS" and "SLI" markets. (See, e.g., RFOF 355-65 62Z 1364 1165, 1180-94, 943-45, 962, 968-70, 991-93, 1024-27, 1052-60; Respondent's Post Trial Br. at pp. pp. 20, 32-35, 46-3; Respondent's Response to CCFOF 228, 234, 236, 248, 257, 279, 289, 291, 326, 501, 635, 708, 987, 996).

A. Complaint Counsel has Failed to Prove that the Relevant Product Markets are Deep-Cycle, Motive, SLI, and UPS Battery Separators for Flooded Batteries

Ignoring 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, Complaint Counsel claim in their brief that the determination of the relevant market is a "matter of business" and "economic realities." FTC v. Cardinal Health, 12 F.Supp. 2d 34, 46 (D.D.C. 1998)(citations omitted); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210, 219 (D.C. Cir. 1986). Yet, Complaint Counsel then proceeded, in each and every one of their purported product markets to wholly ignore both business and economic realities and to rely on "unsubstantiated customer apprehensions" as a "substitute for hard evidence." United States v. Oracle Corp., 331 F. Supp.2d 1098 (N.D.Cal. 2004). As the court in Oracle noted, such is "largely unhelpful" because the witnesses testified to their preferences and "[t]here was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle" or "how much it would cost to adapt other vendors' products to the same functionality that the Oracle and PeopleSoft products afford." Oracle., 331 F. Supp.2d at 1131. These words are directly applicable, and equally true here. In fact, in this case, the customers themselves could not agree, either in testimony or in their own documents, on what the correct "product markets" for battery separators should be. The primary reasons for

Complaint Counsel's failure to properly prove valid product markets are set forth in Respondent's Post-Trial Brief, Respondent's Findings of Fact and Conclusions of Law, and Respondent's Responses to Complaint Counsel's Findings of Fact and Conclusions of law, however, outlined below under each alleged market, are specific points showing the confusion and blurring of lines between these alleged product market, even ignoring the traditional SSNIP and hypothetical monopolist tests, as Complaint Counsel has done, their product markets cannot survive. There is no proof that the PE products used in Complaint Counsel's alleged markets are not "reasonably interchangeable" – in fact, there is testimony that they are interchangeable and used for the same purpose – the only difference between them is size, thickness and pattern – characteristics that are quickly and easily adjusted. (RFOF 70-74; Whear, Tr. 4695, 4699; RX00677, *in camera* Seibert, Tr. 4188, *in camera*; Hauswald, Tr. 984-85). Complaint Counsel have not even bothered to address the fact that if a "reasonable interchangeability of use" test is used then separators in one "motive" application are not even interchangeable with those in another "motive" application because the size of the batteries are different (See e.g., RFOF 883-886 {

} See also RFOF 37, 72, 1185-1188, 769, 885). This is true in all of the FTC's alleged product categories. (FOF 69-78; Brilmyer, Tr. 1915-16 (Standard Daramic HP PE product, intended for automotive applications, could be used "anywhere")).

1. Deep-Cycle Battery Separators are a Not a Valid Product Market

- Complaint Counsel's customer witnesses did not even universally support Complaint Counsel's "deep cycle" product market. For instance, Mr. Godber testified only that "most" batteries used in "deep-cycling" applications have an antimony alloy – not "all" as Complaint Counsel contends. (Godber, Tr. 138; Complaint Counsel Post-Trial Br. at p. 13). Mr. Godber went on to testify that a "motive" battery is a "deep-cycle" battery – the difference is on usage rather than functionality. (Godber, Tr. 144-146). In fact, Mr. Godber testified that Trojan considered using motive power "construction" in batteries for "scrubbers" (within Complaint Counsel's 'deep-cycle' category). They are functionally interchangeable, they are simply different sizes. (Godber, Tr. 146). Mr. Godber also testified that Trojan sells 'sealed' deep-cycle batteries – batteries that go into "golf carts" and other electric vehicles where regulations require that there not be any "free" electrolyte in the battery so it is not a "flooded" battery. (Godber, Tr. 146). Mr. Godber also testified that you can put an automotive separator in a deep-cycle battery. (Godber, Tr. 151). Finally, Mr. Godber testified that the maximum percent of Trojan batteries that could use "CellForce" or "HD" separators was 21% - thus "functionally" 79% of Trojan's batteries must use Flex-Sil separators. (Godber, Tr., 176).

- Mr. Brilmyer testified as follows: "a golf cart battery is a type of a traction battery or motive power battery. It's deep-cycle. And therefore, that technology would apply to all those types of batteries....those are basic [sic] termed industrial batteries." (Brilmyer, Tr. 1831). So, which is it? According to the Microporous former head of "R&D" a traction battery = a motive power battery = a deep-cycle battery = an industrial battery – there is simply no way that this can be support for Complaint Counsel's alleged "deep cycle" market or its "motive" market being "separate" markets for antitrust purposes.

- Additional documents and testimony also show that it is false to suggest that the "industry" delineates batteries as "deep-cycle," "motive," "UPS" and "SLI." (See, e.g., PX0993 at 003-004, *in camera* {

}; Wallace, Tr. 1975 (AGM can be used for "deep cycle" and US Battery is about to sell an AGM deep cycle product). Complaint Counsel's "non-deep-cycle" batteries would include "SLI," "UPS," and "motive", yet Mr. Qureshi testified that "[t]he non-deep-cycle battery is mainly designed to start an engine and occasionally provide current to the vehicle. It's normally used for vehicles. That's why it's called SLI batteries or starting, lighting and ignition batteries." (Qureshi Tr. 1994).

- Complaint Counsel cites to PX0222, *in camera* for its {

} Specifically, PX0222, *in camera* {

}.

- Similarly, PX0316, also relied on by Complaint Counsel, is a series of emails related to Daramic's use of HD in automotive profiles – thus is provides no support for any "deep cycle" market. There is ample evidence that a number of battery manufacturers have used, and continue to use, pure PE in certain applications that those customers consider 'deep cycle' – yet there is significant testimony that no customer is switching from Flex-Sil to PE even though the price difference is significant. (PX0442 at 002, *in camera* {

}; Leister Tr. at 3978-80

(East Penn uses straight PE in some of its deep cycle applications). Flex-Sil is, simply put, a legal antitrust market unto itself and Complaint Counsel have provided no valid evidence to dispute that fact. (See also Respondent's Post Trial Br. at pp. 10-15; RFOF 14, 25, 29, 37, 45-46, 58, 64-65, 67-78, 116, 126, 133, 139, 151-154, 588, 691, 721, 769, 795, 799, 885, 939-940, 1185-1188, 1201, 1334-1336, 1352).

- RX01303, a Daramic presentation, also shows that Daramic does not delineate its products into Complaint Counsel's artificial categories. In fact, the "motive" category includes the allegedly "deep cycle" market of golf carts. (RX01303 at 011). Tellingly, in this same document a "subcategory" of "industrial" separators is "stationary" and a further subcategory of "stationary" is UPS. (RX01303 at 011). This is indicative and illustrative of Complaint Counsel's desperate attempt to parse what it has even admitted is an overall "PE" separator market into contrived "submarkets" in order to bolster market concentration statistics. (See also RFOF 1180-1197; Complaint ¶6).

- The surest proof of any that Flex-Sil and HD are not proper substitutes for each other, is the fact that even when the price of Flex-Sil has increased substantially over the years, customers have not switched to HD, or CellForce. (RFOF 550, 124, 865, 877; McDonald, Tr. 3945-46, 3956-58). That some small percentage of applications can use an HD or CellForce separator in place of a Flex-Sil separator does not make them substitutable under the antitrust laws. (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). As Mr. Gillespie testified – the reason Exide buys Flex-Sil is not because of the price. (Gillespie, Tr. 3092). (See also, RFOF

66, 327-329, 548-49, 745-754, 864-865, 1339; Gillespie Tr. 2954-2955; Respondent's Post Trial Br. at pp. 13-15).

2. Motive Separators are Not a Relevant Market

- Mr. Gilchrist himself admitted to the "reasonable similarity" between a motive power and deep cycle battery. (Gilchrist, Tr. 325), just as Mr. Godber did when he testified that a "motive" battery is a "deep-cycle" battery – the difference is on usage rather than functionality. (Godber, Tr. 144-146).

- EnerSys Hawker used Ace-Sil – a product Complaint Counsel contend is outside of their alleged product markets entirely – extensively in "motive power" batteries. (Gilchrist, Tr. 316) And several witnesses testified that PVC separators from Amer-Sil are used in motive power batteries. (See, e.g., Gilchrist, Tr. 368).

- As Mr. Whear testified in his deposition, further exposing the blurred lines between the products:

{

}

(PX0913 (Whear Dep. pp. 46-48), *in camera*).

This type of confusion and varying nomenclature is exactly why Complaint Counsel's product markets are incorrect and improper. Complaint Counsel's own expert was {

} (RFOF 1180-1201).

- Complaint Counsel cite to PX1786 as support for the proposition that "motive" separators are a relevant market and quote the following phrase from page 113 of that document "Motive power or so-called traction batteries are used for the propulsion of electric vehicles, primarily forklift trucks." (PX1786 at 113). Yet, they ignore the fact that the section on "motive" batteries goes on to note that one "segment" of the motive market is where "deeper cycles" are requested, i.e.: golf cart and heavy duty applications. (PX1786 at 113). It is clear

that the "economic reality" is that the industry considers Complaint Counsel's "deep-cycle" and "motive" markets to be one and the same. (RFOF 78; RX1305 at 007 ("2. Industrial Batteries... 2.1 Motive power batteries for forklifts, and other off-road and electric propelled equipment like boats, street cleaner, airport equipment, golf carts and submarines..." (emphasis added)).

