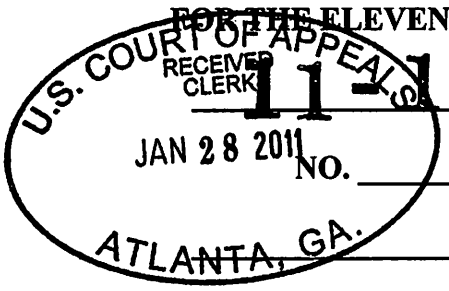
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT



11-10375E

NO. _____

POLYPORE INTERNATIONAL, INC., a corporation,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW

Polypore International, Inc. hereby petitions the Court for review of the Order and Opinion of the Federal Trade Commission entered in *In re Polypore International, Inc.*, Docket No. 9327, on November 5, 2010, and served on November 29, 2010. In the Order under review, the Commission concluded that Petitioner's acquisition of Microporous L.P. violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The Commission ordered divestiture of the acquired assets, including assets located outside the United States, and also imposed certain ancillary orders.

Pursuant to Local Rule 15-2, a copy of the public version of the Order and Opinion to be reviewed are attached as Exhibits A and B, respectively.

Dated: January 27, 2011

Respectfully submitted,

Paul Denis / S.P.M.

Paul T. Denis
Steven G. Bradbury
Gorav Jindal
Irene Ayzenberg-Lyman
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DECHERT LLP
1775 I Street, N.W.
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. P. 15(c) and Local Rule 15(c), I hereby certify that on January 27, 2011, a true and correct copy of the foregoing was served on the following persons who were admitted to participate in the Agency proceedings, via Federal Express:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

Catharine M. Moscatelli, Esq.
Steven A. Dahm, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
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401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202

Sean P. McConnell

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Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

SERVICE INSTRUCTIONS

Pursuant to FED. R. APP. P. 15(c) and Local Rule 15(c), the Circuit Clerk must serve a copy of the Petition for Review on the following:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

Catharine M. Moscatelli, Esq.
Steven A. Dahm, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

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v.

FEDERAL TRADE COMMISSION,

Respondent.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1, Petitioner states that FMR, LLC owns 15% of Petitioner's stock.

Respectfully submitted,

Paul Denis /S.P.M.

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Telephone No.: 202 261 3300
Facsimile No.: 202 261 3333

CERTIFICATE OF SERVICE

Pursuant to FED. R. APP. P. 15(c) and Local Rule 15(c), I hereby certify that on January 26, 2011, a true and correct copy of the foregoing was served on the following persons who were admitted to participate in the Agency proceedings, via Federal Express:

Donald S. Clark
Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-172
Washington, D.C. 20580

Catharine M. Moscatelli, Esq.
Steven A. Dahm, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
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William L. Rikard, Jr., Esq.
Eric D. Welsh, Esq.
Parker, Poe, Adams & Bernstein, LLP
401 South Tryon Street, Suite 3000
Charlotte, North Carolina 28202

Sean P. McConnell

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

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

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED that the Initial Decision of the Administrative Law Judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

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 employee 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 part 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.

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 therefor, 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 the Acquisition Date, and any Battery Separators manufactured or sold by Respondent after the Acquisition Date that do not utilize any Microporous Intellectual Property other than Shared Intellectual Property.

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

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

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

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

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

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

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

a. The date of hire and effective service date;

b. Job title or position held;

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

d. The base salary or current wages;

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

f. Employment status (i.e., active or on leave or disability; full-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 from the Acquisition Date through the Effective Date of Divestiture, including, but not limited to:

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

2. All Tangible Personal Property;

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

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

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

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

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

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

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

V. "Inventories" means:

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

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

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

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

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

Z. "Manufacturing Technology" means all technology, technical information, data, trade secrets, Know-How, and proprietary information, anywhere in the world, related to the research, development, manufacture, finishing, packaging or distribution of Battery

Separators, including, but not limited to, all recipes, formulas, formulations, blend specifications, customer specifications, equipment (including repair and maintenance information), tooling, spare parts, processes, procedures, product development records, trade secrets, manuals, quality assurance and quality control information and documentation, regulatory communications, and all other information relating to the above-described processes.

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

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

   a. the Piney Flats Plant;

   b. the Feistritz Plant;

   c. the Line in Boxes;

   d. Microporous Intellectual Property;

   e. Contracts; and

   f. Books and Records; and

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

BB. "Microporous Battery Separator(s)" means all Battery Separators with respect to 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 from the Acquisition Date through 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 from the Acquisition Date through the Effective Date of Divestiture; or

3. Employed at the Feistritz Plant at any time from the Acquisition Date through the Effective Date of Divestiture.

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

1. All Microporous Patents;

2. All Microporous Manufacturing Technology;

3. All Microporous Know-How;

4. All Microporous Trade Names and Marks;

5. All Microporous Copyrights; and

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

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

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

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

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

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

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

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

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

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

2. All Tangible Personal Property;

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

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

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

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

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

QQ. "Retained Asset(s)" means:

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

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

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

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

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

SS. "Shared Intellectual Property" means all of the following:

1. any Intellectual Property that is 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 from the Acquisition Date through the Effective Date of Divestiture; or

2. any Intellectual Property 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 from the Acquisition Date through the Effective Date of Divestiture.

TT. "Shared Intellectual Property License" means: (i) a worldwide, royalty free, perpetual, irrevocable, transferrable, sub licensable, 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 from the date the Order becomes final and effective through the Effective Date of Divestiture; *provided, however,* that "Terminable Contracts" does not include any contracts or agreements between Respondent or Microporous and any Customer(s) for the supply of any Battery Separator that was entered into prior to the Acquisition Date, except to the extent such contract or agreement was amended or modified, including changes to the pricing terms, after the Acquisition Date; *provided further, however*, that such amended or modified portion of such contract or agreement shall be considered a "Terminable Contract."

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

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

II.

IT IS FURTHER ORDERED THAT:

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

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

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

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

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

suitable for use under normal operating conditions or replaced with equivalent assets;

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

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

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

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

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

confidentiality provisions of employment or other contracts with Respondent; *provided, however,* that Respondent may enforce confidentiality provisions related to Daramic Battery Separators; and,

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

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

2. Upon reasonable notice and request from the Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost,

assistance of knowledgeable employees of the Respondent to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Microporous Intellectual Property or Shared Intellectual Property; and

3. At the option of the Acquirer:

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

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

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

G. Respondent shall:

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

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

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

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

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

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

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

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

III.

IT IS FURTHER ORDERED THAT:

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

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

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

1. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee

pursuant to the terms of this Order in a manner consistent with the purposes of the Order and in consultation with Commission's staff.

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

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

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

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

6. Respondent shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not

resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor Trustee's gross negligence or willful misconduct. For purposes of this Paragraph III.C.6., the term "Monitor Trustee" shall include all Persons retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order.

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

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

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

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

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

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

IV.

IT IS FURTHER ORDERED THAT:

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

B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), 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(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), 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 Paragraph II. of this Order; *provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

6. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the

account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer and assuring compliance with this Order. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required by this Order is consummated, and the Divestiture Trustee has provided an accounting for all monies derived from the divestiture and all expenses occurred.

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

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

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

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

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

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

V.

IT IS FURTHER ORDERED THAT:

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

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

1. Maintain a work force at least as equivalent in size, training, and expertise to what was associated with Microporous prior to March 1, 2010;

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

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

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

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

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

VI.

IT IS FURTHER ORDERED THAT:

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

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

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

3. A Customer may exercise its option to reopen and renegotiate or terminate any Terminable Contract by sending by certified mail, return receipt requested, a written notice to Respondent either to: (i) the address for notice stated in the Contract; or, (ii) Respondent's principal place of business at any time prior to five (5) years after the Effective Date of Divestiture. The written notice shall identify the Terminable Contract that will be reopened or terminated, and the date upon which any termination shall be effective; *provided, however,* that: (a) a Customer with more than one Terminable Contract who sends written notice with regard to less than all of its Terminable Contracts shall not lose its opportunity to reopen and renegotiate or terminate any remaining Terminable Contracts; (b) any Customer who reopens and renegotiates a Terminable Contract prior to the Effective Date of Divestiture shall have a further opportunity to reopen and renegotiate or terminate such Terminable Contract after the Effective Date of Divestiture at any time prior to five (5) years after the Effective Date of Divestiture; (c) Respondent shall not be obligated to reopen and renegotiate or terminate, as the case may be, a Terminable Contract on less than thirty (30) days' notice; and (d) any request by a Customer to reopen and renegotiate or terminate a

Terminable Contract on less than thirty (30) days' notice shall be treated by Respondent as a request to reopen and renegotiate or terminate, as the case may be, effective thirty (30) days from the date of the request.

4. Respondent shall not directly or indirectly:

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

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

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

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

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

VII.

IT IS FURTHER ORDERED THAT:

A. Respondent shall:

1. Within fifteen (15) days after the date this Order becomes final and effective: (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 and effective, 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.

VIII.

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.

IX.

IT IS FURTHER ORDERED THAT, no later than ten (10) days from the date on which this Order becomes final and effective, 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.

X.

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.

XI.

IT IS FURTHER ORDERED THAT:

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

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

C. One (1) year from the date this Order becomes final and effective, and annually thereafter until expiration or termination of Respondent's obligations under the Order on the anniversary of the date this Order becomes final and effective, and at other times as the Commission may require, 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.

XII.

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.

XIII.

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

By the Commission.

Donald S. Clark
Secretary

ISSUED: November 5, 2010
SEAL:

Exhibit B

In the Matter of
POLYPORE INTERNATIONAL, INC.,
a corporation
Docket No. 9327

Opinion of the Commission

By RAMIREZ, Commissioner, for a Unanimous Commission:

I. INTRODUCTION[1]

This case involves a consummated merger of two of the three North American firms that produce battery separators for flooded lead-acid batteries.[2] The battery separators at issue – membranes placed between the positive and negatively-charged plates in batteries to prevent electrical short circuits – are used in a multitude of products, ranging from floor scrubbers and golf carts to cars and backup telecommunications power systems. Battery separators for flooded lead-acid batteries are vital components of products that U.S. consumers use every day.

The acquiring firm, Respondent Polypore International, Inc. ("Polypore" or "Respondent"), develops, manufactures, and sells a broad range of flooded lead-acid battery separators for various end-use applications through its Daramic business unit. The acquired company, Microporous L.P. ("Microporous"), also manufactured flooded lead-acid battery separators, and, at the time of the acquisition, was an aggressive competitor of Daramic.

In August 2007, Respondent's representatives began discussions with Microporous' owners about acquiring Microporous. Contemporaneous documents establish that Daramic at the time feared losing a large amount of business to Microporous, wanted to eliminate Microporous as a competitor, and believed that its acquisition of Microporous would allow it to maintain market share and increase prices. On February 29, 2008, Respondent acquired all of the outstanding stock of Microporous'

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[1] This opinion uses the following abbreviations for citations to the record:

Initial Decision	ID
ALJ Findings of Fact	IDF
Respondent's Appeal Brief	RAB
Complaint Counsel's Answering Brief on Appeal	CCAB
Respondent's Reply Brief on Appeal	RRB
Complaint Counsel's Exhibit	PX
Respondent's Exhibit	RX
Trial Transcript	Tr.

[2] A flooded lead-acid battery is a battery containing an electrolyte liquid acid in which the positive and negative lead plates are suspended. IDF 20. Flooded lead-acid batteries, which are the focus of this case, are different than non-flooded lead-acid batteries, also known as gel or absorbed-glass-mat batteries, which use silica gel instead of liquid acid to interact with the positive and negative plates in the battery. IDF 22, 36, 83.

parent corporation for approximately $76 million.[3] The acquired Microporous business included a plant in Piney Flats, Tennessee, a plant in Feistritz, Austria on the verge of commencing operations, and equipment for an additional production line (referred to as "a line in boxes").