- Despite Complaint Counsel's repeated attempts to put definitional "words" in the mouths of their witnesses related to their "markets" many refused to agree. (See, e.g., (PX0907 (Kung, Dep. at pp. 6-7, *in camera* {

}

3. UPS Separators are Not a Product Market

- Complaint Counsel's "UPS" market is a secondary subset of batteries used for "reserve," "standby" or "stationary" power, which is, itself, a subset of "industrial" batteries. (Respondent's Response to CCFOF 502). Complaint Counsel put forward no evidence that a "UPS" separator was any different in functionality, form, size, or material than any other subset of the stationary types of batteries. As a result, it is entirely unclear how "UPS" can be a category in and of itself. (Respondent's Response to CCFOF 502;Gilchrist, Tr. 306 ("UPS is a type of reserve power"); Roe, Tr. 1815)(When you use the term "industrial," does that mean both motive and UPS? A. I typically, when I mention "industrial," then I have to segregate the application, either industrial motive power or industrial stationary, and when I say "stationary,"

then I have to differentiate between a UPS or telecom. Q. Does industrial then cover all of that? A. Yes. Basically two categories, automotive SLI and industrial."); Roe, Tr. 1736 (Couldn't tell if the demonstrative battery (PX3003) was UPS or telecom – both stationary)).

- Complaint Counsel's blatant attempt to further confuse the issues related to their "UPS" market should also be ignored. During the questioning of Mr. Gilchrist, Complaint Counsel asked him whether Microporous sold products for use in "any of the UPS-type product lines." (Gilchrist, Tr. 397). Mr. Gilchrist responded that "yes," at the time of the acquisition Microporous had been selling CellForce for "UPS" to C&D Dynasty for a year and a half." (Gilchrist, Tr. 397-98). What Complaint Counsel neglected to point out, but surely knew, as did Mr. Gilchrist, was that Microporous was supplying UPS separators to C&D for "gel" VRLA batteries – not the flooded lead acid batteries that are the basis of all of Complaint Counsel's alleged product markets. (PX2110 at 006 (Microporous supplying separators for VRLA gel batteries to C&D); PX0922 (Roe, Dep. at 010-011 (most UPS batteries are "gel" not flooded lead acid batteries); Hauswald, Tr. 994-995 (gel batteries are not flooded lead acid batteries); PX2110 at 011); Complaint ¶5).

- Complaint Counsel's argument in their brief does not even address or provide any facts to support UPS as a separate market – it merely addresses whether the acquisition would have an anticompetitive impact on UPS in light of Microporous' attempt (but not success) at introducing { } (Complaint Counsel's Post Trial Br. at pp. 23-25). Again, Respondent directs the Court to its previous arguments, and support for those arguments, showing that { } (Respondent Post Trial Br. at pp. 21-22; RFOF 335-361, 1222; Respondent Responses to CCFOF 512, 519-520).

4. SLI Battery Separators are Not a Relevant Market

- Complaint Counsel argue simultaneously that Microporous was an "actual participant" in the SLI market, that it was an "uncommitted entrant" and that it was a "perceived potential or a potential competitor." (Complaint Counsel's Post Trial Br. at pp. 26-28).

- Complaint Counsel state that North American automotive battery manufacturers would not switch away from PE in response to a 5% price increase, but they fail to consider, or even address, whether manufacturers would simply switch to a thicker product in another of Complaint Counsel's product markets (i.e.: "motive" or "UPS") assuming prices for those products remained the same. (Complaint Counsel's Post Trial Br. at pp. 25). This is a fundamental problem with Complaint Counsel's entire "product market" argument and cannot be overcome.

- Furthermore, Complaint Counsel state, incorrectly, that in North America separators for "SLI batteries" are made from PE. (Complaint Counsel's Post Trial Br. at p. 25). In fact, there is significant evidence that a number of manufacturers make SLI batteries with AGM technology. (Respondent's Response to CCFOF 241, 321, 247).

- It is also curious that Mr. Gilchrist, whose credibility was questioned by his own board members, testified that Microporous was "never confronted" with competition in SLI from any competitor other than Daramic or { } in North America. (Gilchrist, Tr. 342; PX2300 (Heglie IHT, 60)). As Microporous had never commercially made SLI separators prior to the acquisition, how Microporous could have been confronted by competition for a product it did make is unexplained. (See, e.g., Respondent's Post-Trial Br. at pp. 20-21; Respondent's Response to CCFOF 547, 551).

- As set out thoroughly in Respondent's Post Trial Brief, its findings and its responses to Complaint Counsel's findings, Microporous was not "definitely ready" to produce and sell SLI separators anywhere in the world. (RFOF 369-420; Respondent's Responses to CCFOF 551, 554, 615, 629, 631; Respondent's Post Trial Br. at pp. 32, 47, 51-54). The fact that it had the "capability" to do so (i.e.: production lines capable of producing pure PE material) means nothing – as, in fact, Microporous had been "capable" of producing pure PE separators since the Jungfer line was installed in 2001 – yet in the 7 years it had that line in production it only managed to produce one significant "sample" run that was later sold. (Respondent's Responses to CCFOF 295, 547, 551; Respondent's Post Trial Br. at p. 20). Complaint Counsel's statements that Microporous had been "successful" in winning SLI business are patently false and totally unsupported. It did not have any contracts for any SLI sales at the time of the acquisition, and the {

} – something even Microporous management considered unlikely. (Respondent's Response to CCFOF 615; Respondent's Post Trial Br. at pp. 51-54; RFOF 369-420; RX00283 ("strong bets" not to happen)). Complaint Counsel here are literally creating a story that does not exist and is entirely unsupported by anything in the record. The law may only require that the courts deal in "probabilities" not "certainties," but it certainly does not allow for what Complaint Counsel would condone – a dealing in fantasy and unreality. (Respondent's Response to CCFOF 551, 615; Respondent's Post Trial Br. at 51-54; RFOF 369-410; Gen. Dynamics Corp., 415 U.S. at 505.

B. The Relevant Geographic Market is Worldwide

- Complaint Counsel's sole focus in support of its "North American" versus a "global" market is that separators have not been routinely imported into North America from

other regions. However, this is not the standard that must be applied to determine what is the appropriate "geographic" market, and Complaint Counsel's attempts to patch together its own standard must fail. See, e.g., Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994), cert denied, 513 U.S. 1150 (1995)(the relevant geographic market is the area "to which consumers can practically turn for alternative sources of the product...").

- As noted by Respondent previously, {

} (RX0119, *in camera*; RX01407, *in camera*). In 2008, { } its North American facility. (PX1833, *in camera*). In 2007, {

} (PX1833, *in camera*). This was more than the entire PE volume than Microporous was capable of producing in North America assuming it had no other business. (Respondent's Responses to CCFOF 554, 959, RFOF 1090). Complaint Counsel have failed throughout the trial, and in their post-trial, briefing to address the fact that, if there were a SSNIP in North America only (the applicable SSNIP standard for Complaint Counsel here) then the customers purchasing products in other countries could, and would, practically turn to suppliers in other regions, primarily Asia, to supply their needs. (Respondent's Post Trial Br. at pp. 15-16). This alone is above the critical loss factor needed to show that the geographic market is not North America, but global.[3]

[3] Complaint Counsel continue to rely on "price discrimination" in support of their geographic market argument, however, {

} (Simpson, Tr. 3328, *in camera*; RFOF 1202-1214)

- Moreover, the evidence is overwhelming that {

} (Weerts, Tr. 4464-65, 4469, *in camera*; Thuet, Tr. 4339-40 ; RX00050, *in camera*; Seibert, Tr. 4165; RX01342; PX0184; RX00551 at 3-4, *in camera*; RX01447, *in camera*; RX01448, *in camera*; RX01064; RX01067; RX01125; RX01447, *in camera*; RX01558, *in camera*; RX01085, *in camera*; RX01409, *in camera*; RX00586, *in camera*; RX01600, *in camera*; RX00587-04, *in camera*; RX00555, *in camera*; RX00553, *in camera*; RX00550, *in camera*; Leister, Tr. 3992; RX00079; Hall, Tr. 2862, *in camera*; RX00037-03, *in camera*; RX00043-03,05, *in camera*; RX00048-02, *in camera*; RX00066-07, *in camera*; RX00074-06, *in camera*; Burkert, Tr. at 2360-61, *in camera*; RX00023; RX00193; RX00198; RX00199, *in camera*; RX00203, *in camera*; RX00204; RX00225; RX00237; RX00239, *in camera*; Burkert, Tr. at 2450, *in camera*; RX00223; RX00303, *in camera*, RX00304; RX00305; RX00306; RX00307).

- Complaint Counsel's feeble attempts to point to the force majeure in 2006, and the strike at Daramic's Owensboro facility as evidence that consumers will not switch to suppliers outside of North America must fail, as such events are clearly not "non-transitory" as an event must be in order to qualify under the SSNIP test. (RFOF 312, 636-648).

- There is significant evidence that {

} (RFOF 152-55, 493, 977-1049, 1109, 1111; Hall, Tr. 2878, *in camera*; Leister, Tr. 3992-93, 4045, *in camera*; PX0903 (Thuet Dep., p. 80-82); Thuet, Tr. 4339-40).

- Ironically, Complaint Counsel's entire argument for divestiture of the former Microporous "Feistritz" plant is that in order to be a "viable" competitor a company must have a "global footprint." Complaint Counsel's Post-Trial Br. at pp. 71-72. Complaint Counsel use the phrase "global footprint" no less than five times in two pages, claiming that a "viable" competitor must have worldwide facilities and a global presence. This must mean either that (1) Microporous was not a "viable" competitor at the time of the acquisition, or at any time before as it clearly did not have a "global footprint" prior to the acquisition, or (2) this is a worldwide geographic market. Respondent, in fact, believes that both of these options are true and are confirmed by evidence at trial. (RFOF 186-223, 398, 442-429; Respondent's Responses to CCFOF 161).

C. Respondent has Effectively Rebutted Complaint Counsel's Prima Facie Case

1. Evidence Demonstrates that Entry into the Relevant Markets Would be Timely, Likely and Sufficient

- Complaint Counsel continue to ignore the fact that under the law entry may be shown by more than just "de novo" entry. Commentary on the Horizontal Merger Guidelines at 37 (2006); Baker Hughes, 908, F.2d at 987-89; United States v. Syufy Enter., 903, F.2d 659 (9th Cir. 1990); United States v. Waste Management, Inc., 743 F.2d 976, 981-84 (2d Cir. N.Y. 1984) ; United States v. Calmar, Inc. 612, F.Supp 1298 (D.N.J. 1985). They ignore the fact that there is significant evidence both of expansion by previously existing firms, and that there is threatened entry by certain firms. (See, infra).

- As noted repeatedly by Respondent, and routinely ignored by Complaint Counsel, { } and several { } (RFOF1106-07, 1109-10). Evidence supports the fact that it would be {

} (Thuet, Tr. 4357-58, *in camera*; PX0903 (Thuet, Dep. at 80-83)).

- Further, there is significant evidence in the record that it is entirely possible to set up a new production line in 18 months or less – including planning and testing – and has, in fact, been routinely done. {

} (PX0907 (Kung, Dep. at 29-31), *in camera*; RX00147 at 001, *in camera*; RX01314 at 001, *in camera*; RX00115, *in camera*; RX01045 at 001, *in camera*; Gaugl, Tr.4543, RFOF 977-1052, 1061-1088). To replace the infinitesimal "competitive presence" Microporous had in PE separator sales in North America would hardly been the monumental task Complaint Counsel attempt to portray. (RX01120, *in camera*; RFOF 1105-1111).

- Complaint Counsel also do not take into account the repositioning { } that is confirmed in the record. {

} (RFOF 932, 938, 934, 943-45, 969, 947, 1078, 1092-93, 1112-1113; RX00676; PX2174). Complaint Counsel have failed to provide any viable evidence that {

} (RFOF 943-45).

- Complaint Counsel also seem to turn a blind eye to {

} which is just as valid an "entry" as a "de novo" participant. ABA, Mergers and Acquisitions: Understanding the Antitrust Issues at 196 n.27 (3d ed. 2008); United States v. Country Lake Foods, 754 F. Supp. 669, 680 (D. Minn. 1990). (See, e.g., RX00239, *in camera*; PX0909 (McDonald Dep., p. 34-36), *in camera*; RFOF 480, 491; RX01120, *in camera*;

RX00061, *in camera* {

}).

2. Complaint Counsel can Show No Anticompetitive Effects

(a) An "Intent" to Raise Prices Post-Acquisition Does Not Show an Anticompetitive Effect

- Complaint Counsel repeatedly refer to documents and testimony noting that Daramic "intends" or "intended" to raise prices. (Respondent's Post-Trial Br. at p. 4, 23-24; Respondent's Response to CCFOF 773-774). An "intent" to raise prices is not enough to show unilateral effects, or market power. Even sixteen (16) months after the acquisition, Complaint Counsel have not succeeded in showing that Daramic has increased prices for any of the reasons articulated by Dr. Simpson. (Respondent's Post-Trial Br. at pp. 4, 22-24; Respondent's Response to CCFOF 790-807; RFOF 1252-1270). Any increases that have been announced were fought, despite being universally covered and allowed under contract and pursuant to extraordinary increases in raw material costs. (Respondent's Response to CCFOF 807; RFOF 251-52, 257, 632). Complaint Counsel have failed to support its case on this point. (Respondent's Post-Trial Br. at pp. 26-27; Respondent's Response to CCFOF 807; RFOF 251-52, 257, 632).

- The fact that Daramic "intended" to raise prices prior to the acquisition is also immaterial when viewed in the light of reality, where even after the merger Daramic has been unable to implement its announced – and contractually permitted - price increases.[4] {

[4] Complaint Counsel also fail to note that Microporous also "intended" to raises its prices in 2008 – in several cases significantly. (RX00084; McDonald, Tr. 3806-07; RX00653; McDonald, Tr. 3808-10 (12% and 6% increases to Exide). Intent is not fact and cannot be relied upon as such.

}. (Axt, Tr. 2213, 2249 *in camera*; Gillespie, Tr. 3044-3045, *in camera;*; Seibert, Tr. 4194-4213, *in camera;*; Godber, Tr. 201-202). This is significant evidence that Daramic does not have unilateral (nor has it ever had any) market power. (Respondent's Post-Trial Br. at pp. 25-27; Respondent's Response to CCFOF 804; RFOF 257, 629-630, 632, 634, 759-760).

- Complaint Counsel have not, and cannot, show any evidence of Daramic's alleged unilateral market power subsequent to the acquisition (or before). Complaint Counsel do not even make any specific claim that the acquisition gave Daramic additional market power that enables it to raise prices. Even customers with allegedly "no where to turn" have fought announced prices, even though those increases were contractually permitted and entirely supported by increases in costs. (RFOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489; Respondent's Post Trial Br. pp. 24-27). Complaint Counsel's proposition that Daramic has unilateral market power is flatly contradicted by the evidence. (RFOF 306-309, 339, 239, 314, 442, 569, 734, 946-951, 1200, 1236, 1298; 1308, 1313, 1384, 1339, 1366-72; PX0489; Respondent's Response to CCFOF 324).

- It must also be noted here, that Complaint Counsel's claims of "two other harmful unilateral effects in the SLI market" are not cognizable. The effect of the acquisition on {

} on any other individual customer, is entirely inconsequential – the only question before this Court is the effect of the acquisition on competition, not on any specific firm. (See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993)("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001)). Furthermore,

Complaint Counsel's reliance solely on Dr. Simpson to support this statement is further evidence that it cannot provide any empirical evidence to support this bizarre and legally immaterial claim. (RFOF 1371-72; Respondent's Response CCFOF 324, 634-635).

(b) Complaint Counsel have shown no Coordinated Effect, or Likelihood of Coordinated Effects

- First, as Complaint Counsel have failed to prove that Microporous was a participant in their alleged "SLI" market (the only market, according to Complaint Counsel, that is even capable of coordinated interaction) this claim must fail since there has been no change in market concentration post-acquisition. (Respondent's Post Trial Br. at pp. 18-19; Respondent's Response to CCFOF 547, 551, 295; RFOF 335).

- Further, Complaint Counsel ignore or brush aside factors that operate to offset the likelihood of coordination, including the fact that rivals must be able to reach terms of coordination that are profitable, must be able to detect violations and then impose punishment when violations occur. Commentary on the Horizontal Merger Guidelines at 18-19 (2006). 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). The evidence at trial that { } of Daramic's business, { } is replete and soundly defeats any conclusion by Dr. Simpson that coordinated interaction will occur. (RFOF 306-09, 946-57; Simpson, Tr. 3391, *in camera*; Kahwaty, Tr. 5182, *in camera*).

- Coordinated interaction is less likely in industries, such as the alleged SLI market, that involve differentiated as opposed to homogenous products with complex pricing and other marketing issues that are negotiated with customers on a one-on-one basis, and industries in

which the existence of sophisticated customers acts as a deterrent to seller coordination. (Respondent's Responses to CCFOF 147, 530-531, 549; RFOF 34; Kahwaty, Tr. 5181-84, *in camera*).

- Complaint Counsel base almost their entire "coordinated" argument on one customer's perception of competition several years ago, instead of the actions and facts underlying the vigorous and significant competition in their alleged SLI market today. What a competitor "says" is inconsequential when judged against what it "does" – which, in this case, {

} (RFOF 39 – 139, 186 – 223, 273 – 314, 946-57, 1159 – 1398, and 1422-72).

- Additionally, {

} (RX00259, *in camera*). {

} (Simpson, Tr. 3202, *in camera*; PX1503 at 002, *in camera*; RFOF 206, 355-368, 445, 927; Respondent's Response to CCFOF 512-525, 530-31; Hall, Tr. 2666, *in camera*). Further, as noted above, Microporous was not a participant in the SLI market and thus {

}

- Finally, Complaint Counsel's suggestion that knowledge of a competitor's moves is evidence of coordinated interaction does not fly for several reasons. First, it is just as likely that knowledge of a competitor's moves will fuel, not stifle, competition by promoting effective counter-attacks. Second, once again, Complaint Counsel's argument flies in the face of its own

product markets and Microporous as a viable and effective competitor in those markets. If Microporous and Daramic were, as Complaint Counsel claim, the only competitors in the UPS, deep-cycle and motive "markets" that they allege, then turning Complaint Counsel's argument around, there must have been little if any "rivalry" and competition between Daramic and Microporous since they were allegedly fully aware of each other's "moves." Complaint Counsel claim that these markets were highly concentrated before the merger; if this is so, then Complaint Counsel's own claims suggest a "likelihood of interdependent anticompetitive conduct." (FTC v. PPG Industries, Inc., 798 F.2d 1500, 1503 (1986)). This unsupported argument shows the danger of relying on "presumptions" and "ideas" rather than the cold, hard facts which clearly show that there are no coordinated effects likely as a result of this acquisition in the sale of SLI separators.

3. Respondent's Defenses are Sufficient

- Complaint Counsel appear to suggest that market share data alone is sufficient to make their case, while at the same time suggesting that the only defense available to Respondent is to show that the market share data is erroneous. However, both these suggestions are incorrect. As the court in Baker Hughes noted, the proper role of market concentration data is that it "simply provides a convenient starting point for a broader inquiry into future competitiveness." Baker Hughes, 908 F.2d at 984. That court went on to refute Complaint Counsel's second point as well, noting that "[i]t is a foundation of Section 7 doctrine, disputed by no authority cited by the government, that evidence on a variety of factors can rebut a prima facie case." Id. (See also General Dynamics, 415 U.S. at 503-04 ("deteriorating market position both before and after acquisition" can rebut prima facie case); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981); International Harvester Co., 564 F.2d at 773-79. Respondent has shown that, regardless of the market share data, there is no evidence that the acquisition will

"substantially lessen competition, or tend to create a monopoly" because entry will be timely, likely and sufficient, and Microporous was a weak competitor in deteriorating financial condition that would have had no perceptible effect on competition for the sale of any battery separators had it not been acquired by Daramic. (RFOF 314, 338, 386, 394, 399-400, 1061-1087, 1089-93, 1095-1121; Respondent's Response to CCFOF 490, 660-664, 684, 818, 823-24, 835-41, 861, 881-885, 889-911, 914-918, 1037-1043; Respondent's Post-Trial Br. at pp. 2-3, 10, 27-28).