Based on our *de novo* review of the facts and law in this matter, we conclude that the acquisition is reasonably likely to substantially lessen competition in three relevant markets: North American deep-cycle; motive; and starter, lighting, and ignition ("SLI") battery separators. We agree with Chief Administrative Law Judge D. Michael Chappell (the "ALJ") that the appropriate remedy is complete divestiture of all of the acquired Microporous assets, as well as certain other ancillary relief necessary to restore competition that was lost through the acquisition. However, while we conclude that Complaint Counsel properly defined a relevant market for uninterruptible power source ("UPS") battery separators in North America, and the record supports the conclusion that Daramic has a monopoly in that market, we find that Complaint Counsel did not meet their burden to show that the acquisition has lessened, or is reasonably likely to substantially lessen, competition in the UPS separator market.[4]

II. FACTUAL BACKGROUND

A. THE PARTIES

1. Polypore/Daramic

Polypore, a Delaware corporation headquartered in North Carolina, manufactures microporous membranes used in separation and filtration processes. Daramic, one of Polypore's four divisions, develops, manufactures, and sells various types of flooded lead-acid battery separators both in the United States and abroad. IDF 1-4. Prior to the acquisition of Microporous, Daramic had two plants in the United States and five foreign plants.[5] IDF 38-39. [redacted] IDF 40.

At that time, Daramic produced polyethylene or "PE" separators for all four end-use applications alleged in the Complaint to constitute relevant product markets:

- Deep-cycle – batteries installed in products with a lower amperage draw over a longer period of time, such as golf carts and floor scrubbers (IDF 19);

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[3] The Commission did not become aware of the transaction, which was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, until after the acquisition had been consummated.

[4] We adopt the ALJ's findings of fact to the extent not inconsistent with this opinion and make new factual findings based on our *de novo* review of the record. We present our findings of fact and conclusions of law throughout the opinion as appropriate to the subject matter under discussion.

[5] These plants were located in Owensboro, Kentucky; Corydon, Indiana; Selestat, France; Norderstadt, Germany; Potenza, Italy; Prachinburi, Thailand; and Tianjin, China. IDF 38-39.

- Motive power – batteries used in mobile industrial products such as forklifts and mining equipment (IDF 25, 204);

- UPS – "uninterruptible power source" products, such as backup stationary batteries for computer and telecommunication systems (IDF 35, 235);[6] and

- SLI (starter, lighting, and ignition) – batteries used in automotive applications, including cars, trucks, buses, boats, and jet skis. IDF 32.

For motive and UPS, Daramic sold primarily Daramic CL (IDF 197, 411); and for SLI it sold primarily Daramic HP. IDF 253-54, 427. Daramic also produced Daramic HD, a PE separator made with a liquid latex additive, which was created primarily for deep-cycle applications. IDF 41, 373, 472, 475. Daramic also sold a product called Darak, a non-PE separator produced in Germany and used primarily in gel batteries. IDF 41, 234, 618. [redacted] IDF 42. [redacted] *Id.*

2. Microporous

Microporous, also a Delaware corporation, was a smaller battery separator company owned by a private equity firm, Industrial Growth Partners. IDF 5, 9. Microporous previously had done business under the name Amerace. IDF 8. Prior to the February 2008 acquisition, Microporous operated one plant in Piney Flats, Tennessee and was scheduled to begin operating a second plant in Feistritz, Austria in March 2008. IDF 43-44, 778-79. Microporous also owned a line in boxes – unassembled manufacturing equipment it had originally ordered for the purpose of building a fourth production line at the Piney Flats plant. IDF 773, 775. As of the date of trial, some of the equipment for the line remained in boxes in Austria, while other pieces of the new line were at a semi-finished stage with a supplier, or in use in existing lines at Piney Flats. IDF 1269-70.

Prior to the acquisition, Microporous' product line consisted of three products: Flex-Sil, a separator made of rubber, primarily for deep-cycle applications; Ace-Sil, a hard rubber separator typically used in high-end industrial applications; and CellForce, a PE-based separator sold primarily for motive applications, which includes ground-up Ace-Sil as an additive to improve performance. IDF 45, 198, 387. [redacted] IDF 46. Microporous competed head-to-head against Daramic for sales to both deep-cycle and motive battery separator customers. Additionally, Microporous had begun developing and marketing a PE separator for use in SLI applications – the source of most of Daramic's PE battery separator sales – and was in the process of negotiating a

[6] Separators for industrial applications, such as industrial motive and UPS products, are sometimes collectively referred to as "industrial" separators. IDF 23.

[7] SLI is by far the largest market segment, accounting for almost three-quarters of flooded lead-acid battery separator sales in 2005. IDF 261.

supply contract with Exide Technologies, Inc. ("Exide"), a large potential customer. IDF 429-36, 694-716.

Microporous was also engaged in a research and development project approved in early 2007 known as Project LENO. IDF 617. Project LENO began as an effort to develop a separator to compete with Daramic's Darak separator. IDF 234, 618. The project later included research related to the development of a separator for flooded lead-acid UPS batteries. IDF 618. At the time of the acquisition, the success of Project LENO was in doubt, and even if the research proved successful, a commercially qualified product was at best several years away. McDonald, Tr. 3866-69, *in camera*; IDF 1011-14.

B. OTHER BATTERY SEPARATOR FIRMS

1. Entek

Entek[8] was the only firm other than Daramic and Microporous that supplied flooded lead-acid battery separators to North American customers at the time of the acquisition. Entek has one manufacturing facility in the United States (in Oregon) and one in the United Kingdom. IDF 47. Entek had sold separators for industrial applications in the 1990s, but had since exited the industrial side of the business. IDF 392-93, 578, 1027, 1029. Entek's sales at the time of the acquisition consisted almost entirely of SLI separators. IDF 382. In 2007, [redacted] IDF 1115.

2. Foreign Firms

A number of suppliers in India, China, Indonesia and Korea produce flooded lead-acid battery separators for local customers. IDF 444, 1064-78. Anpei and BFR are Chinese manufacturers that produce SLI separators. IDF 340, 444, 1064, 1070. Amer-Sil is a European manufacturer that operates a plant in Luxembourg that produces polyvinyl chloride ("PVC") separators used in European flooded lead-acid motive batteries.[9] IDF 443. No foreign firm exports flooded lead-acid battery separators to North America, and none has any facilities in North America. IDF 332-34, 338-40, 343-50, 449-51.

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[8] Entek International LLC and its sister company Entek International Ltd. were owned and operated by Entek Holding Company (collectively "Entek"). IDF 47.

[9] North American customers do not use PVC separators for motive batteries due to performance disadvantages relative to PE separators and because PVC separators may be associated with the release of unstable chlorine at certain temperatures. [redacted] Thus, while EnerSys, a large motive customer, uses PVC separators for some applications in Europe, it does not approve PVC separators for use in North America, where the applications are heavier duty. IDF 203.

C. CUSTOMERS

The battery separators at issue in this case are sold to firms that manufacture flooded lead-acid batteries. Some customers are large companies with multinational operations, while others are relatively small with operations only in the United States. Four of the largest customers are Exide, JCI, EnerSys, and East Penn Battery Company ("East Penn"). IDF 49-59, 65-66.

Exide is one of the largest battery manufacturers in the world, with facilities in North America, Europe and Asia. IDF 52, 53. Although it produces batteries for all four end-use applications, the majority of its business is in SLI batteries (for cars, trucks, motorcycles, recreational vehicles, and boats) and deep-cycle (for golf carts). IDF 54. Prior to the acquisition, Exide worked with Microporous to develop an SLI battery separator product and was in the process of negotiating a supply contract with Microporous. IDF 694-716.

JCI is the largest automotive battery manufacturing company in the world. IDF 49. It is headquartered in Milwaukee, Wisconsin and has plants throughout the world. IDF 51. JCI primarily purchases SLI separators; it also buys some deep-cycle separators for golf cart batteries, which account for 2-3% of its total production. IDF 50. Prior to the acquisition, JCI encouraged Microporous to develop an SLI separator to provide a competitive alternative to Daramic for automotive applications. IDF 650, 684-89. In 2007, JCI qualified the Microporous SLI product for use but ultimately entered into a supply contract with Entek [redacted] IDF 690, 1115.

EnerSys is the world's largest manufacturer of industrial batteries, including both motive (for forklifts) and reserve power batteries (for UPS battery backup, telecommunications, and utilities). IDF 56. It has plants in the United States, China and Europe. IDF 57. EnerSys encouraged Microporous to develop a separator product to provide a competitive alternative to the Daramic products for UPS applications, and Microporous was in the process of attempting to do so at the time of the acquisition. IDF 618.

East Penn is a lead-acid battery and wire and cable manufacturing company headquartered in Pennsylvania. IDF 65. It has two U.S. plants and an assembly plant in China, and produces batteries for all four end uses. IDF 65-66.

Other battery manufacturer customers include: Trojan Battery Company, which manufactures and sells deep-cycle batteries primarily for golf carts and other deep-cycle applications;[10] Crown Battery Manufacturing Company, which makes batteries for all four applications (IDF 67-69); Douglas Battery Manufacturing Company, a family-

[10] Trojan Battery has two plants, both in the United States. IDF 63. Trojan was Microporous' largest customer, representing about 43% of all Microporous' sales. IDF 64. Trojan is the largest golf cart battery manufacturer in the world, with 2007 sales of approximately [redacted] IDF 60, 61.

owned company that produces certain types of deep-cycle and motive batteries[11] (IDF 70-73); U.S. Battery Manufacturing Company, which has two U.S. plants and manufactures batteries primarily for deep-cycle applications (IDF 74-77); and Bulldog Battery Corporation, which has one U.S. plant and makes flooded-lead batteries for motive applications. IDF 78-80.

III. PROCEDURAL HISTORY

A. PLEADINGS

On September 29, 2008, the Commission issued a three-count complaint against Polypore. In Count I, the Complaint charged that Polypore's February 29, 2008 acquisition of Microporous may substantially lessen competition or tend to create a monopoly in relevant North American markets for deep-cycle, motive, SLI, and UPS battery separators in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45.[12] Complaint ¶¶ 5, 14, 48. Specifically, Count I alleged that the acquisition was a merger to monopoly in the North American deep-cycle and motive markets, and a merger to duopoly in the SLI market. *Id.* ¶¶ 20-23, 27-29, 38. With respect to the UPS market, Count I alleged that competition was harmed because Microporous had developed a new separator that would compete with Polypore and had secured a contract with a major customer that was testing Microporous' new UPS product. *Id.* ¶¶ 24, 30, 31. Count I alleged further that testing, qualification, and reputation create significant barriers to entry in each of the relevant markets, and that the acquisition will cause and has caused higher prices and other anticompetitive effects in the relevant markets. *Id.* ¶¶ 32-38.

Count II alleged that Polypore had entered into an unlawful joint marketing agreement with Hollingsworth & Vose ("H&V"), a firm that manufactures absorbed-glass-mat separators, to forestall H&V's entry into the PE separator market, in violation of Section 5 of the FTC Act. *Id.* ¶¶ 47, 51. Count III charged that Daramic monopolized the alleged relevant markets, also in violation of Section 5 of the FTC Act, by executing contracts with large customers that would preclude or deter Microporous from competing effectively. *Id.* ¶¶ 39-40, 45-46.

Polypore filed an answer on October 15, 2008, admitting only that it had acquired Microporous and denying all of the substantive allegations in the Complaint. As an affirmative defense, Daramic alleged that the acquisition is a procompetitive response to market dynamics that will result in substantial merger-specific efficiencies that will outweigh any potential anticompetitive effects. Answer ¶ 14.

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[11] In January 2010, EnerSys announced its purchase of certain Douglas assets. IDF 59.

[12] The Complaint alleged in the alternative that the transaction was unlawful in an "all PE" separator market in North America. Complaint ¶¶ 6, 14. However, Complaint Counsel did not pursue this theory and instead opposed Respondent's claim of an "all PE" market at trial.

During the trial, which began on May 12, 2009 and concluded on June 12, 2009, the ALJ heard testimony from over thirty witnesses and admitted more than 2,000 exhibits into evidence. The ALJ closed the hearing record on June 22, 2009. The parties submitted post-trial briefs and proposed findings of fact on July 17, 2009 and made their closing arguments on August 20, 2009.[13]

B. INITIAL DECISION

The ALJ issued an Initial Decision ("ID") on February 22, 2010, holding that the acquisition was reasonably likely to substantially lessen competition in North American markets for deep-cycle, motive, UPS, and SLI separators, as charged in Count I. ID at 7, 213-24. In particular, the ALJ found that the relevant markets were the North American markets for deep-cycle, motive, UPS, and SLI battery separators, basing his decision on the fact that separators are manufactured and designed according to end use and sellers can set prices according to a separator's end use and customer location. The ALJ found further that, at the time of the acquisition, Microporous was Daramic's only competitor in the deep-cycle and motive markets, and one of Daramic's two competitors in the SLI market. The transaction was therefore a presumptively unlawful merger to monopoly in the deep-cycle and motive markets, and a presumptively unlawful merger to duopoly in the SLI market. ID at 246-51, 253-59. In the UPS market, the ALJ determined that Microporous was developing a product to compete with Daramic for North American customers and was a "substantial factor" in the market. ID at 252-53, 258. Having found that Microporous was the only firm positioned to enter the UPS market, the ALJ concluded that the acquisition entrenched Daramic's existing UPS monopoly. ID at 259.