III. Complaint Counsel Cannot Show that Daramic Monopolized or Attempted to Monopolize any Market or that it Entered in to Agreements that Unlawfully Restrained Trade

A. Count III: Monopolization and Attempted Monopolization

- Monopoly power is "the power to control prices or exclude competition." E.I. duPont de Nemours & Co., 351 U.S. at 391. "The courts have generally understood the monopolization offense to depend on a finding of 'monopoly' power, and they define 'monopoly' as the power to control price or to exclude competition." IIIB Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law § 802(c) (2008). Courts will not always accept even high market shares as evidence of monopoly power. "Market share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share." American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery, Inc., 185 F.3d 606, 623 (6th Cir. 1999).

- Complaint Counsel cannot show that Daramic has the power to "control prices or exclude competition" in any of their product markets. (See supra at p. 32; Respondent's Post-Trial Br. at pp. 51-52). They don't even attempt to show a monopoly in the "deep-cycle" market

despite claiming such in their Complaint,[5] and their argument relative to the SLI "market" is entirely conjured. { }, in fact, currently has a { } market share in North America's "SLI" market – { } – a position it has held for many years. (RFOF 927, 1287; RX00034 at 013). Dr. Simpson testified that by {

} (RFOF 438, 1388; Kahwaty, Tr. 5229-5230, *in camera).*

- Complaint Counsel rely on dicta in Denstply for their claim that Daramic's less than 50% share of the SLI segment is sufficient to constitute a monopoly. (Complaint Counsel's Post Trial Br. at p. 52; United States v. Denstply Int'l Inc., 399 F.3d 181, 187 (3d Cir. 2005)). But neither Denstply, nor Fineman v. Armstrong World Industries, which is also cited, support Complaint Counsel here. Fineman v. Armstrong World Indust. Inc., 980 F.2d 171, 201 (3d Cir.1992). Denstply's market share was 75-80%. 339 F.3d at 186. In Fineman, the market share was 55% and, before proceeding to find no violation, the court merely "[a]ssum[ed] arguendo that the record might support an inference of monopoly power" in that case. Fineman, 980 F.2d at 201, 203. In Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., which is cited by Fineman, the court relied on Judge Learned Hand's classic formulation that 90% market share is enough but "it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not...." to hold in that case that there was no support for a claim of monopoly power. Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 489 (5th Cir.1984); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945). Judge Hand's solution is proving

[5] In fact, {

} (Complaint ¶39; PX0033 at 040, *in camera*).

to be prophetic. After looking at all the cases and considering the relevant economics, the Areeda/Hovenkamp treatise concludes: "We believe 70 or 75 percent to be a reasonable minimum for a 'well defined' market." Antitrust Law at 384. In any event, there is no evidence that Daramic has the power in the SLI segment "to restrict entry, supply or price." Fineman, 980 F.2d at 201 (citations omitted). With its {

} Daramic reduction in output in an attempt to "control price." RFOF 943-45. This major "relevant factor" demonstrates conclusively that Daramic has no monopoly power in the alleged SLI segment.

- Complaint Counsel's repetitive parroting of Daramic's ability to "charge supracompetitive" prices must be put to rest and in context here. The only evidence Complaint Counsel have of any "supracompetitive" prices relate to the prices {

}.

(RFOF 518-526; Respondent's Post Trial Br. at pp. 45, 56-57). The prices agreed to under that contract, as described in detail in Respondent's other filings, were, {

}. (RFOF 524-526; Respondent's Post Trial Br. at pp. 45, 56-57; PX0726; PX0731; PX0908 at 21, *in camera*; Respondent's Response to CCFOF 8). Over the course of the {

}. (RFOF 518-543; Respondent's Post Trial Br. at p. 45). There is absolutely no evidence of any real "supracompetitive" prices. In fact, the evidence shows that Microporous was the "high cost" producer and that Daramic's prices are, a majority of the time,

less than its competitor's prices. (RFOF 546, 1200, 1384; Respondent's Post Trial Br. at pp. 47-50; Respondent's Response to CCFOF 323, 528, 635).

- Complaint Counsel's argument related to the allegedly anticompetitive 'exclusive dealing arrangements' between Daramic and a number of battery manufacturers also misses the mark entirely. Complaint Counsel spend pages discussing Daramic's dealings with { } resorting, yet again, to the completely unsubstantiated (beyond the testimony of Mr. Gilchirst which was not credible) story that the force majeure in 2006 was fabricated. (Complaint Counsel's Post Trial Br. at pp. 55-58). Complaint Counsel rely on the idea that Microporous was "not affected at all" by the force majeure, but apparently purposefully overlook the fact that Microporous used one tenth of the PE supply that Daramic required. (Trevathan, Tr. 3646; RFOF 554, 636-659, 731; Respondent's Post Trial Br. at p. 58). Furthermore, none of the hand wringing and carrying on by Complaint Counsel related to Daramic's allegedly "exclusionary" conduct vis-a-vis {

} (RFOF 667-77; Respondent's Post Trial Br. at p. 55). Clearly Microporous was not excluded from competition for { } Further, notwithstanding the acquisition, Microporous was not in a position to supply even one square meter of additional material to {

} (RFOF 337, 374-75; Respondent's Post Trial Br. at p. 63). Microporous was not able to begin any expansion in Europe prior to its purchase by IGP in November 2006 and the funding of the expansion in December of that year – the expansion in Austria was completed timely and there is no evidence that anything Daramic did impeded it at all. (RFOF 324, 374-75). Similarly, Complaint Counsel's discussion of Daramic's actions with respect to {

} (RFOF 580-82; Respondent's Post Trial Br. at pp. 43-44). If { } there are certainly no facts showing that it was Daramic that was preventing that from happening. (RFOF 553-55; Respondent's Post Trial Br. at p. 53). Finally, Complaint Counsel's inclusion of Daramic's discussions with {

}

B. Count II: Unreasonable Restraint of Trade

- Complaint Counsel bases this claim on the idea that Daramic "learned" that H&V might enter the PE market and then sought to enter an agreement to stay out of each other's markets. (Complaint Counsel's Post Trial Br. at pp. 67-68). However, as noted above, the only evidence of any "interest" in PE by H&V is a letter written to Exide regarding the sale of the Corydon facility in 1999. (See supra at pp. 6-7; PX0726; PX1368; PX0726). There is no evidence that beyond this one letter {

} (PX0925 (Porter Dep., pp. 25-26, 170-174, *in camera).* Complaint Counsel have no evidence that Daramic had any plans to enter the AGM market. (FOF 1124). The two are not, and never have been, competitors and the Cross Agency Agreement was a legitimate sales joint venture. (See Respondent's Post Trial Br. at pp. 60-63; RFOF 1123-1132, 1480-1486; Respondent's Response to CCFOF 1167 - 1196).

IV. No Remedy is Needed as Complaint Counsel have Not Proved Their Case

A. The Proposed Order Is Overbroad And Punitive and Complete Divestiture Would be an Archaic and Punitive Remedy that Will Doom any "NewCo."

1. Divestiture of the Piney Flats, Feistritz and Microporous facilities and production lines is not necessary

The so-called divestiture provisions of Complaint Counsel's Proposed Order represent a kind of deception that the FTC itself would normally challenge under Section 5. These

provisions purport to contemplate the orderly sale of the Microporous assets to a knowledgeable buyer willing to pay a fair price. However, in fact, the combined operation of these provisions very likely would cause the Microporous assets to be given away by the Divestiture Trustee with little or no compensation paid for them. The Proposed Order represents extreme punishment that runs counter to all legal requirements. "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.").

The divestiture provisions in the Proposed Order raise the serious question of whether, under present economic circumstances, any divestiture would be possible on a reasonable financial basis. The Proposed Order calls primarily for the divestiture of the entire Piney Flats plant, { } (RFOF 425), adds to that the Feistritz plant, { } (RFOF 425,1144), and, in addition, includes the "line in boxes," which represents additional unneeded equipment now operating at 0% capacity. It is hard to imagine any competently managed and potentially viable NewCo that would rush to the acquisition of such a collection of hobbled production facilities. It is particularly hard to understand why any rational buyer would consider such an acquisition given Section VI of the Proposed Order, which provides that *all* customers have the unilateral right to terminate their contracts. The combination of these provisions means that any buyer would obtain severely { } together with a provision that all the customers for products produced by those facilities could terminate their contracts "without penalty, forfeiture or other charge."

Moreover, the Proposed Order creates the major concern that the forced divestiture of such a collection of { } within six months "and at no minimum price" (Proposed Order Sec. II(A)) would simply result in a punitive give-away. If Respondent were unable to accomplish the divestiture, the Divestiture Trustee would take over the give away task. While he/she is required to use "best efforts to negotiate the most favorable price and terms available," he/she also may sell the assets "at no minimum price" and collect compensation (at least in part) on a commission basis only if a sale is made – again, "at no minimum price." (Proposed Order Sec. IV(E)(6)). Under current economic conditions generally and those prevailing in this industry, these mechanisms are predestined to produce a disposition of these assets on a highly punitive basis. Again, the threat of a completely non-remunerative divestiture is exacerbated by the provisions of Section VI, which enable all the business being transferred to be terminated at the unilateral option of the customers. At a minimum, any divesture order must allow 12 or more months to effect an acquisition in improved economic conditions, be based on a fair evaluation of the assets and their potential as a minimum price, and be based in enforceable contracts which fairly support the business.

In addition to these global concerns, the divestiture requirements raise four issues: (1) whether total divestiture would actually be required in order to "restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger." B.F. Goodrich Co., 110 F.T.C. at 345; (2) If not, whether competition could be effectively restored by divestiture of the Microporous PE line at Piney Flats; or (3) whether the Feistritz plant should be included in the divestiture; and (4) whether the "line in boxes" shall also be included.

As an initial matter, however, the Goodrich principle operates to ask what Microporous would look like today had it not been acquired. As Respondent has pointed out, Microporous

was in a precarious financial condition at the time it was acquired and that, combined with the economic downturn, predicts the likelihood that, at best, its condition would be very weak, with even its survival in doubt. (Respondent's Post-Trial Br. at pp. 47-51). That being the case, restoring competition to the state in which it would have "continued to exist" absent the acquisition indicates that no divestiture at all should be required.

As the Court is well-aware, partial divestiture is commonplace and, even though Complaint Counsel quote the Goodrich principle, it actually supports partial divestiture in this case. (See Respondent's Response to Complaint Counsel's Proposed Conclusions of Law 54-55). The easiest case is Ace-Sil, where not even Complaint Counsel argue there was competition with a Daramic product. Accordingly, there can be no argument that divestiture of the Ace-Sil line is necessary to "restore" competition. For that matter, the same is also true as regards the Flex-Sil line since the evidence shows that Daramic's HD product was not effectively competitive with Flex-Sil. (Respondent's Post-Trial Br. at 12-14; RFOF 117-126, 181-183).

Indeed, as Respondent has pointed out the alleged competition could be fully "restored" simply by divestiture of the Piney Flats PE separator line capable of making HD. That means that NewCo, even by Complaint Counsel's theories, would be fully able to compete with Daramic by selling HD separators in competition with Flex-Sil, which would be sold by Daramic. (Respondent's Post-Trial Br. at pp. 66-67). Complaint Counsel's objections to this solution are unconvincing. They complain that HD is "difficult and inefficient to make and much less profitable than CellForce" and that Daramic "has provided no evidence" that NewCo would be an effective competitor with the PE line making HD. (Complaint Counsel's Post-Trial Br. at p. 75). Ironically, this objection contradicts their argument at trial that Daramic was a vigorously effective competitor with HD against Microporous' Flex-Sil. Meanwhile, on the flip

side, Complaint Counsel have produced no evidence showing that NewCo could not be an effective competitor with the PE line making HD with employees trained by Daramic.

The reasons the Feistritz plant should not be divested are simple and straightforward: (1) the plant never sold product in North America; (2) it had not, and would not have, operated to assist Microporous in being a more effective competitor in North America; and (3) Feistritz would be a burden on any divestiture since it is now operating {

} (Respondent's Post-Trial Br. at pp. 64-65).

Notwithstanding these basic facts and bleak statistics, Complaint Counsel argue for Feistritz divestiture (1) to make NewCo "viable;" (2) so that NewCo will have a "global footprint;" (3) to provide more capacity in North America; (4) to provide NewCo with the "scale necessary" to compete with Daramic; and (5) peculiarly, that divestiture of non-relevant assets have been required in other cases, to wit, Chicago Bridge & Iron v. FTC. (Complaint Counsel's Post-Trial Br. at pp. 69-74). These arguments come up short:

(1) Feistritz would threaten NewCo's viability, not enhance it. Indeed, as Respondent has noted, {

} an attractive prospect for NewCo;

(2) Complaint Counsel's entire case is based on the argument that both well before, and at the time of, the acquisition, Microporous was a vigorous competitor of Daramic's. However, the fact is that during that entire time, the Microporous "global footprint" was rooted

solely in Piney Flats, Tennessee, and nowhere else – not particularly global, with all due respect to Piney Flats;

(3) Whatever may have been the case in 2005, or for that matter 2007 or 2008, there is clearly no current need for additional capacity at Piney Flats, which is now operating { } (RFOF 425). The fact is that the "freeing up" of 60% of the PE/CellForce line at Piney Flats with the opening of Feistritz { } The argument for Piney Flats capacity has no basis in fact;

(4) The response to a "global footprint" applies here as well. Complaint Counsel cannot have their cake and eat it too – they cannot legitimately argue that Microporous was a vigorous competitor pre-February 2008 without Feistritz – when it lacked "scale" and a "global footprint," – yet also argue that NewCo cannot be a vigorous competitor unless it has the "scale" and "global footprint" it would supposedly get with the inclusion of Feistritz. As legal briefs are wont to say, "they can't have it both ways."

(5) As for the divestiture of irrelevant assets, Complaint Counsel neglect to mention that the divestiture of the non-relevant assets in Chicago Bridge was not required if Acquirer and the Monitor Trustee determined that such divestiture was not "necessary to achieve the purposes of the Order." In the Matter of Chicago Bridge & Iron Co., Docket No. 9300, Final Order ¶ IV(A); Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 441-42 (5th Cir. 2008). Moreover, while the "water department" might have provided "a consistent revenue stream to complement sporadic tank sales" in Chicago Bridge, the same cannot be said of Feistritz here, as its current financial condition indicates.

In light these facts, the requirement that the "line in boxes" be divested also makes neither business nor financial sense. Both Piney Flats and Feistritz have { } "NewCo," adding the line in boxes to the package will surely do so. Complaint Counsel argue, contrary to the facts, that absent the acquisition Microporous would have installed the line in boxes as a second PE line in Piney Flats. (Complaint Counsel's Post-Trial Br. at p. 74). However, as Respondent has shown repeatedly through the testimony and documents, the purchasing and progress on that line was suspended in May or June 2007 and the Microporous Board made it clear that its suspension would continue until Feistritz proved to be viable, which never happened. (Respondent's Post-Trial Br. at pp. 61-62). For all these reasons, the requirement for divestiture of the "line in boxes" makes no sense.

2. Other Provisions of the Proposed Order are Punitive and Improper

In light of the facts noted above, the requirements that the divestiture occur within six months and "at no minimum price" converts the divestiture into a impermissible punitive, rather than a remedial, measure. The financial circumstances of Feistritz and the environment today of the industry and the economy means that mandatory divestiture under such requirements will convert the divestiture into a fire sale.

Section II(C)(3) requires Respondent to divest to NewCo customer contracts where those contracts are with Microporous or involve Microporous products. However, if Respondent is unable to obtain the customer's consent, this subsection requires that Respondent "shall enter into such agreements, contracts, or licenses as are necessary to realize the same effect as such transfer or assignment." The meaning of this requirement is unclear. It cannot be determined what kind of an "agreement, contract or license" is contemplated by this section. It is also unclear how the

provisions of this section relate to those of section VI, which would allow all customers to reopen, renegotiate or terminate their contracts. Additionally, Complaint Counsel has failed to explain how and whether it is possible to differentiate between each "Microporous" product and each "Daramic" product – making this proposal even more confusing and improper.

Section II(C)(4) requires Respondent to grant to NewCo "a Shared Intellectual Property License." The definitions of "Retained Assets," "Shared Intellectual Property" and "Shared Intellectual Property License" apparently produce the result that Respondent would be required to grant NewCo a license to use intellectual property that was owned and used by Polypore/Daramic well in advance of the acquisition. "Shared Intellectual Property" is defined to include intellectual property that is a "Retained Asset," which, in turn, is defined as any property that was "owned, created, developed, leased or operated by Polypore prior to the Acquisition." Any such requirement that Polypore must license to NewCo its own, "pure" IP would be manifestly punitive and should not be allowed.

Section II(F)(1) would prohibit Respondent from filing any lawsuit against NewCo regarding "Intellectual Property that is owned or licensed by Respondent." This would apparently prevent Respondent from challenging NewCo for any use of PE separator technology.

Section II(F)(3) requires Respondent to enter into with NewCo a "Technical Services Agreement" and a "Transition Services Agreement." Although the scope of these agreements is undefined, the FTC cannot justify a request for relief that would require Daramic to provide services to NewCo that it did not provide to Microporous prior to the divestiture. 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 other things.[6] To restore competition to the state it would otherwise have been today cannot include forcing Daramic to provide services to make Microporous more efficient and competitive than it would have been but for the transaction. This again is a punitive remedy and is inappropriate.

Section V(B)(1) of the Proposed Order would require Daramic to maintain a Microporous work force equal to the force in place as of the acquisition date. This requirement is out of "sync" with the facts since the Microporous work force long since has dropped below its level as of February 29, 2008, due to efficiencies Daramic has implemented and to the economic downturn. At this point, the Order should merely require that the work force be maintained from the date of the Order until the date of divestiture.

Section VI of the Proposed Order is unclear and, apparently, internally inconsistent. First, there is a technical problem since this provision would give customers the right to "reopen and renegotiate or to terminate" their contracts while "customer" is defined as any direct or indirect purchaser. But indirect purchasers would not have contracts with Respondent. Accordingly, the definition of "customer" must be amended and clarified.

The more fundamental problem with Section VI is the one referred to above, i.e., that all customers of Daramic and Microporous are given the option "unilaterally to reopen and renegotiate or to terminate their contracts . . . without penalty, forfeiture or other charge to the customer." This provision apparently applies to all customers where the separators are to be supplied within North America (although the entire contract is applicable if it provides for supply

[6] See Kahwaty Report, ¶¶174, 196;

both within and outside North America) and where the contract was in effect between the date of the Order and the divestiture, and to all customers of Microporous where the contract was entered into before the acquisition and amended or modified after the acquisition. This provision would threaten chaos both for Daramic and Microporous with huge and unnecessary market uncertainties. If the objective of the Order is to assure ongoing competition in the alleged markets, it would seem that it should provide for an orderly process that would create a more rational business environment and allow opportunity for sellers and buyers to plan for production, distribution and sales.