The ALJ also found evidence of the procompetitive benefits of pre-acquisition competition between Microporous and Daramic, and evidence that the acquisition was motivated by anticompetitive intent and resulted in post-acquisition anticompetitive effects, which bolstered the presumption of reasonably likely anticompetitive effects in each of the four relevant markets. ID at 266, 269. The ALJ also considered Daramic's rebuttal evidence concerning entry barriers, buyer power, efficiencies and Microporous' financial condition, but held that the evidence was not sufficient to overcome Complaint Counsel's strong *prima facie* case. ID at 270-99.

With respect to Count II, the ALJ held that the noncompete provisions in Daramic's joint marketing agreement with H&V constituted an unlawful horizontal market allocation agreement. ID at 319-22.

As to Count III, the ALJ concluded that Complaint Counsel failed to establish their claims of monopolization and attempted monopolization in any of the four relevant markets. Specifically, he found that Complaint Counsel did not prove that Daramic

[13] On October 15, 2009, the ALJ reopened the trial record for the limited purpose of receiving evidence regarding Daramic's alleged decline in sales to Exide. On July 19, 2010, after the ALJ had issued the Initial Decision, the Commission reopened the hearing record to accept into evidence declarations regarding Entek's efforts to develop a deep-cycle separator.

possessed monopoly power or a dangerous probability of achieving monopoly power in the SLI market. ID at 305. The ALJ also found that while Complaint Counsel proved that Daramic had monopoly power in the deep-cycle, motive and UPS markets, they did not establish that Daramic engaged in exclusionary conduct in those markets. ID at 306-16. The ALJ therefore dismissed Count III in its entirety. ID at 316.

As a remedy for Count I, the ALJ ordered complete divestiture of all the acquired physical and intangible assets, along with ancillary relief to eliminate the anticompetitive effects of the acquisition. ID at 338-41. In connection with Count II, the ALJ ordered Daramic to terminate the noncompetition provisions of its marketing agreement with H&V, and to cease and desist from implementing or enforcing them. ID at 323-28.

C. APPEAL

Respondent timely filed a Notice of Appeal on March 10, 2010 and a Revised Notice of Appeal on March 15, 2010. Respondent challenges all of the ALJ's findings of fact and conclusions of law relating to Count I, including the remedy. Respondent also disputes those factual findings and legal conclusions related to whether Daramic had monopoly power or a dangerous probability of achieving or maintaining monopoly power in the North American deep-cycle, motive and UPS battery separator markets.[14] Respondent did not appeal any portion of the Initial Decision related to Count II, and Complaint Counsel did not appeal the dismissal of Count III. The Commission heard oral argument on July 28, 2010.

Respondent makes four principal claims on appeal. It argues first that Complaint Counsel failed to prove that separators for deep-cycle, motive, SLI and UPS batteries constitute distinct and separate relevant product markets. RAB at 9-19. According to Respondent, at the time of the acquisition, Daramic competed in an "all PE market," while Microporous competed largely in a market for rubber separators that included only its Flex-Sil product. Respondent also argues that Complaint Counsel failed to prove that the relevant geographic market is North America, asserting instead that the proper geographic market is global. RAB at 19-24.

Respondent also claims that even if Complaint Counsel had proven their alleged relevant product and geographic markets, they failed to prove actual or likely anticompetitive effects. According to Respondent, Complaint Counsel's case fails because Microporous was not a competitor in the SLI or UPS markets; Entek competes in the deep-cycle, motive and UPS markets; barriers to entry are low; and buyers are sophisticated and have substantial leverage. RAB at 4, 25-28, 34, 41-50. Finally, Respondent argues that the remedy, and in particular the portion of the order requiring divestiture of Microporous' plant in Feistritz, Austria, is overbroad and punitive. RAB at 50-58.

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[14] Because the ALJ dismissed Count III, and Complaint Counsel did not appeal the dismissal, we review all of the factual findings and legal conclusion relevant to the ALJ's decision on Count I, but do not review those factual findings or legal conclusions that were relevant solely to Count III.

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." The Commission may "exercise all the power which it could have exercised if it had made the initial decision."[15] 16 C.F.R. § 3.54.

V. LEGAL FRAMEWORK

Section 7 of the Clayton Act prohibits acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. As the statutory language suggests, Congress enacted Section 7 to curtail anticompetitive harm in its incipiency. *See Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962)). Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. Thus, while a Section 7 violation cannot rest on proof of the "mere possibility" of anticompetitive effects, Section 7 does not require that competitive harm be established with certainty. *Id.*; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001). Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial. *United States v. General Dynamics Corp.*, 415 U.S. 486, 505-06 (1974).[16]

Merger enforcement is therefore concerned with preventing the unlawful acquisition, maintenance, and exercise of market power. U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf ("2010 HORIZONTAL MERGER GUIDELINES").[17] Mergers that enhance market power can enable the merged firm to

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[15] The *de novo* standard of review is required by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b), (c), and applies to both findings of fact and inferences drawn from those facts. *Realcomp II, Ltd.*, No. 9320, at 15 n.11 (FTC Oct. 30, 2009), *available at* http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf.

[16] While evidence of post-acquisition consumer harm can provide conclusive proof that post-acquisition consumer harm is reasonably probable, the absence of post-acquisition evidence of anticompetitive effects does not necessarily prove the converse. Because post-acquisition evidence may be manipulated by the parties, it may in certain circumstances have little evidentiary value. *Chicago Bridge*, 534 F.3d at 435; *see also General Dynamics*, 415 U.S. at 504-05 ("If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending."). Moreover, the fact that consumers have not suffered harm during the interval between the acquisition and trial "does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial." *General Dynamics*, 415 U.S. at 505; *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1378-79 (9th Cir. 1978); *see also* 2010 HORIZONTAL MERGER GUIDELINES § 2.1.1.

[17] The U.S. Department of Justice and the Federal Trade Commission issued revised Horizontal Merger Guidelines on August 19, 2010. Although we rely on the 2010 Guidelines in this opinion, our substantive analysis in this case would be identical under the 1992 Horizontal Merger Guidelines.

profitably alter its marketplace decisions to the detriment of consumers by, for example, raising prices, cutting output or reducing product quality or variety. Mergers that enhance market power can also diminish incentives for innovation. *Id.* In some instances, a merger can reduce the number of firms in a market to a level that increases the likelihood that firms will expressly or tacitly coordinate their actions. *Id.* In other instances, a merger may create the likelihood of both unilateral and coordinated effects with respect to price or nonprice aspects of competition. *Id.*

Courts have traditionally analyzed Section 7 claims under a burden-shifting framework. *See, e.g.*, *Heinz*, 246 F.3d at 715; *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990). Under this framework, Complaint Counsel can establish a presumption of liability by defining a relevant product and geographic market, and showing that the transaction will lead to undue concentration in the relevant market. *Baker Hughes*, 908 F.2d at 982-83.

A plaintiff can bolster a *prima facie* case based on market structure with evidence showing that anticompetitive unilateral or coordinated effects are likely. *Heinz*, 246 F.3d at 717. Documents created by the merging parties in the ordinary course of business are often highly probative of both industry conditions and the likely competitive effects of a merger. 2010 HORIZONTAL MERGER GUIDELINES § 2.2.1. Indeed, qualitative evidence regarding pre-acquisition competition between the merging parties can in some cases be sufficient to create a *prima facie* case even without quantitative evidence of changes in market concentration. *See, e.g., Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1053 (2004) (noting that qualitative evidence on pre-acquisition competition may support the conclusions based on market structure and can provide an independent basis for a *prima facie* case under Section 7); 2010 HORIZONTAL MERGER GUIDELINES § 2.1.4. Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring); 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 964, at 18-19 (3d ed. 2009); 2010 HORIZONTAL MERGER GUIDELINES § 2.2.1.

If the plaintiff establishes a *prima facie* case of probable harm, the burden of production shifts to the defendant, who must produce evidence showing that the plaintiff's evidence paints an inaccurate picture of the merger's likely competitive effects. *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974); *Heinz*, 246 F.3d at 725. The stronger the plaintiff's *prima facie* case, the greater the defendant's burden of production on rebuttal. *Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991. A defendant can rely on a variety of types of evidence to meet its burden on rebuttal, including evidence that casts doubt on the significance or accuracy of the plaintiff's market share and concentration evidence, factors that indicate that collusion is improbable, and evidence of likely efficiencies. *Baker Hughes*, 908 F.2d at 985. If the defendant meets its burden, the burden of production shifts back to the plaintiff to produce additional evidence of competitive harm and merges with the ultimate burden of persuasion, which remains with the plaintiff at all times. *Id.* at 983.

Both Complaint Counsel and Respondent developed their evidence and litigated this case by reference to a relevant market and this traditional burden-shifting framework. The ALJ relied on the same legal framework in the ID. We find that this framework illuminates the factual record and competitive issues in this case and therefore apply it in this opinion. As we have noted in prior cases, however, and as the courts have also recognized, this analytical approach "does not exhaust the possible ways to prove a § 7 violation on the merits." *Whole Foods*, 548 F.3d at 1036; *see also Evanston Northwestern Healthcare Corp.*, No. 9315, Comm'n Op. at 86-88 (FTC Aug. 6, 2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf; 2010 HORIZONTAL MERGER GUIDELINES § 4. Market definition is a predictive tool that is not always the best vehicle to establish proof of competitive harm and can in some cases obscure rather than expose the competitive effects of a merger. *See Evanston Northwestern*, Comm'n Op. at 86 ("The role of the market definition tool, however, is potentially much less important in merger cases in which the availability of natural experiments allows for direct observation of the effects of competition between the merging parties, as well as the absence of such competition."). In a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish Section 7 liability without separate proof of market definition. *Evanston Northwestern*, Concurring Op. of Comm'r Rosch at 8, *available at* http://ftc.gov/os/adjpro/d9315/070806rosch.pdf. Accordingly, the legal framework for analyzing a Section 7 claim is and should be a flexible tool that enables the factfinder to credibly and efficiently organize evidence in a manner that sheds light on the likely competitive effects of a merger.

VI. LIABILITY

A. RELEVANT PRODUCT MARKETS

The ALJ concluded that, prior to the acquisition, Daramic and Microporous competed in four distinct relevant product markets: deep-cycle, motive, UPS, and SLI battery separators. ID at 210. This determination was based on the fact that battery separators have different design and performance features that vary with the end use of the separator, and that, in most instances, separators manufactured for one type of battery are not reasonably interchangeable with separators for a different type of battery. ID at 211. The ALJ also found that industry participants not only recognize battery separator markets based on end use but that separator manufacturers price that way. ID at 211-12.

Respondent disputes these findings. According to Respondent, PE separators, which comprise most of Daramic's product line, are reasonably interchangeable with each other regardless of end use. Respondent also claims that Daramic's PE separators are not substitutes for, and do not compete with, Microporous' Flex-Sil product, a rubber separator used in deep-cycle batteries. RAB at 9-19. On that basis, Respondent argues that the proper relevant product markets are an "all PE" separator market and a market consisting only of Flex-Sil.[18] *Id.* We disagree and affirm the ALJ's product market determinations.

[18] Respondent also argues that Microporous' Ace-Sil constitutes its own relevant market. Ace-Sil is a hard

The factors that determine the contours of a relevant market are well known. The "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). "Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000).

As "evidentiary proxies for direct proof of substitutability" courts look at "practical indicia" of market boundaries, such as industry or public recognition of the market, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[19] *Brown Shoe*, 370 U.S. at 325; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986). These observable market facts provide evidence of interchangeability and the cross-elasticity of demand.