Sections VII and VIII provide relief for the claims regarding exclusionary contracting and the H&V agreement, respectively. Section VIII, for instance, is anticompetitive in that it prohibits certain ordinary and customary transactions with certainty. These provisions are completely unnecessary and could restrict competition rather than enhance it.

Section IX of the Order provides that "Respondent shall not advertise, market or sell any Battery Separator utilizing cross linked rubber anywhere in the world" for a period of two years. There is no reasonable basis for this provision in the Order.

Section XI would require Respondent to give notice of any acquisition, merger or consolidation – including creation or dissolution of subsidiaries – for a period of 20 years, the full length of the Order as provided in section XIV. Given the length of time imposed upon this requirement, it is exceedingly burdensome. Additionally, Polypore – the Respondent in this matter – is the parent of a number of additional companies that are unconnected to the flooded lead acid battery separator market, and should not be effected by any part of Complaint Counsel's Proposed Order or this case. It is doubtful whether any other merger decree whether

resulting from litigation or by consent has ever imposed such a long compliance time with the attendant risks of civil penalties in the amount of $16,000 per day, and there is simply no basis for such a requirement other than pure, unadulterated punishment.

3. The Proposed Order Redlined

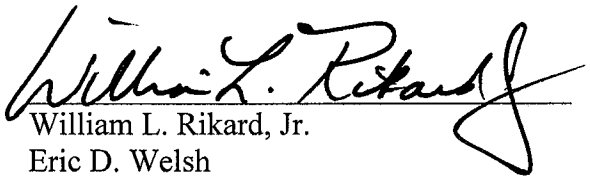
To assist the Court, and attached and incorporated herein as Exhibit A, is a detailed list of the infirmities that infest the Proposed Order. To further assist the Court, and attached and incorporated herein as Exhibit B, is a redlined revision of the Proposed Order in which those multiple infirmities are addressed.

V. Conclusion

For the reasons set forth above, and more particularly in Respondent's Post Trial Brief, Respondent's Findings of Fact and Conclusions of Law, and Respondent's Response to Complaint Counsel's Findings of Fact and Conclusions of Law, Complaint Counsel has failed to prove their claims and each count in their Complaint should be dismissed with prejudice.

Dated: August 7, 2009

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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 Reply Brief [PUBLIC]***, and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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

I hereby certify that on August 7, 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 Reply Brief [PUBLIC]*** upon:

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

I hereby certify that on August 7, 2009, I caused to be served via first-class mail delivery and electronic mail delivery a copy of the foregoing ***Respondent's Post-Trial Reply Brief [PUBLIC]*** upon:

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EXHIBIT A

Exhibit A

Set forth below in the order set out in the Proposed Order are problems and issues that would need to be addressed in the event a decision is made which requires divestiture.

PROPOSED ORDER

I.

H. The definition of "Contracts" does not sufficiently delineate and exclude Respondent's contracts or agreements. As such, it should be amended to ensure that it excludes all contracts or agreements of any kind related to Respondent, including, but not limited to, contracts relating to the development, manufacture, finishing, packaging, distribution, marketing or sale of any Daramic Battery Separators.

K. The definition of "Daramic Battery Separators" needs to state clearly that the factory where the separators are produced is irrelevant and that it covers all aspects of the development, manufacture, marketing and sale of the separators, not just the separators themselves.

L. The definition of "Direct Cost" is too narrow and should be revised to mean the actual cost of any relevant assistance or service as there are components of the cost to provide a service that reasonably should be included in the payment sought from the Acquirer.

Q. The definition of "Feistritz Plant" is both too limiting and ambiguous with respect to equipment that is used to make Daramic Battery Separators. Thus, it should state with greater specificity the items that are excluded and should state affirmatively that it does not include Daramic Battery Separators produced or stored in inventory at the Feistritz Plant after the Acquisition Date.

EE. The definition of "Microporous Employees" is too broad and needs to be clarified to exclude any employee who was employed by Respondent on or after the Acquisition Date and who may have been transferred either to the Piney Flats Plant or to the Feistritz Plant in the ordinary course of business.

KK. The definition of "Monitor Trustee" conflicts with the substantive terms of the Order and needs to be modified to be consistent with those terms in that the Trustee's only responsibility is to oversee Respondent's compliance with the Order, not to oversee the divestiture process.

NN. The definition of "Piney Flats Plant" is both too limiting and ambiguous with respect to equipment that is used to make Daramic Battery Separators. Thus, it should state with greater specificity the items that are excluded and should state affirmatively that it does not include Daramic Battery Separators produced or stored in inventory at the Piney Flats Plant after the Acquisition Date.

OO. The definition of "Polypore" or "Respondent" is too broad and should be revised to clearly state that it is limited to Polypore and its Daramic subsidiary. There is no basis to include any business operations of Celgard or Membrana into the scope of the Order.

RR. The definition of "Retention Bonus" should be eliminated. There is no basis for Respondent to be compelled to pay a bonus of any kind to Microporous employees who choose to be employed by the new entity. In the event there is a divestiture, Respondent

is committed to continue to pay salary and benefits to Microporous Employees up to the Effective Date of Divestiture and that is sufficient. Such a bonus, if required at all, should come from the Acquirer. To the extent it remains in the order, the scope and extent should be clarified: it should only apply to certain senior level employees and the amount should be limited to no more than a sum equal to 1 week of the Employee's salary.

WW. The definition of "Terminable Contracts" needs substantial clarification. It needs to state clearly that it does not apply to contracts with entities that are performed only in Europe, Asia, Africa or South America. It also needs to eliminate an inherent ambiguity by deleting the phrase "including changes to the pricing terms" in order to state clearly that it does not apply to annual price adjustments pursuant to a price-adjustment clause, but only to amendments that actually change or modify the way in which separators are priced.

II.

A. In light of the present conditions of the world economy, six months is an inadequate amount of time in which to attempt the sale. Respondent submits that a minimum of 12 months will be required to achieve a fair and orderly sale—one that is more likely to accomplish the Commission's stated goal of enhancing competition in the separator industry. Moreover, the Respondent submits that the Order should provide that, if at the end of the applicable period, the Respondent has submitted to the Commission a plan of divestiture, or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission. This parallels the procedural timetable afforded to a Divestiture Trustee (should one be appointed) and is fair and reasonable under the circumstances..

Respondent also submits that the Order should state that the Commission shall not unreasonably withhold or condition approval of an Acquirer or a Divestiture Agreement.

B. The Order recognizes a potential conflict between the Order and a Divestiture Agreement, but it needs to clarify that, in any conflict between the terms of the Order and the terms of a Divestiture Agreement, the terms of the Order will pre-empt and supersede any term in such an Agreement.

C. 3. The Order needs to reflect that some vendors and/or customers may not willingly consent to the assignment of their contracts. Rather than imposing an absolute obligation to obtain all consents, the Order should be revised to provide that Respondent will use its "reasonable and necessary efforts" to obtain required consents.

D. 1. The Order needs to clarify Respondent's obligations with respect to allowing the Acquirer an opportunity to interview Microporous Employees. In the first instance, it needs to state that the obligation does not apply to any former Microporous Employees who voluntarily moved away from the general vicinity of either the Piney Flats Plant or the Feistritz Plant and, second, it needs to state that beyond providing a list, contact information and access to personnel files, Respondent does not need to incur any costs or expenses to make former employees available for the Acquirer to interview.

3. In the event of a divestiture, there is no basis for Respondent to be compelled to pay a bonus of any kind to Microporous employees who choose to be employed by the new entity—in addition to their normal salary and benefits. Such a payment, if required at all, should be at the expense of the new company. To the extent it remains in the Order, however, the scope and extent should be clarified: it should only apply to certain senior level employees and the amount should be limited to no more than a sum equal to 1 week of the Employee's salary.

F. 2. The Order should provide that any assistance Respondent provides is subject to any applicable, demonstrable privilege.

H. This provision should be deleted as it accomplishes nothing. It is nothing more than a broad, self-serving statement of principle that has no place in the Proposed Order as it does not direct any action or service. However, if this is the Commission's goal, then it is clear that Microporous was not engaged in competition in Europe as of the Acquisition Date and directing the divestiture of the Feistritz Plant is not warranted.

III.

In the first instance, Respondent respectfully submits that Complaint Counsel has not established that a Monitor Trustee is required to oversee Respondent's compliance with the Order. There has been no showing of waste or mismanagement by the Respondent in operating the former Microporous—if anything, Respondent has improved Microporous' administrative and production capabilities. Nor has there been any showing that Respondent has ignored or shown any tendency to ignore Commission directives. Respondent should be permitted the opportunity to comply with the Order free from the expense and burden of a Monitor Trustee. If Respondent's actions or reports suggest that it is not complying, then and only then would there be a basis for the Commission to seek the appointment of a Monitor Trustee.

A. In the event Respondent is directed to retain a Monitor Trustee, the Order should state clearly that the Commission shall not unreasonably withhold, or condition approval of a Monitor Trustee proposed by Respondent.

C. 5. Respondent is concerned that a Monitor Trustee will drive up its costs of complying with the Order by retaining expensive and unnecessary professionals. The Order should impose on the Monitor Trustee an obligation to minimize costs through retaining appropriate professionals and negotiating competitive rates and/or alternative billing arrangements.

6. The Respondent should not be obligated to indemnify the Monitor Trustee against claims and liabilities that resulted from the Trustee's simple negligence and/or willful acts.

8. The Monitor Trustee's reports should shift from every 60 days to quarterly once the Divestiture is complete.

E. If the Monitor Trustee needs to be replaced, then the Order should clarify that the substitute trustee can either be retained by Respondent or appointed by the Commission in accordance with the procedure laid out in the Order.

V.

A. The Order should clarify that, if a divestiture is ordered, then in the course of operating Microporous pending such divestiture, Respondent should make such prudent decisions in the ordinary course of business as are most likely to keep Microporous a viable entity and should not be required to maintain all contracts, leases or licenses without regard for the economic impact of such an extension or renewal.

1. Respondent should only be required to maintain a work force of proportional size and expertise as needed to keep Microporous viable during an economic downturn. Requiring Respondent to maintain a workforce similar to what was in place on the Acquisition Date would be detrimental to the company's economic viability given the down-turn in the global economy and the concomitant decline in purchases and production.

3. Respondent should only be required to provide working capital and carry on projects as a prudent business would do in current economic environment. With declining sales, production and revenues due to the global economy, maintaining all capital projects could be detrimental to the company's economic viability.

VI.

A. 3. Respondent submits that a Customer's right to re-open, renegotiate or terminate a Terminable Contract should be shortened from five (5) years to two (2) years from the Effective Date of Divestiture. As a practical matter, there are only 2 Daramic contracts and 2 Microporous contracts that conceivably could be impacted by this provision and these customers have sufficient incentive to seek to re-open or renegotiate those contracts upon divestiture. Similarly, the Order should be clarified to state that it does not apply to any customers with contracts for production and delivery solely outside of North America. The Order should state that even if a Terminable Contract was in effect between the date the Order became final and the Effective Date of Divestiture, if it has expired by the time a Customer gives notice of a desire to reopen or renegotiate that contract, then Respondent is not obligated to reopen or renegotiate that Terminable Contract. Similarly if a Customer with a Terminable Contract seeks to reopen or renegotiate that contract, Respondent is not obligated to reopen, renegotiate or terminate the contract if the Customer is in material breach of the terms of the contract at the time it seeks leave to reopen, renegotiate or terminate. Finally, it should state that the terms of any renegotiated contract apply only prospectively to the remaining unexpired term of the contract and are not retroactive.

5. The Order should be modified to give Microporous Customers with Terminable Contracts whose contracts are still in force and where there is no existing material breach the right either to accept the Terminable Contract in its then-current form or to rescind any modification or amendment made after the Acquisition Date. As it now is drafted, enforcement of this provision—especially if Customers are allowed to reopen, renegotiate or terminate contracts simply due to a price change during the term of the agreement—could only result in a reduction in value of Microporous to an Acquirer. The Acquirer would not know in advance of purchasing Microporous which contracts would be valid and which would be reopened, renegotiated and/or terminated. Giving the Customer

the option to choose between the originally negotiated arrangement and the existing contract gives the Acquirer a greater degree of certainty and increases the viability of a new Microporous.

VII.

C. Respondent submits that this paragraph of the Order is too limiting and, ultimately, as written, is anti-competitive. Without the opportunity to offer volume discounts to Customers, to meet Customer demands for long-term contracts with volume-based discounts, or to respond to competitive bids presented by other separator manufacturers, puts Respondent at a severe competitive disadvantage in North America—hardly a desirable goal of the Commission. It also forces Respondent to move away from contracts entirely to spot pricing, which may be less competitive. In a truly competitive environment, Respondent, New Microporous and other competitors need to be free to negotiate with customers on all aspects of a supply relationship, including pricing, volume and term.

XII.

A. Requiring Respondent to submit reports every sixty (60) days, even after it has complied with the key provisions of the Order is burdensome. Respondent submits that a shift to quarterly reports once an ordered divestiture occurs should suffice.

EXHIBIT B

Exhibit B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

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

PROPOSED ORDER

I.

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

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

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

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

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

E. "Books and Records" means all originals and all copies of any operating, financial or other books, records, documents, data and files relating to Microporous, including, without limitation: customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, Customer Approvals and Information; accounting records; credit records and information; correspondence; research and development data and files; production records; distributor files; vendor files, vendor lists; advertising, promotional and marketing materials, including website content; sales materials; records relating to any employees who accepts employment with the Acquirer; educational materials; technical information, data bases, and other documents, information, and files of any kind, regardless whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media;

provided, however, that where documents or other materials included in the Books and Records to be divested with Microporous contain information: (1) that relates both to

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

F. "Commission" means the Federal Trade Commission.

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

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

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

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

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

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

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

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

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

H. "Contracts" means all contracts or agreements of any kind related to Microporous, and all rights under such contracts or agreements, including: Microporous Customer Contracts, leases, software licenses, Intellectual Property licenses, warranties, guaranties, insurance agreements, employment contracts, distribution agreements, product swap agreements, sales contracts, supply agreements, utility contracts, collective bargaining agreements, confidentiality agreements, and nondisclosure agreements; *provided, however,* that the definition of "Contracts" excludes all contracts or agreements of any kind related to Respondent, including, but not limited to, contracts relating to the development, manufacture, finishing, packaging, distribution, marketing or sale of any Daramic Battery Separators.

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

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

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

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

K. "Daramic Battery Separator(s)" means any Battery Separators manufactured or sold by Respondent as of the day before Acquisition Date, and any Battery Separators manufactured or sold by Respondent that do not utilize any Microporous Intellectual Property other than Shared Intellectual Property, without regard for the plant where such Battery Separators are produced and including all information related to the development, manufacture, finishing, packaging, distribution, marketing or sale of any such Battery Separators.

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L. "Direct Cost" means the actual cost of providing the relevant assistance or service.

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

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

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

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

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

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

a. The date of hire and effective service date;

b. Job title or position held;

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

d. The base salary or current wages;

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

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

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

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

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

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

2. All Tangible Personal Property;

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

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

Provided, however, that the definition of "Feistritz Plant" shall not include any assets used primarily in connection with the development, manufacture, finishing, packaging, distribution, marketing or sale of any Daramic Battery Separators, nor any Daramic Battery Separators produced or stored in inventory at the Feistritz Plant after the Acquisition Date.

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R. "Force Majeure Event" means whatever events, actions, occurrences or circumstances have been identified or specified as constituting "force majeure" or a "force majeure

event" in a contract or agreement between the Respondent and a Customer for the supply of Battery Separators.

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

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

U. "Intellectual Property" means Patents, Manufacturing Technology, Know-How, and Trade Names and Marks.

V. "Inventories" means:

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

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

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

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

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

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

trade secrets, manuals, quality assurance and quality control information and documentation, regulatory communications, and all other information relating to the above-described processes.

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

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

   a. the Piney Flats Plant;

   b. the Feistritz Plant;

   c. the Line in Boxes;

   d. Microporous Intellectual Property;

   e. Contracts; and

   f. Books and Records; and

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

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

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

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

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

1. Employed by Microporous as of the Acquisition Date;

2. Employed at the Piney Flats Plant at any time between the Acquisition Date and the Effective Date of Divestiture, except for any employee who was employed by Respondent on or after the Acquisition Date and who was transferred to the Piney Flats Plant in the ordinary course of business; or

3. Employed at the Feistritz Plant at any time between the Acquisition Date and the Effective Date of Divestiture, except for any employee who was employed by Respondent on or after the Acquisition Date and who was transferred to the Feistritz Plant in the ordinary course of business.

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

1. Microporous Patents;

2. Microporous Manufacturing Technology;

3. Microporous Know-How;

4. Microporous Trade Names and Marks;

5. Microporous Copyrights; and

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

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

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

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

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

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

Deleted: the divestiture requirements of this Order, including

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

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

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

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

2. All Tangible Personal Property;

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

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

Provided, however, that the definition of "Piney Flats Plant" shall not include any assets used primarily in connection with the development, manufacture, finishing, packaging, distribution, marketing or sale of any Daramic Battery Separators, nor any Daramic Battery Separators produced or stored in inventory at the Feistritz Plant after the Acquisition Date.

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OO. "Polypore" or "Respondent" means Polypore International, Inc., and Daramic, LLC, including their directors, officers, employees, agents, representatives, predecessors, successors, and assigns; *provided, however,* that the definition of "Polypore" or "Respondent" shall not include Polypore's subsidiaries Celgard and Membrana.

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

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

QQ. "Retained Asset(s)" means:

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

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

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

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

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

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

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

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

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

WW. "Terminable Contract(s)" means all contracts or agreements and rights under contracts or agreements between the Respondent and any Customer(s) for the supply of any Battery Separator in or to North America (including the entirety of any contract or agreement that includes in the same contract or agreement the supply of Battery Separators both inside and outside North America) in effect at any time between the date the Order becomes final and the Effective Date of Divestiture; *provided, however,* that "Terminable Contracts" does not include any contracts or agreements between Respondent and any Customer(s) for the supply of any Battery Separators to be performed solely outside of

North America (e.g., Europe, Asia, Africa, South America); *provided* further, that "Terminable Contracts" does not include any contracts or agreements between Microporous and any Customer(s) for the supply of any Battery Separator that was entered into prior to the Acquisition Date, except to the extent such contract or agreement was amended or modified after the Acquisition Date; *provided further, however,* that such amended or modified portion of such contract or agreement shall be considered a "Terminable Contract."

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XX. "Trade Names and Marks" means all trade names, commercial names and brand names, all registered and unregistered trademarks, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), trade dress, logos, service marks and applications, geographical indications or designations, and all rights related thereto under common law and otherwise, and the goodwill symbolized by and associated therewith, anywhere in the world.

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

II.

IT IS FURTHER ORDERED that:

A. Not later than twelve (12) months after the date the divestiture provisions of this Order become final, Respondent shall divest Microporous, absolutely and in good faith, and at no minimum price, to an Acquirer that receives the prior approval of the Commission and in a manner, including pursuant to a Divestiture Agreement, that receives the prior approval of the Commission. If, however, at the end of the applicable twelve-month period, the Respondent has submitted to the Commission a plan of divestiture, or believes that divestiture can be achieved within a reasonable time, such period may be extended by the Commission.

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1. The Commission shall not unreasonably withhold or condition, approval of an Acquirer or a Divestiture Agreement.