Under the Horizontal Merger Guidelines, a product market is defined by asking whether a hypothetical monopolist of the proposed product market could impose a small but significant and nontransitory increase in price ("SSNIP") without losing sufficient sales to render the price increase unprofitable. 2010 HORIZONTAL MERGER GUIDELINES § 4.1.1; *see also Whole Foods*, 548 F.3d at 1038; *Swedish Match*, 131 F. Supp. 2d at 160-61 & n.8. Where a seller "could profitably target a subset of customers for price increases," a relevant market can be based on a particular use or uses by groups of buyers of the product for which a hypothetical monopolist could profitably impose at least a "small but significant and nontransitory" increase in price. 2010 HORIZONTAL MERGER GUIDELINES § 4.1.4. A hypothetical monopolist is unlikely to be able to raise price to a targeted group where buyers can engage in arbitrage. *Id.*

The record here supports relevant product markets based on the end use of separators. Manufacturers tailor separators along a variety of dimensions according to both the individual customer and the specific application or end use. IDF 92-98, 104,

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rubber battery separator that is typically used in very high-end stationary applications such as telecommunications, nuclear plants, and military products. IDF 45. The Complaint does not allege that the transaction led to a substantial lessening of competition in any market where Ace-Sil separators are sold. We therefore reach no conclusion as to whether Ace-Sil constitutes a relevant product market.

[19] Although Respondent criticizes the ALJ's reliance on "46-year old *Brown Shoe's* 'practical indicia'" rather than quantitative evidence, courts continue to rely on these factors to define a relevant market. *See, e.g.*, *Whole Foods*, 548 F.3d at 1033, 1044-45; *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41-43 (D.D.C. 2009); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075, 1078 (D.D.C. 1997). The Commission and the DOJ also consider such evidence relevant and probative. 2010 HORIZONTAL MERGER GUIDELINES § 2.2; U.S. DEPT. OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 9 (Mar. 2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf ("In the vast majority of cases, the Agencies largely rely on non-econometric evidence, obtained primarily from customers and from business documents.").

106-08, 110. Flooded lead-acid battery separators are differentiated by various physical characteristics, including their base material (*e.g.*, polyethylene or rubber), additives to the base material, "rib spacing and profile," "backweb" thickness, overall thickness, border areas, and finishing (*e.g.*, delivered in rolls or cut into smaller flat sheets).[20] IDF 85-86. The fact that two separators may have one characteristic in common, such as backweb thickness, does not mean that the separators can be substituted for one another in a particular application if the other features are different, such as the base material, additives to the base material, or profile. IDF 86-97. If a separator designed for one type of battery is used in a different type of battery, the battery's performance, including its life, would be adversely affected. *See, e.g.*, Leister, Tr. 4022-24. Thus, based on design and functionality, a separator manufactured for a particular end use or customer is not reasonably interchangeable with other separators.

We recognize that certain separator products, such as Daramic HD and CellForce, can be used in more than one type of battery. But that fact does not alter our conclusion. Daramic itself distinguishes between end-use separator markets and sets separator prices accordingly. For instance, it currently charges different prices for Daramic HD and CellForce (formerly a Microporous product) depending on the separator's end use. IDF 114-16; PX0395 at 40, *in camera*; Gilchrist, Tr. 458, *in camera*; Hauswald, Tr. 793-95, *in camera.* Daramic also tracks sales according to the end use of separators (as did Microporous). IDF 100-02. Moreover, because separators are tailored according to customer-specific designs, arbitrage is unlikely. IDF 85, 92, 117-18. Accordingly, as explained in detail below, deep-cycle, motive, UPS, and SLI separators constitute distinct relevant product markets.

1. Deep-Cycle Market

Deep-cycle batteries are used in products such as golf carts, floor scrubbers, and scissor lifts that require a low amperage draw over a long duration of time. IDF 19, 128. Deep-cycle batteries are typically discharged more deeply – to a lower state of discharge – than motive batteries and are designed to run at a lower amperage for a longer period of time than SLI batteries. IDF 130-31.

Relative to other batteries, deep-cycle batteries have high antimony content in the lead alloy grid, which aids in their construction and enhances the capacity for cycles of charges and deep discharges. IDF 15, 132-37. If antimony migrates from the positive to the negative plate in the battery, "antimony poisoning" occurs, which causes the voltage of the battery to drop and can lead to conditions that shorten the battery's life. IDF 138-39. The separator in a deep-cycle battery ties up the antimony in the electrolyte liquid, preventing the antimony from settling on the negative plate. IDF 15.

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[20] Ribs are protrusions on the separator that help establish the physical spacing in the battery to ensure that there is an appropriate amount of acid between the plates. The shapes and sizes of the ribs make up part of the separator's profile. IDF 31. Backweb thickness is measured between the ribs and acts to create a wall of insulation in the battery between the plates. IDF 16.

Rubber separators are the most effective in preventing the transfer of antimony between the lead plates and therefore in reducing antimony poisoning in deep-cycle batteries. IDF 140. Microporous' Flex-Sil is made of natural rubber. IDF 143. CellForce, also developed and sold by Microporous, is a PE-based separator with a rubber additive in the form of ground-up Ace-Sil. IDF 144, 148. Microporous sold both for deep-cycle batteries. As alternatives to the Microporous products, Daramic sold a rubber separator, Daramic DC, and later a blended PE-rubber product, Daramic HD, which includes rubber in the form of latex. IDF 145-47, 502, 505-06.

Pure PE separators that are used in motive, UPS, and SLI batteries are not viable substitutes for deep-cycle separators because they do not suppress antimony poisoning and do not perform as well in deep-cycle batteries as separators that are made of, or incorporate, rubber. IDF 150-55. Similarly, because of the differences in the batteries and the corresponding requirements for the separators used in those batteries, separators made for motive batteries and separators made for SLI batteries are not reasonably interchangeable with separators made for deep-cycle batteries. IDF 130, 132, 152-56.

Prior to the acquisition, Daramic HD competed with Microporous' Flex-Sil separators. When Daramic HD was introduced in 2005 as a competitive alternative to Flex-Sil, deep-cycle customers initially used it in a limited way, but then expanded their use over time. IDF 512. U.S. Battery tested Daramic HD in 2005, for example, and "indicated a desire to switch four of its new product lines away from Flex-Sil to Daramic HD." IDF 480. U.S. Battery later increased its purchases of Daramic HD and extended its use to additional battery models. IDF 515. Similarly, Exide began switching from Flex-Sil to Daramic HD for its deep-cycle batteries in 2005 and later continued to convert additional batteries from Flex-Sil to Daramic HD. IDF 502, 513, 518. Exide now uses both Flex-Sil and Daramic HD as substitutes in its most common golf cart battery, which makes up approximately 80% of Exide's deep-cycle sales. IDF 503. The record also shows that Microporous responded to competition from Daramic's deep-cycle separators by reducing prices. IDF 464, 470-71. Daramic HD constrained the price of Flex-Sil. IDF 470-71. Similarly, prior to the acquisition, U.S. Battery, Trojan Battery, and Exide successfully used the threat of switching to Daramic HD as leverage to avoid Flex-Sil price increases. IDF 470, 521, 523, 528-29.

Certain customers, however, continue to prefer Flex-Sil over both Daramic HD and CellForce despite Flex-Sil's higher price, and Respondent points to this preference to support its claim that Flex-Sil occupies its own relevant market. We are not convinced, however. Preferences by some buyers for one product do not necessarily mean that the product comprises a separate relevant product market, particularly when differentiated products are involved. Substitution for the purpose of defining relevant markets does not require complete switching between products in the same market. *See United States v. Oracle*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 122 (D.D.C. 2004). Furthermore, courts have not hesitated to assign

products to the same market despite price differences when the products, in fact, constrained each other's price levels.[21]

The record also shows that deep-cycle battery manufacturers would not switch to pure PE products in response to a price increase. For instance, when Exide was unable to purchase Daramic HD due to a strike at Daramic's Owensboro plant, Exide did not switch to a pure PE separator for its deep-cycle batteries, instead paying a price premium to purchase Flex-Sil as a substitute.[22] IDF 173. Daramic's Vice-President of Marketing and Sales, Sterling Tucker Roe, testified that despite price increase announcements, no deep-cycle customers have switched from products that contain rubber to pure PE separators. IDF 170-71. We therefore find that separators for deep-cycle batteries are a relevant product market.

2. Motive Market

Motive batteries are used primarily in industrial equipment such as forklifts. IDF 204. These batteries are typically operated for much longer periods than SLI batteries and have more rigorous mechanical and chemical requirements. IDF 196. Motive separators are designed to meet these more demanding performance standards. *Id.* The positive plates in motive batteries, for instance, are surrounded by thick insulation to prevent an electrical short. IDF 194. This means that motive battery separators typically have a thicker backweb than other separators. IDF 195. Requirements for electrical resistance are lower because of the typically low current densities for motive batteries. IDF 196. Because of motive batteries' distinctive characteristics, separators that are made for deep-cycle, UPS, SLI and other applications are not typically interchangeable with motive separators.[23] IDF 130, 193-96.

Larry Axt, Vice President of Global Procurement at EnerSys, testified that when Daramic declared *force majeure* for motive separators in 2006, EnerSys established a team to search worldwide for an alternative source of supply, but was unable to find an alternative supplier anywhere in the world. Axt, Tr. 2216-18, *in camera*. The merging

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[21] *See, e.g., AD/SAT v. Associated Press, Inc.*, 181 F.3d 216, 228 (2d Cir. 1999) (holding that the price difference between one-hour delivery services for newspaper advertisements ($40) and overnight transmission services ($8) was insufficient to demonstrate the two services were in different markets). Even the cases cited by Respondent did not hold that products fall in different markets based on price differences alone; rather, the courts considered whether the price differences had implications for substitution and the cross-elasticity of demand. Thus, in *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988), the court *in dictum* expressly stated that "generally a price differential, even a substantial one, is irrelevant for purposes of determining reasonable interchangeability."

[22] Respondent takes issue with this and other similar customer testimony, arguing it is unreliable. RAB at 19. We disagree. The record contains credible customer testimony identifying specific actions that customers have taken to fill supply needs. *See Oracle*, 331 F. Supp. 2d at 1133 (finding testimony of defendant's witnesses credible because they testified about concrete and specific actions taken to meet customers' information processing needs).

[23] North American customers do not use PVC separators for motive batteries because they do not perform as well as PE separators and may be associated with the release of unstable chlorine. Thus, while EnerSys uses PVC separators for some applications in Europe, it does not use PVC separators in North America where the applications are heavier duty. IDF 203.

parties' own documents also confirm that motive separators are a distinct market. *See* IDF 216-20.

3. UPS Market

UPS batteries provide reserve power for stationary products such as computer systems, telecommunications networks, and data centers. IDF 225-35. UPS batteries generate a higher current over a shorter period of time than classic reserve power batteries. They must be very dependable and generally last between 15 and 20 years. IDF 225. UPS batteries have thick plates and tend to be built with a clear case to allow inspection of the battery's acid level. IDF 226. Separators for UPS batteries are typically made of microporous PE but require lower residual oil content than separators for other flooded battery applications to reduce what is referred to as the "black scum" problem. IDF 227-29. Oil residue or "black scum" interferes with the maintenance of a UPS battery by obscuring the indicators of the acid level, making it harder to detect the formation of lead sulfate on the plates. IDF 228. Black scum can also interfere with a valve, causing the battery to overfill and spill acid when an automatic watering system is used. IDF 229.

Daramic developed a separator, Daramic CL, with a patented type of oil, which Daramic calls "clean oil," that reduced the black scum problem. IDF 230. Other PE separators do not reduce black scum and are not well suited for UPS battery applications.[24] IDF 231-32. Accordingly, separators for UPS batteries are also a relevant product market.

4. SLI Market

SLI batteries are used in automobiles and other motorized vehicles. IDF 259-60. SLI separators have their own distinct characteristics, which enable SLI separators to perform optimally in motor vehicles, and distinguish SLI separators from other PE separators. SLI separators must have relatively low electrical resistance to permit the surge in current that is needed to start a car. IDF 249. Puncture resistance and mechanical strength are also particularly important because the battery fails if the separator is punctured during assembly of the vehicle. IDF 252. In addition, SLI separators, and hence the backweb, must be very thin. IDF 250-51. Because SLI separators are thin, they are produced with fewer raw materials and are typically priced lower than separators for other end uses.[25] Based on functionality and performance characteristics, separators made for other types of batteries are not reasonably interchangeable with separators made for SLI batteries. IDF 131-32, 195-96. Daramic

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[24] Daramic's Darak separator, made from cross-linked phenolic rather than PE, contains no oil and might solve the black scum problem, but it is very stiff and very chemically stable with low electrical resistance. Darak is primarily used in gel, as opposed to flooded lead-acid batteries, and is significantly more costly than PE-based separators. IDF 41, 234.

[25] The average price of Daramic's SLI separators is $0.70 per square meter; Daramic HD separators for deep-cycle applications range in price from $1.50 to $2.90 per square meter; and its motive power separators cost $1.90 to $3.00 per square meter. IDF 267, 114.

and Microporous documents and testimony also segregate automotive separators as a distinct market segment. IDF 268-70. Separators for SLI batteries are therefore also a relevant product market.

5. The Expert Evidence

Complaint Counsel's expert, Dr. John Simpson, applied the hypothetical monopolist test to each market using a critical loss analysis. PX0033 at 6, 12-19, *in camera*. Dr. Simpson concluded that a hypothetical monopolist that supplied separators for each end use would lose less than 10% of its sales in response to a 5% price increase. *Id.*

Respondent's expert, Dr. Henry Kahwaty, opined in turn that PE separators belong in a single relevant market because they are highly differentiated and can be tailored to work across applications. RX0945 at 035-38, 049-53, *in camera*. He also concluded that separator manufacturers do not have sufficient information to set targeted prices based on end use. *Id.* at 053-56. Dr. Kahwaty also argued that Flex-Sil constitutes a separate relevant market because Flex-Sil has unique performance characteristics and is sold at a premium. *Id.* at 041-42. Dr. Kahwaty's application of the hypothetical monopolist test to a market consisting of Flex-Sil led him to find that the critical loss from a 5% price increase for Flex-Sil is 15.4%. Based largely on qualitative evidence regarding the preferences of Flex-Sil's largest customers, Dr. Kahwaty concluded that a hypothetical monopolist could profitably raise the price of Flex-Sil by at least 5%. *Id.* at 046.

We do not find Dr. Kahwaty's opinions persuasive. As explained above, there is more than ample evidence that separator manufacturers can and do set separator prices according to end use. Dr. Kahwaty also failed adequately to consider the evidence regarding pre-acquisition competition between Daramic HD and Flex-Sil.[26] While we agree with Dr. Kahwaty that Dr. Simpson's application of the hypothetical monopolist test to the deep-cycle market could in theory miss a separate relevant market for Flex-Sil,[27] that did not occur here. Dr. Simpson carefully analyzed the qualitative evidence

[26] As Dr. Simpson pointed out, Dr. Kahwaty argued that a hypothetical firm that was the only supplier of Flex-Sil could profitably raise the price of Flex-Sil over existing prices by at least 5%, but does not explain why Microporous did not raise the price of Flex-Sil prior to the acquisition if it had the power to do so. PX2251 at 2-3, *in camera*. Dr. Kahwaty also stated that Flex-Sil appears to be priced below a profit maximizing level because its price is set by negotiations with customers, but he fails to explain how customers that allegedly have no competitive alternatives could extract lower prices through negotiations. RX0945 at 048, *in camera*. Elsewhere, Respondent emphasizes that Flex-Sil was priced above competitive levels before the acquisition and asserts that the ALJ defined an overly broad market by examining substitution patterns without adjustment for Flex-Sil's pre-existing market power. RRB at 33. However, for the purpose of evaluating the competitive effects of a merger between the producers of Flex-Sil and Daramic HD, evidence of pre-merger competition between those products suggests that customers could be harmed by the acquisition and warrants including both products in the same relevant market.

[27] In setting out the framework for his analysis, Dr. Simpson considered whether a hypothetical monopolist supplying deep-cycle separators to North American customers could profitably impose a SSNIP, but did not first consider whether a monopolist supplying Flex-Sil to North American customers could do the same.

regarding pre-acquisition competition between Flex-Sil and Daramic HD and based on that evidence correctly concluded that Daramic HD was a meaningful competitive constraint on the price of Flex-Sil. PX0033 at 13. Moreover, even apart from Dr. Simpson's opinion, for the reasons discussed above, Complaint Counsel established that the proper relevant markets in this matter are based on the end use of battery separators.

B. RELEVANT GEOGRAPHIC MARKET

The ALJ defined a North American geographic market based on customer location. ID at 239-43. He found that separator manufacturers can and do set prices based on a customer's geographic location, and that, because separators are tailored to an individual customer's demand, a customer could not likely defeat a discriminatory price increase through arbitrage. IDF 271-79.

Respondent argues that arbitrage would defeat any effort to exercise market power based on customer location and claims that the proper geographic market is global. RAB at 19-24. Respondent's expert also rejected the conclusion that sellers could price discriminate based on customer location. Analyzing the geographic market based on the location of suppliers, Dr. Kahwaty concluded that the relevant geographic market is global. RX0945 at 057-58, *in camera*.

We review the evidence under the familiar standards from the case law and the Horizontal Merger Guidelines. The boundaries of the relevant geographic market, like the boundaries of the relevant product market, depend on reasonable interchangeability and cross-elasticity of demand. *Brown Shoe*, 370 U.S. at 336. A relevant geographic market defines the geographic area to which consumers "could practicably turn for alternative sources of the product." *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995). Under the Horizontal Merger Guidelines, a relevant geographic market is the smallest region in which a hypothetical monopolist that was the only seller of the relevant product located within that region could profitably implement a "small but significant and non-transitory" increase in price. 2010 HORIZONTAL MERGER GUIDELINES § 4.2. Where suppliers can set prices based on customer location, and customers cannot avoid targeted price increases through arbitrage, suppliers may be able to exercise market power over customers located in a particular geographic region, even if a price increase to customers located in other geographic regions would be unprofitable. *Id.* at § 4.2.2.

Applying these standards to this case, we find that the relevant geographic market is North America. Because battery separators are tailored to a particular customer and type of battery, and sold through individualized negotiations, separator suppliers set separator prices based in part on customer location. IDF 275-79. Moreover, because separators are differentiated along a variety of dimensions according to customer

demand, a customer could not easily defeat a discriminatory price increase through arbitrage.[28] IDF 274.

Additionally, while the evidence shows that North American suppliers export separators to other parts of the world, it is undisputed that North American battery manufacturers do not consider foreign supply a reasonable competitive alternative to local supply due primarily to cost and quality. Foreign supply increases the risk of supply chain disruption and entails greater freight, warehousing, inventory and other costs. It also decreases the likelihood of a timely response to quality or technical problems. IDF 286-91, 312-14. With one exception, there is no evidence that any North American battery manufacturer has imported flooded lead-acid battery separators from outside North America. IDF 283-85, 311, 333-34, 346, 349-50, 352-53. The lone exception occurred in 2008 when EnerSys was forced to purchase separators from Daramic's plant in Feistritz due to a labor strike at Daramic's Owensboro, Kentucky plant. EnerSys estimated that importing separators from Europe increased its costs by approximately 20%. IDF 313. Other separator customers, as well as Daramic and Microporous, recognize the cost-based benefits of local supply. IDF 287-88, 290-300, 303-09. All of this serves to confirm that North America is the relevant geographic market.

C. MARKET PARTICIPANTS

Market participants are firms that currently supply products in the relevant market, as well as firms not currently selling in the market that are likely to provide rapid and effective supply responses to the exercise of market power by current sellers without incurring significant sunk costs. 2010 HORIZONTAL MERGER GUIDELINES § 5.1. Where a firm is actively attempting to sell its products to customers in the relevant market and those efforts impact the behavior of existing sellers, that firm may be treated as an actual competitor. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (finding that a merger violated Section 7 where the acquired firm had made efforts to sell in the relevant market and those efforts, even though unsuccessful, had influenced the behavior of the acquiring firm in that market).[29]

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[28] Complaint Counsel established that Daramic and Entek currently charge different prices for separators in different geographic regions, which shows that suppliers can and do set prices according to customer location. That fact, along with the inability of customers to defeat a discriminatory price through arbitrage, supports the conclusion that the transaction could enhance Daramic's market power over North American customers, even if it did not have the same impact on customers located in other parts of the world. For similar reasons, we find the Elzinga-Hogarty test does not illuminate the competitive effects of this transaction because it considers competition based on supplier rather than customer location. *See* Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULLETIN 45 (1973); Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 ANTITRUST BULLETIN 1 (1978).

[29] *See also Marine Bancorp.*, 418 U.S. at 625 n.24 (noting that the unlawful merger in *El Paso* had "removed not merely a potential, but rather an actual, competitor" because the acquired firm's marketing efforts relative to one of the acquiring firm's customers had caused the acquirer to make major price and other concessions); 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 912a (3d ed. 2006) ("The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a

The ALJ found that Daramic and Microporous were the only firms participating in the deep-cycle separator market prior to the acquisition, with market shares of approximately 10% and 90% respectively. IDF 384-85. He also found them to be the sole participants in the motive market, respectively representing approximately 90% and 10% of the market. IDF 410. In the SLI market the ALJ concluded that Daramic accounted for approximately 48% of the market, Entek had approximately 52%, and Microporous was actively bidding for SLI business. IDF 439; ID at 259. Finally, he also determined that, while Daramic had a 100% share in the UPS market, Microporous was a "substantial factor" in that market. ID at 258. We affirm the ALJ's conclusions with respect to the deep-cycle, motive and SLI markets. However, we find that Complaint Counsel failed to prove that Microporous was a participant in the UPS market.

1. Microporous Was a Participant in the North American SLI Market

We agree that Microporous was a participant in the North American SLI market, seeking to challenge Daramic and Entek's hold on the market. Not only was Microporous actively competing for SLI business, it had made meaningful progress towards supply arrangements with JCI and Exide, two of the largest automotive battery manufacturers in the world with significant manufacturing facilities in North America. IDF 49-55; ID at 258-59. It is also clear that Daramic perceived Microporous as a competitive threat and reacted by reducing prices. IDF 820-21, 824-25, 849, 852.

JCI first approached Microporous about an SLI supply agreement in 2003, as part of JCI's plan to generate more competition in the market. IDF 649-50. Daramic responded by convincing JCI to enter into a [redacted] supply contract with the suggestion it would cut off supply in Europe if JCI did not agree to a long-term commitment. IDF 663, 667, 677-78. At the same time, however, JCI continued to work with Microporous to develop acceptable SLI separators and qualified the SLI separators in 2007. IDF 684-90.

During this time, Microporous was also negotiating a supply agreement with Exide. IDF 710-16. In 2007, Microporous and Exide had entered into a memorandum of understanding ("MOU") in which Microporous represented it would supply substantial volumes of SLI separators to Exide beginning in 2010. IDF 697-700. Microporous sent separator samples to Exide for testing, exchanged drafts of a supply agreement with Exide, and continued to meet and consult with Exide regarding an SLI separator. IDF 707-09. The MOU expired at the end of 2007, and the parties renewed the agreement in February 2008. IDF 710. Melvin Gillespie, who was responsible for Exide's negotiations with Microporous, testified that when Exide renewed the MOU in February 2008, it planned to purchase SLI separators from Microporous beginning in January 2010. *Id.* Microporous and Exide were still engaged in discussions shortly before Daramic acquired Microporous in February 2008. IDF 711-16.

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merger to monopoly. . . . [a] firm that has submitted bids against the dominant firm but lost is clearly an 'actual' competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder.").

Respondent tries to downplay Microporous' dealings with these customers. It argues, for instance, that Microporous failed to produce an acceptable SLI product for JCI and that their discussions ended in 2007. RAB at 25-26. But, while JCI did reject Microporous' early run of separators, the record shows that JCI qualified the Microporous SLI product in 2007. IDF 640, 651, 684-90. Moreover, JCI's decision to enter into a long-term supply agreement with Entek rather than Microporous in the fall of 2007 does not mean that Microporous was not an active participant in the SLI market. JCI's decision had little to do with Microporous' development or manufacturing capabilities and instead reflected JCI's concern that Daramic might acquire Microporous and that a trade secrets dispute between Daramic and Microporous[30] could delay Microporous' installation of necessary capacity by the end of 2008. IDF 691-93, 734.

Respondent also claims that Exide did not seriously pursue a supply relationship with Microporous. RAB at 26. Respondent notes that Exide did not renew the MOU until several weeks after the original had expired, and that the parties made no progress on a supply agreement in 2007. Respondent also points to a February 2008 email in which Steven McDonald, Microporous' Director of Sales and Marketing, expressed frustration with the pace of the negotiations with Exide. RAB at 27 (citing RX0285). However, Exide's Vice-President for Global Procurement testified that, in February 2008, when Exide's MOU with Microporous was extended, "We had full intention that we were going to be buying Microporous separators in 2010." Gillespie, Tr. 2976; IDF 710. Moreover, we fail to see why Microporous' expression of frustration with the pace of negotiations with Exide suggests Microporous was not seriously competing for business in the SLI market. Indeed, the document suggests just the opposite.

Finally, citing a November 2007 Board of Directors memorandum, Respondent contends the Microporous Board mandated a business strategy away from the production of SLI separators.[31] RAB at 27 (citing RX0401). Here too, the weight of the evidence demonstrates otherwise. Both the former President and owners of Microporous testified that nothing in that Board document prevented Microporous from pursuing SLI opportunities, and that, absent the acquisition, Microporous intended to supply Exide. IDF 799-803; Trevathan, Tr. 3753. In fact, negotiations with Exide continued through February 2008, providing direct, contemporaneous evidence that Microporous did not regard pursuit of SLI business as foreclosed. IDF 710-16.

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[30] The dispute concerned a PE manufacturing line Microporous had purchased from Jungfer, an Austrian company, in 1999. Under its contract with Jungfer, Microporous was prohibited from using Jungfer's trade secrets to sell PE separators in Europe. Daramic acquired Jungfer in 2001 and attempted to enforce the trade secrets clause against Microporous, to prevent Microporous from installing PE production lines in Europe. IDF 760-65.

[31] The memorandum, titled "MPLP Strategic Mandates," was from the Microporous Board of Directors to Microporous' President Mike Gilchrist. Describing the company's strategic objectives for 2008, the Board wrote that, "[o]ther than filling the 2nd line in Austria, the Board does not endorse a pure PE growth strategy competing head-to-head with larger competitors (i.e. Daramic, Entek). Some exceptions may be made to this . . . but these and any other exceptions must be approved by Board on a case-by-case basis." RX0401.

There is also no question that Daramic perceived Microporous as a serious competitive threat in the SLI market. As early as January 2004, Daramic's head of worldwide sales, Mr. Roe, alerted the sales team that JCI might soon be pursuing automotive opportunities and that it had "become critical that we assess the true sales situation of [Microporous'] Cell-Force product." IDF 681 (quoting PX0244; Roe, Tr. 1248-51). By 2007, Daramic believed that Microporous was a serious competitive threat and that it had the potential to capture as much as 20 to 25 msm of Daramic's business in 2009 and an even larger share in 2010. IDF 807. Responding to a request concerning Daramic's 2008 budget and long range plans, Mr. Roe stated that "2008 will be the most challenging year ever faced by Daramic," that Daramic was "beginning to feel the real effects" of price competition and Daramic's past performance issues; and that, "unlike prior years, we have a true legitimate big competitor entering the market [Microporous] and for sure they will capture volume whatever it takes."[32] IDF 435 (citing PX0482 at 2); IDF 809 (quoting PX0238 at 1; PX0922 at 362-63, *in camera*; Roe, Tr. 1302-03). Collectively, this evidence demonstrates that Microporous was a participant and actual competitor in the North American SLI separator market.

2. Complaint Counsel Failed to Prove That Microporous Was a Participant in the UPS Separator Market

In 2007, Microporous began developing a PE separator to compete with Daramic's Darak product, a non-PE separator made in Germany, as part of a research effort known as Project LENO.[33] IDF 244. Based on the status of Project LENO at the time of the acquisition, the ALJ concluded that Microporous was a potential competitor "poised" to enter the North American UPS separator market and was a "substantial factor" in that market. ID at 258-59.

Respondent disputes this, claiming that Microporous' research effort was unsuccessful and failed to lead to a commercially viable product. RAB at 27-28. Respondent also argues that Project LENO focused on developing separators for gel batteries primarily for European customers. *Id.* Thus, even if successful, the research would have had no impact on a North American market for flooded lead-acid UPS battery separators. *Id.* Complaint Counsel counter by arguing that Project LENO included the development of a "white PE" separator for flooded lead-acid UPS batteries, and that Microporous was testing a UPS product it expected would generate substantial revenues as early as 2008. CCAB at 8, 20-21.

We find that the evidence is not sufficient to prove that Microporous was a participant in the UPS battery separator market. Unlike in the SLI market, Microporous had not developed a commercially viable separator to offer North American UPS customers, nor had any customer qualified or come close to qualifying a Microporous UPS separator. There is also no indication that Daramic perceived Microporous as a

[32] Likewise, there is evidence that Entek also considered Microporous to be a competitive threat in the SLI market. IDF 436; Weerts, Tr. 4517, *in camera*; PX1832 at 26-27, *in camera*.

[33] Respondent maintains Darak has never been sold for use in flooded lead acid batteries in North America. RAB at 28.

competitive threat in the UPS market, or that it reacted by competing more aggressively in the UPS market. In addition, while Project LENO did evolve to include research related to the development of a white PE separator for UPS batteries, the evidence suggests that the success of Project LENO was in doubt. The ALJ relied primarily on the testimony of Microporous' Director of Research & Development, George Brilmyer, to find otherwise. Based on Mr. Brilmyer's testimony, the ALJ concluded that the Microporous team believed it had found a solution to the "black scum" problem and that EnerSys planned to switch to the Microporous white PE product for its flooded lead-acid UPS batteries when it was qualified. IDF 622-24. The ALJ determined that, with Project LENO, Microporous "would likely have been in the [UPS separator] market within one year without the additional expenditure of sunk costs of entry." IDF 420. However, Mr. Brilmyer had left the merged company by August 2008 and testified he did not know the current status of the EnerSys tests on the white PE separator. Brilmyer, Tr. 1857. He also acknowledged that testing often takes years, the industry had been seeking a solution to the black scum problem for a long time, and Daramic was still working on a possible formulation when he left the company in August 2008. *Id.* at 1847, 1887, 1908. Moreover, Mr. McDonald, Microporous' Director of Sales, testified that when samples of a white PE product were provided to EnerSys in the summer of 2007, the testing ran into problems and could not be conducted in actual batteries. McDonald, Tr. 3866-68, *in camera*. Mr. McDonald also testified that an additional sample was provided to EnerSys in July 2008, but his understanding of the status of the project at the time of trial was that there is "no advantage with the white PE versus the PE they are already purchasing from Daramic." McDonald, Tr. 3869, *in camera.*

Considering the record as a whole, and in light of the evidence regarding entry barriers in this industry discussed below, we conclude that the evidence does not support the ALJ's conclusion that Microporous was a participant in the North American UPS market.

3. Entek Was Not a Participant In Either the Motive or Deep-Cycle Market

Of the four relevant markets, the ALJ concluded that Entek was a participant only in the SLI market. IDF 382-83, 392, 403, 421, 1027-30. Specifically, the ALJ found that Entek was committed to an SLI-only strategy, and that its past refusals and disinterest in response to customer invitations to supply non-SLI separators showed it did not intend to participate outside the SLI separator market. IDF 378-81, 394-98, 421, 1029-30.

Respondent initially argued that Entek was an uncommitted entrant in the deep-cycle and motive markets because it had previously sold separators for deep-cycle and industrial applications and could quickly shift supply to these applications in response to a price increase. RAB at 5-6, 28. Respondent also maintained that Entek had substantial excess capacity at the time of the acquisition and was discussing sales of deep-cycle and industrial applications with EnerSys, Exide and JCI. *Id.* at 28. In connection with its Third Motion to Reopen the Hearing Record, Respondent purported to present new evidence showing that "a competitor of [Daramic], which Respondent believes to be Entek . . . is providing separators for deep-cycle and motive applications to North

American customers, in direct competition with Daramic." Brief in Support of Third Motion to Reopen at 1. Accordingly, Respondent now argues that Entek is an actual competitor in both the motive and the deep-cycle markets and that the ALJ erroneously concluded that the acquisition resulted in mergers to monopoly in those two markets. *Id.* at 2.

We disagree. There is no evidence that Entek is currently supplying separators for motive or deep-cycle batteries. Nor is there evidence suggesting a likelihood of timely entry by Entek in either market. Entek exited the motive market over ten years ago, deciding to focus on thin separators such as those used in SLI applications. IDF 1027, 1029. Prior to the acquisition, Entek declined numerous opportunities to re-enter the motive market.[34] IDF 395, 397, 1032, 1034. Although Entek had excess capacity in 2008,[35] and appears, at least initially, to have considered potential motive opportunities, the evidence does not show that Entek is likely to provide a rapid supply response. IDF 399. For example, while Entek responded to Exide's November 2008 request for proposal to supply motive and UPS separators, Entek explicitly stated that Exide would have to pay for tooling and that it could not guarantee a competitive price. IDF 1035. These were important issues to Entek. IDF 1035 (citing Gillespie, Tr. 3129-30, *in camera*). At the time of trial in June 2009, Entek still had not run any material and did not know what the costs or pricing would be for industrial separators. IDF 1037; Weerts, Tr. 4509, 4527, *in camera.* Moreover, Exide estimated that testing separators for motive or stationary applications would take approximately two years. Gillespie, Tr. 2973-74.

Entek also had discussions with EnerSys, but here too the evidence does not show that Entek is a participant in the motive market. EnerSys first approached Entek at an industry conference in May 2008 about potential production of motive separators. IDF 1041. While indicating initial interest at the conference, Entek failed to return a signed non-disclosure agreement, which was the prerequisite for further discussions, despite numerous follow-up e-mails and telephone calls from EnerSys. *Id.* Then, shortly before trial, Entek submitted an offer for approximately 1,000 square meters of one profile of industrial product where EnerSys required six msm of that profile. IDF 1042. EnerSys determined that Entek's profile would not work for its North American products, and it had no plans to order PE separators from Entek. IDF 1042-43. Moreover, even had the parties decided to proceed further, six to eight months of preliminary testing on pre-production samples would have been required, and production testing would have taken another two and a half years. IDF 1044.

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[34] Likewise, when Crown Battery asked Entek if it could supply industrial PE separators during the Daramic Owensboro strike in August 2008, Entek could not do so because it lacked the proper tooling. IDF 394, 952.

[35] The record shows that Entek had substantial excess capacity in 2008. Much of that capacity was due to an expansion undertaken pursuant to a 2007 MOU under which Entek became JCI's exclusive supplier in North America and Europe. Weerts, Tr. 4472-74, *in camera*; RX0131, *in camera*. The expansion was aimed at SLI separators, not motive or deep-cycle products, and most of the excess capacity was at Entek's UK plant rather than its U.S. plant in Oregon. Weerts, Tr. 4458-59, *in camera*.

The recent evidence submitted by Respondent does not show Entek to be any closer to participation in the motive market. Daramic's CEO, Mr. Toth, stated that, in May 2010, he spoke with a JCI representative regarding "JCI's need for battery separators for industrial applications, including separators for golf cart batteries." Affidavit of Robert B. Toth, ¶ 2 (June 30, 2010), *in camera*. The JCI representative apparently responded that "Entek was willing to produce an industrial separator . . . and had, in fact produced industrial separators."[36] *Id.* at 3. However, in a declaration submitted by Complaint Counsel, Robert Gruenstern, JCI's Executive Director of Product Engineering, stated that JCI does not manufacture motive batteries [redacted]. Declaration of Robert Gruenstern, ¶ 2 (July 12, 2010), *in camera*; *see also* Hall, Tr. 2665.

Respondent also argues that Entek is a participant in the deep-cycle market, pointing to evidence that Entek has considered developing a deep-cycle separator for JCI.[37] RAB at 28. Entek has discussed supplying separators to deep-cycle customers. Prior to the acquisition, Crown Battery discussed purchasing a deep-cycle separator from Entek and expected to test an Entek separator for its deep-cycle batteries in 2009. IDF 1031; Balcerzak, Tr. 4138-39. It appears from Respondent's recent affidavits that Entek recently provided samples to JCI and Superior Battery for testing.[38] However, these discussions with customers are not sufficient to show that Entek is a participant in this market. More than two years after the acquisition, and despite evidence of Daramic's post-acquisition price increases in the deep-cycle market, there is nothing to suggest Entek has entered the deep-cycle market or even qualified a product. At best, the record shows that Entek is testing a product with JCI and Superior Battery, which is not enough to show that Entek is a market participant.

The evidence, in other words, does not show that Entek is in a position to provide a rapid and effective supply response to the exercise of market power by Daramic in the motive or deep-cycle markets. The ALJ therefore correctly concluded that Entek was not a participant in these markets, and the additional evidence that Respondent submitted on reopening does not persuade us otherwise.

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[36] The reference in Mr. Toth's affidavit to "industrial separators" is ambiguous. Daramic has elsewhere used the term "industrial" to refer to a broad range of batteries – basically, all batteries other than SLI and other starter batteries. RX1305 at 7. As a result, it is unclear whether the phrase is intended to refer to separators for motive batteries. The other affidavits submitted by Respondent – all from Daramic employees – clearly refer only to golf cart (*i.e.*, deep-cycle) battery separators. *See* Affidavit of Randy A. Hanschu, ¶¶ 3, 6 (June 29, 2010), *in camera*; Affidavit of Steve McDonald, ¶ 3 (June 28, 2010); Affidavit of S. Tucker Roe, ¶¶ 4, 6 (June 30, 2010), *in camera*.

[37] Although JCI entered into a long-term supply agreement with Entek [redacted] IDF 1046.

[38] *See supra* note 36.

D. REASONABLY LIKELY COMPETITIVE EFFECTS

1. The Acquisition Is Presumptively Illegal in the North American Deep-Cycle, Motive, and SLI Markets

The ALJ concluded that the acquisition was presumptively unlawful in all four relevant markets. In particular, the ALJ found that the merger created a monopoly in the deep-cycle and motive markets, where prior to the acquisition, Daramic and Microporous were the only two market participants. ID at 246-49, 251. The ALJ also found that Daramic entrenched its monopoly position in the UPS market by acquiring the only firm "poised" to enter that market. ID at 259. In the SLI market, the ALJ concluded that Daramic acquired one of its two competitors, recreating the duopoly that existed before Microporous began to compete in that market. ID at 259.

Respondent disputes the ALJ's findings on market definition and Entek's participation in the non-SLI markets, and challenges the ALJ's market concentration findings on those grounds. Respondent also claims that Complaint Counsel failed to make out a *prima facie* case with respect to the SLI market because Microporous did not have SLI sales at the time of the acquisition. Respondent asserts that Complaint Counsel cannot establish a *prima facie* case unless they show an increase in the numerical concentration data. RRB at 18.

As explained above, we find that the ALJ properly defined four relevant markets and concluded that Entek was a participant in only the North American SLI separator market. We also agree that the acquisition was presumptively unlawful in the North American deep-cycle, motive and SLI separator markets. However, we conclude that Complaint Counsel have not met their burden with respect to liability in the North American UPS market because, as discussed above, they have not proven that Microporous was a participant in that market.[39]

Daramic and Microporous were the only participants in the deep-cycle market, with market shares of approximately 90% and 10% respectively. IDF 384-385. The acquisition increased the HHI in the deep-cycle market by 1,891 points, resulting in an HHI of 10,000. IDF 384. Likewise, Daramic and Microporous were the sole participants in the motive market, with market shares of approximately 90% and 10% respectively. IDF 410. The merger raised the HHI in the motive market by 1,663 points, also resulting in an HHI of 10,000. *Id.* The concentration data in both the deep-cycle and motive markets is in itself more than sufficient to create a presumption of illegality in those markets.[40] *See Heinz*, 246 F.3d at 716 (increase in HHI of 510 in a market with HHI of 4,775 created a presumption "by a wide margin"); 2010 HORIZONTAL MERGER GUIDELINES § 5.3.

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[39] We also find that the evidence regarding Project LENO is not sufficient to establish liability under a theory of potential competition.

[40] While we find that the evidence does not support Respondent's assertion that Entek was a participant in the deep-cycle or motive markets, our conclusion that the acquisition is presumptively unlawful in these markets would not differ with a merger to duopoly.

At the time of the acquisition, Daramic and Entek were responsible for all sales in the North American SLI market. IDF 439. The market was highly concentrated, with an HHI of 5,005. IDF 439; *see Heinz*, 246 F.3d at 716 (HHI of 4,775 indicative of a highly concentrated market); 2010 HORIZONTAL MERGER GUIDELINES § 5.3. Although Microporous had not yet made sales in the SLI market, it was actively competing for business and constraining Daramic's prices. IDF 820, 822, 826-28, 833, 849, 850-52. The acquisition eliminated the impact that Microporous had on competition in the market and returned the market to a duopoly controlled by the two long-time incumbents. This evidence is sufficient to create a presumption that the merger was also unlawful in the SLI market.[41] *See Chicago Bridge*, 138 F.T.C. at 1053; *Heinz*, 246 F.3d at 717.

2. There Is Also Evidence of Reasonably Likely Anticompetitive Effects in the Deep-Cycle, Motive and SLI Markets

The ALJ also concluded that the evidence showed a reasonable likelihood of anticompetitive unilateral effects in all four markets and a reasonable likelihood of anticompetitive coordinated effects in the SLI market. We concur with the ALJ's findings with respect to the deep-cycle, motive and SLI markets.

a. Pre-acquisition competition between Daramic and Microporous

Daramic spent many years working to develop a battery separator that would perform effectively in deep-cycle applications. IDF 457. It introduced Daramic DC, its first commercial separator for deep-cycle batteries, in 2002, and an improved product, Daramic HD, in 2005. IDF 459, 476. The evidence shows that Daramic developed its deep-cycle products to compete with Microporous' Flex-Sil rubber separator. IDF 489-90.

Before the acquisition, competition between Daramic and Microporous in the deep-cycle market resulted in lower prices for customers. Donald Wallace, Executive

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[41] In light of our conclusions below that barriers to entry into each of the relevant markets are significant, we find that liability in the SLI market could be premised in the alternative on the elimination of actual or perceived potential competition. Both doctrines apply to mergers that involve concentrated markets with few likely entrants. *Marine Bancorp.*, 418 U.S. at 624-25, 630. Actual potential competition rests on the theory that the merger eliminated a firm that was on the verge of entering the market *de novo* or through a toehold acquisition. *Id.* at 633; *accord Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981); *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255, 1265-70 (5th Cir. 1981). Perceived potential competition rests on the theory that the very presence of one of the merging parties as a potential entrant constrained the exercise of market power by current sellers in the market. *Marine Bancorp.*, 418 U.S. at 624-25. The facts here support liability under both theories. Microporous was the only firm in a position to enter the concentrated North American SLI market and was already bidding for business. Daramic perceived Microporous as a competitive threat and reacted by offering more competitive terms to those customers it believed it could lose to Microporous. Accordingly, even if Microporous was not an actual competitor in the SLI market at the time of the acquisition, the acquisition was nevertheless unlawful. The Agencies analyze acquisitions of potential competitors under the standard horizontal merger framework. 2010 HORIZONTAL MERGER GUIDELINES § 5.1.

Vice President of U.S. Battery, testified that after he told Microporous his company was buying deep-cycle separators from Daramic, Microporous offered a lower price for Flex-Sil. Wallace, Tr. 1927, 1945-46. Mr. McDonald, a Daramic sales manager and former Microporous employee, testified that Microporous had reduced its price in response to customer threats to switch to HD. McDonald, Tr. 3779, 3943. Trojan Battery, U.S. Battery, and Exide were each able to get a price reduction or avoid a price increase from Microporous by threatening to switch at least a portion of their deep-cycle business to Daramic HD. IDF 470, 520, 521, 525, 535.

Pre-acquisition competition between Daramic and Microporous also lead to lower prices for customers in the motive market. Daramic's Vice-President for Sales and Marketing testified that he reduced prices on industrial separators in response to competing offers from Microporous. IDF 583; Roe, Tr. 1265; PX0409. In 2004, EnerSys was able to use a competing bid from Microporous to negotiate a price reduction from Daramic of approximately 14% for its North American motive business. IDF 593. The President of Bulldog Battery, Norman Benjamin, testified that after his company switched its motive business from Daramic to Microporous, Daramic tried to win the business back by offering a lower price. IDF 607; Benjamin, Tr. 3505, 3516. Microporous responded by reducing its price to close to the price Daramic had quoted. Benjamin, Tr. 3516-17. But where Daramic did not face competition from Microporous, it pushed for higher prices. In an internal Daramic email regarding Exide, a Daramic sales executive wrote to his colleague that Daramic should be prepared to push for a price premium, noting that "Since they can't go to Amerace [*i.e.*, Microporous], we can negotiate a little tougher."[42] IDF 600; PX0843 at 1.

Microporous was also planning to expand its production capacity in both Europe and the United States. IDF 773-804. Daramic perceived this expansion as a threat in both the motive and SLI markets. PX0433 at 4; PX2242 at 1, *in camera*. In response, Daramic put together "the MP plan." IDF 820-23; Roe, Tr. 1292-94. Daramic identified East Penn Battery, Crown Battery, and Douglas Battery as customers that were "At Risk via MP." PX0258; Roe, Tr. 1288-90. In the fall of 2007, Daramic offered these customers contracts that would freeze prices in 2009 and limited future price increases to a pre-set formula as part of its "strategy against Amerace." IDF 822; PX0255, *in camera*.

b. Daramic's pre-acquisition intent

Daramic's internal business documents, including the documents given to Polypore's Board of Directors shortly before it met to consider the acquisition, provide convincing evidence of Daramic's pre-acquisition anticompetitive intent. In an effort to minimize the import of these documents, Respondent claims it acquired Microporous "as a means to diversify its product line, gain access to Microporous' rubber technology and enter the niche rubber market, as requested by customers." RAB at 3, 34 & n.23. While

[42] Despite the evidence of the benefits to customers of pre-acquisition competition between Daramic and Microporous, Respondent asserted at oral argument that certain customers supported the acquisition. Transcript of Oral Argument at 71-72. However, the record does not show pre-acquisition customer support for the merger, nor does the record show that, at the time of trial, any customers were better off as a result of the merger.

Daramic was certainly interested in acquiring Microporous' rubber technology and increasing its sales to deep-cycle battery customers, that does not contradict the strong evidence of anticompetitive intent.

Daramic's documents show it was motivated to acquire Microporous at least in part to eliminate a competitive threat in the motive and SLI markets. These documents also show that Daramic saw the acquisition as a profitable alternative to expanding its share in the deep-cycle market through continued innovation and competition with Microporous on price and quality.

Several years before the acquisition, Daramic executives began to express their concerns about competition with Microporous and discuss an acquisition as a defensive strategy. IDF 759; PX0167. Daramic's head of sales sent a memorandum to Daramic's then-CEO, Frank Nasisi, on May 13, 2005, explaining the advantages and disadvantages of acquiring Microporous. PX0433 at 4; Hauswald, Tr. 638; Roe, Tr. 1192. Mr. Roe stated that if Daramic did not acquire Microporous, Microporous "may continue [its] plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins." PX0433 at 4.

Mr. Toth took over as CEO of Polypore in July 2005. IDF 754. Daramic's Vice President, Pierre Hauswald, helped him assess a potential acquisition of Microporous. *Id.* In a cover note on the subject, Mr. Hauswald wrote that [redacted] PX2242 at 1, *in camera*. Internal Daramic emails from 2005 also show that Daramic executives were concerned about Microporous' expansion plans and more vigorous competition in both the motive and SLI markets.[43]

Daramic remained concerned about Microporous' expansion just prior to the acquisition. On October 24, 2007, Mr. Hauswald reported to Polypore's Board on Daramic's due diligence on the proposed acquisition, known as "Project Titan." IDF 854. [redacted] PX0738, *in camera*; PX0203, *in camera*.

On October 4, 2007, Michael Graff, Chairman of the Board, received an advance copy of the Project Titan October 24, 2007 Board presentation that included Mr. Hauswald's speaker notes as part of an interim report on the project. IDF 854. With the exception of the speaker notes and backup slides, the presentation to the Board on

[43] PX0168 (September 21, 2005 email from Pierre Hauswald to Robert Toth, stating that "[Microporous] is a real threat for our business, not only in the industrial market, but, later, in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts expire."); PX0694 (October 14, 2005 email from Frank Nasisi to Pierre Hauswald and Robert Toth, responding to news that Microporous had started construction on a second production line, stating "We must do everything possible to stop this process . . . . The bottom line is that [Microporous] can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth.").

October 24, 2007 was identical to the slides previously provided to Mr. Graff. IDF 859.

PX0738 at 4, *in camera*.

Id. at 8.

Id. at 10. Mr. Hauswald wrote in his speaker notes that without the acquisition,

Id. at 4.

The Board presentation also included a slide describing benefits and synergies from the acquisition. These included

PX0738 at 7, *in camera*.

Id.

PX0823 at 13, *in camera*.

Shortly before the acquisition closed on February 28, 2008, the due diligence team provided the Board with a status report on the acquisition, citing,

IDF 861; PX0464 at 004, *in camera*.

c. Daramic's post-acquisition prices

The evidence also shows that

This evidence is probative of the acquisition's reasonably likely anticompetitive effects and strengthens Complaint Counsel's *prima facie* case.

Approximately six months after Respondent acquired Microporous,

IDF 611, 912-16; PX0950 at 14-15, *in camera*.

IDF 611, 913-915; PX0950 at 14-15, *in camera*. While Respondent is correct that Complaint Counsel did not prove that all customers that received price increase announcements actually began to pay higher prices, the record does show that the announced increases were effective in at least some instances. For example,

IDF 897; PX0950 at 15, *in camera*. Daramic's head of sales testified that

[redacted] Roe, Tr. 1192, 1222. Mr. Roe testified that the price increase applied to Daramic's HD products, as well as separators for SLI and motive applications. *Id.* Similarly, between August and November 2008, [redacted] IDF 898; PX0950, *in camera*. [redacted] IDF 898; Benjamin, Tr. 3503, 3505, 3521-22. By contrast, in the five years immediately preceding the acquisition, Microporous had only increased the price of CellForce to Bulldog Battery by approximately 3%. IDF 613. When asked at trial whether he tried to move his business to a different supplier in response to the price increase, Mr. Benjamin testified that "there is no other supplier, so you're kind of stuck." IDF 614; Benjamin, Tr. 3526.

Additionally, Complaint Counsel's expert credibly testified that [redacted] IDF 920-21; Simpson, Tr. 3213-20, *in camera*. Respondent argues Dr. Simpson [redacted] RAB at 37. However, Dr. Simpson testified that [redacted] Simpson, Tr. 3214-19, *in camera*; PX2068 at 1. We find Dr. Simpson's testimony on this issue persuasive.

This strong qualitative evidence of anticompetitive unilateral effects in the deep-cycle, motive, and SLI markets corroborates Complaint Counsel's already strong *prima facie* case.

3. Anticompetitive Coordinated Effects Are Likely in the SLI Market

The ALJ found that Respondent failed to rebut the strong presumption of likely coordinated effects in a merger to duopoly in the SLI market. ID at 265. Respondent maintains that, because SLI separators are differentiated and sold through large individually-negotiated supply contracts, coordination is unlikely. RAB 39-40.

In a market with high barriers to entry, a merger to duopoly creates a presumption of anticompetitive coordinated effects. *Heinz*, 246 F.3d at 724-25 (finding that the elimination of a third rival would create a "durable duopoly," increasing both the opportunity and incentive for the duopolists to coordinate to increase price); *FTC v. PPG Indus.* 798 F.2d 1500, 1503 (D.C. Cir. 1986) (noting that "where rivals are few, firms will be able to coordinate their behavior either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels"). By eliminating Microporous as a third player in the SLI market, the acquisition increased the likelihood of anticompetitive coordinated effects. A defendant can defeat the presumption of likely coordination with evidence showing structural barriers to coordination in the market. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009). Respondent has not met that burden here.

Respondent is correct that battery separators are differentiated products and, in many cases, sold through large negotiated contracts. Respondent is also correct that these factors make it more difficult for sellers to coordinate on price and increase the incentives for sellers to deviate from any coordinated pricing arrangement. But there is a strong presumption of coordination in a market with only two sellers, and the evidence regarding industry custom and practice supports that presumption here.

Despite product differentiation, price levels and price increases are relatively transparent in the industry. Daramic announces price increases publicly. In 2005, after Daramic announced that it was increasing prices, Daramic's head of sales told his colleagues in an internal email that he had "GREAT NEWS . . . [a]s you can see, Entek has followed our lead. Their increase for thinner (6 mil – 8 mil) backwebs is 4%-5% and the thicker is 7% -10%. I am sure NSG and [Microporous] will follow. We really should not be afraid to ask and get the 6% we announced." PX0235. When Daramic announced its 2009 price increases in the fall of 2008, it did so in a press release. PX0371. Moreover, Daramic's Vice-President, Mr. Hauswald, testified that the separator industry is small enough that sellers are typically able to acquire competitive information from customers in the course of negotiations. IDF 731-33; Hauswald, Tr. 629, 834-40, *in camera*. Based on both the presumption of coordination and the evidence regarding pricing transparency, we conclude that anticompetitive coordinated effects in the SLI market are likely.[44]

E. RESPONDENT'S REBUTTAL EVIDENCE

While we conclude that Complaint Counsel have established a *prima facie* case of likely competitive harm in the North American deep-cycle, motive and SLI separator markets, Respondent can rebut Complaint Counsel's case with evidence that shows that competitive harm is unlikely. *Heinz*, 246 F.3d at 725. Respondent argues that entry and power buyers would counteract any potential anticompetitive effects from the acquisition. We affirm the ALJ's conclusion that Respondent did not satisfy its burden of production.[45]

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[44] Respondent argues that it has lost significant business from JCI and Exide to Entek since the acquisition, demonstrating vigorous competition in the SLI market. RAB at 39. We find otherwise. As an initial matter, JCI entered into a long-term supply agreement with Entek [redacted] before the acquisition, even though the agreement was not effective until JCI's contract with Daramic expired in December 2008. IDF 734, 736. And while Exide did move a portion of its business from Daramic to Entek since the acquisition, the evidence shows that Exide's long-term supply arrangement with Daramic expired, and Exide adopted a strategy of avoiding sole-source arrangements. IDF 744, 747. We do not agree that these events show coordination in the SLI market is unlikely post-acquisition.

[45] At trial, Respondent also argued that evidence of efficiencies and Microporous' financial condition were sufficient to rebut Complaint Counsel's *prima facie* case. ID at 293-300. The ALJ rejected these arguments and Respondent has not raised these arguments in its appeal briefs. However, because Respondent's Notice of Appeal challenges all portions of the ID relating to Count I, we have reviewed the evidence in support of these defenses and agree with the ALJ that Respondent's evidence regarding efficiencies and Microporous' financial condition at the time of the acquisition is not sufficient to show that competitive harm from the acquisition is unlikely.

1. Entry

Even mergers in concentrated markets are unlikely to harm competition where entry is likely, timely and sufficient to alleviate the otherwise likely anticompetitive effects. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998); 2010 HORIZONTAL MERGER GUIDELINES § 9. For entry to constrain the likely harm from a merger that enhances market power, the scale must be large enough to constrain prices post-acquisition. *Chicago Bridge*, 534 F.3d at 429. Respondent's burden is to produce evidence sufficient to show that the likelihood of entry "reaches a threshold ranging from 'reasonable probability' to 'certainty.'" *Id.* at 430 n.10. The history of entry in the relevant markets "is a central factor in assessing the likelihood of entry in the future." *Cardinal Health*, 12 F. Supp. 2d at 56; 2010 HORIZONTAL MERGER GUIDELINES § 9.

The ALJ concluded that entry into the relevant markets is slow and difficult and that neither Asian manufacturers nor Entek were likely to enter the markets and restore lost competition. ID at 283-88. Respondent contends that entry barriers are low and that evidence of likely entry from Asian suppliers and Entek is sufficient to rebut Complaint Counsel's *prima facie* case. RAB at 41-50.

We find that the record does not support Respondent's arguments. In fact, Daramic itself acknowledges the existence of substantial barriers to entry. IDF 928-30. Among other barriers, a *de novo* entrant would face large capital requirements to build a separator plant of sufficient size and scale to operate profitably and service large customers. IDF 924-25, 928-29. An entrant would also have to possess or develop the specialized technological expertise and know-how needed to build and operate a production line. IDF 935-63. Reputation also creates barriers to entry. IDF 970-71; PX0265 at 11. Patent protections and other proprietary information can create additional barriers. IDF 932-34.

Overcoming these entry barriers is a slow process. Design, installation and testing of a PE separator line can take eighteen to twenty months. IDF 974-75, 988-90, 992. Product testing and qualification with customers can last from 18 to 24 months for deep-cycle separators (IDF 1017-24); two to three years for motive and UPS separators (IDF 1011-13); and up to 21 months for SLI separators. IDF 1025. Since many of the steps towards entry must happen sequentially, entry takes several years. IDF 923. The history of entry into the North American separator markets supports our conclusion that entry barriers are substantial. There is no evidence that any firms other than Daramic and Microporous have entered the relevant markets in the past ten years. Daramic's history of entry in the deep-cycle market, and Microporous' history with respect to CellForce, and its motive and SLI separators, show that entry into the relevant markets is slow and costly, and developing a products reputation for reliability with customers is difficult, even for manufacturers with experience in other separator markets. IDF 457-69, 649-51, 684-90, 993-95.

The barriers are even greater for Asian firms. As discussed above, Asian supply is not a competitive alternative for North American customers due to transportation costs, import and export duties, and the increased costs and risks with respect to supply chain

management and warehousing. IDF 286-91, 312-19, 349, 1060. Excluding freight, import duties, and value-added tax, the prices that BFR quoted to EnerSys were more than 10% higher than Daramic's prices. IDF 341, 1096. When transportation costs and taxes are included, the differential is approximately 20%. IDF 341. Mr. Kung, a principal of Chinese SLI supplier BFR, testified that BFR cannot compete in North America because its prices are not competitive and it does not have enough English-speaking staff or capacity to supply North American customers. IDF 321, 336. Accordingly, BFR has no intention of selling PE separators in North America. IDF 343. Asian manufacturers also face higher production costs than North American manufacturers and have a relatively poor reputation for quality and reliability among North American battery manufacturers. IDF 1061, 1065-66, 1075-77, 1082, 1088-89. For example, EnerSys does not perceive Chinese SLI manufacturers BFR and Anpei to be comparable to Microporous in terms of quality or reliability. IDF 1101.

There is also little support for Respondent's contention that battery manufacturers would sponsor Asian entry into the North American market. RAB at 45-50. [redacted] IDF 336, 339, 343, 1111, 1121. The record also shows that EnerSys at one time considered sponsoring development of a PE separator from Alpha Beta, a Chinese manufacturer that provides EnerSys with absorbed-glass-mat separators, but stopped plans to move forward because Alpha Beta lacked the expertise to justify a large capital investment. IDF 1124. Exide and East Penn Battery each testified that they did not intend to sponsor entry by any manufacturer, Asian or otherwise. IDF 1125-26. Nor does the evidence show that Asian firms could enter more quickly because their products have already been approved and qualified by North American customers.[46] While some battery manufacturers have performed preliminary testing on material produced by certain Asian manufacturers, the results have generally not been encouraging, and none of the Asian manufacturers has yet been qualified to provide separators in any of the relevant product markets. IDF 1102, 1061, 1081-83, 1095, 1102.

Significantly, no Asian firm has entered the North American separator market, despite Daramic's post-acquisition price increases. IDF 897-916. In fact, there is no evidence that any Asian separator manufacturer has ever sold separators to North American customers. IDF 346, 349. When Respondent's counsel was asked at oral argument about Asian imports, he stated that there had been "interaction" between North American customers and Asian suppliers, but he could not point to any actual sales or imports into North America, or even the likely prospect of such sales. Oral Argument Tr. at 33-35. Interaction between North American customers and Asian firms is not sufficient to show a likelihood of entry. As we explained in *Chicago Bridge*, mere

[46] Respondent overstates the