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B. Respondent shall comply with all terms of the Divestiture Agreement approved by the Commission pursuant to this Order, which agreement shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement shall not reduce, limit or contradict, or be construed to reduce, limit or contradict, the terms of this Order; *provided, however,* that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondent under such agreement; *provided further, however,* that if any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order and the Divestiture Agreement. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or

not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

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

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

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

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

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

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

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

presence or hearing of any employee or agent of Respondent; and, (iv) allow the Acquirer to inspect the personnel files and other documentation relating to such Microporous Employees, to the extent permitted under applicable laws; *provided, however*, that nothing required herein requires Respondent to expend any resources or incur any costs or expenses in connection with making any current employees available to the Acquirer pursuant to (iii) hereof and, *provided further*, that beyond fulfilling its obligations under (i), (ii) and (iv) above, nothing herein requires Respondent to undertake any efforts or incur any costs to make former employees available to the Acquirer;

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

3. Respondent shall: (i) continue to extend to any Microporous Employees, during their employment prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits;

Deleted: ; (ii) pay a Retention Bonus to any Microporous Employee(s) to whom the Acquirer has made a written offer of employment who accepts a position with the Acquirer at the time of divestiture of Microprous

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

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

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

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

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

1. Respondent shall covenant to the Acquirer that Respondent shall not join, file, prosecute or maintain any suit, in law or equity, either directly or indirectly through a third party, against the Acquirer or any Releasees under Intellectual

Property that is owned or licensed by Respondent as of the Effective Date of Divestiture, including, but not limited to, the Jungfer Technology, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution, offer to sell or sale of Microporous Battery Separators;

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

3. At the option of the Acquirer:

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

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

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

G. Respondent shall:

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

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

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

4. not use, directly or indirectly, any such Confidential Business Information (other than as necessary to comply with the following: (i) the requirements of this

Order; (ii) the Respondent's obligations to the Acquirer under the terms of any Divestiture Agreement; or (iii) applicable law);

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

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

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

III.

IT IS FURTHER ORDERED that:

A. If, based on the reports submitted by Respondent as required by this Order, the Commission concludes that Respondent is not complying with the obligations, requirements and responsibilities imposed by this Order, then within thirty (30) days after service of written notice thereof by the Commission, Respondent shall retain a Monitor Trustee, acceptable to the Commission, to monitor Respondent's compliance with its obligations and responsibilities under this Order, consult with Commission staff, and report to the Commission regarding Respondent's compliance with its obligations and responsibilities under this Order.

1. The Commission shall not unreasonably withhold, or condition, approval of a Monitor Trustee proposed by Respondent.

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

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

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

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

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

3. The Monitor Trustee shall serve until the expiration of period for Customers to seek reopening and renegotiation or termination of Terminable Contracts as provided in Paragraph VI. of this Order; *provided, however*, that the Commission may modify this period as may be necessary or appropriate to accomplish the purposes of the Order.

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

5. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities; *provided, however*, that the Monitor Trustee shall use its best efforts to minimize costs through the negotiation of competitive rates and alternate billing arrangements. The Monitor Trustee shall account for all expenses incurred, including fees for his or hers services, subject to the approval of the Commission.

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

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

8. The Monitor Trustee shall report in writing to the Commission (i) every sixty (60) days from the date the Monitor Trustee is appointed until the Effective Date of Divestiture and quarterly thereafter, (ii) at the time a divestiture package is presented to the Commission for its approval, and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this order.

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

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

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

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

IV.

IT IS FURTHER ORDERED that:

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

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

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee

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

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

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

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

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

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

4. The Divestiture Trustee Agreement shall prohibit the Divestiture Trustee, and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants from disclosing, except to the Commission (and in the case of a court-appointed trustee, to the court) Confidential Business Information; *provided, however*, Confidential Business Information may be

disclosed to potential acquirers and to the Acquirer as may be reasonably necessary to achieve the divestiture required by this Order. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.

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

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

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

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

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

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

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

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

V.

IT IS FURTHER ORDERED that:

A. From the date this Order becomes final until the Effective Date of Divestiture, Respondent shall take such reasonably prudent actions as are necessary to maintain the full economic viability, marketability, and competitiveness of Microporous, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of Microporous and assets related thereto except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining Intellectual Property, Contracts, Trade Names and Marks, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture, but only to the extent that preserving or extending such assets or rights is in the best economic interests of Microporous.

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

1. Subject to efficiencies achieved in the ordinary course of business since the Acquisition Date, and as necessary to respond to changes in demand, sales and production, maintain a work force at least proportionally equivalent in size, training, and expertise to what was associated with Microporous prior to the Acquisition Date;

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

3. Subject to efficiencies achieved in the ordinary course of business since the Acquisition Date, and as necessary to respond to changes in demand, sales and production, provide sufficient working capital to operate Microporous at least at current rates of operation, to meet all reasonable capital calls with respect to Microporous and to carry on, at least at their scheduled pace, such capital projects, business plans and promotional activities as a reasonable, prudent business would undertake in the current economic environment;

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

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

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

VI.

IT IS FURTHER ORDERED that:

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

1. No later than ten (10) days from the date this Order becomes final, Respondent shall notify all Customers with Terminable Contracts of their rights under this Order and, for each such Terminable Contract, offer the Customer the opportunity to reopen and renegotiate or to terminate their contract(s) so long as their Terminable Contract will be in effect after the Effective Date of Divestiture and so long as the Customer is not in material breach of said Terminable Contract. Respondent shall send written notification of this requirement and a copy of this Order and the Complaint, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

2. No later than ten (10) days from the Effective Date of Divestiture, Respondent shall send written notification of the Effective Date of Divestiture to all customers with Terminable Contracts, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General

Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

3. A Customer may exercise its option to reopen and renegotiate or terminate any Terminable Contract by sending by certified mail, return receipt requested, a written notice to Respondent either to: (i) the address for notice stated in the Contract; or, (ii) Respondent's principal place of business at any time prior to two (2) years after the Effective Date of Divestiture. The written notice shall identify the Terminable Contract that will be reopened or terminated, and the date upon which any termination shall be effective; *provided, however,* that: (a) a Customer with more than one Terminable Contract who sends written notice with regard to less than all of its Terminable Contracts shall not lose its opportunity to reopen and renegotiate or terminate any remaining Terminable Contracts; (b) a Customer shall have only one (1) opportunity to reopen, renegotiate and/or terminate a Terminable Contract, which right can be exercised at any time prior two (2) years after the Effective Date of Divestiture; (c) Respondent shall not be obligated to reopen and renegotiate or terminate, as the case may be, a Terminable Contract on less than thirty (30) days' notice; (d) any request by a Customer to reopen and renegotiate or terminate a Terminable Contract on less than thirty (30) days' notice shall be treated by Respondent as a request to reopen and renegotiate or terminate, as the case may be, effective thirty (30) days from the date of the request; and (e) Respondent shall not be obligated to reopen and renegotiate or terminate, as the case may be, either (i) a Terminable Contract which has expired by its terms as of the date the Customer's written request is received or (ii) where the Customer is in material breach of the Terminable Contract it seeks to reopen, renegotiate or terminate. The terms and conditions of any renegotiated contract shall be prospective only.

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4. Respondent shall not directly or indirectly:

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

   b. Retaliate against, or take any action adverse to the economic interests of, any Customer that exercises its right under the Order to reopen and renegotiate or terminate any Terminable Contract; *provided, however,* that Respondent may enforce Contracts, or seek judicial remedies for breaches of Contracts, based upon rights or causes of action that accrued prior to the exercise by a Customer of an option to terminate a Contract.

5. Respondent shall include in the Divestiture Agreement a requirement that the Acquirer shall allow all Customers with Terminable Contracts for Microporous Battery Separators that remain in effect as of the Effective Date of Divestiture and where the Customer is not in material breach of that Contract the right and option unilaterally either to accept the Terminable Contract in its then-current form or to rescind any amendments or modifications that were made after the Acquisition Date, solely at the Customer's option, without penalty, forfeiture or other charge to the Customer, and consistent with the requirements of this Paragraph of the

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Order as if the Terminable Contract remained with Respondent. Respondent shall include in the Divestiture Agreement a requirement that all Customers with Terminable Contracts for Microporous Battery Separators shall be third party beneficiaries of this provision of the Divestiture Agreement, with the right to enforce this provision independent of, and apart from, Respondent.

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

VII.

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

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

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

C. Entering into or enforcing any agreement or other arrangement, express or implied, that is intended to prevent or restrict a Customer from purchasing Battery Separators from a Person other than Respondent; *provided, however,* that nothing herein prevents Respondent from offering volume-based discounts to a Customer, offering specific price/volume/term provisions at the request of a Customer or otherwise responding to competitive bids from other separator manufacturers.

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

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

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

VIII.

IT IS FURTHER ORDERED that:

A. Respondent shall:

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

2. Within thirty (30) days after the date this Order becomes final, file with the Commission the written amendment to the H&V Agreement ("Amendment") that complies with the requirements of Paragraph VII.A.1, it being understood that nothing in the H&V Agreement, currently or as amended in the future, or the Amendment shall be construed to reduce any obligations of the Respondent under this Order. The Amendment shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Amendment shall constitute a failure to comply with this Order. The Amendment shall not be modified, directly or indirectly, without the prior approval of the Commission.

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

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

IX.

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

X.

IT IS FURTHER ORDERED that, no later than ten (10) days from the date on which this Order becomes final, Respondent shall provide a copy of this Order to each of Respondent's officers,

employees, or agents having managerial responsibilities for any of Respondent's obligations under this Order.

XI.

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

A. any proposed dissolution of Respondent;

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

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

XII.

IT IS FURTHER ORDERED that:

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

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

C. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and annually until expiration or termination of Respondent's obligations under the Order, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Respondent shall deliver a copy of each such report to the Monitor Trustee.

XIII.

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

A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence,

memoranda and all other records and documents in the possession or under the control of Respondent related to any matter contained in this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

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

XIV.

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

By the Commission.

Donald S. Clark
Secretary

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ISSUED: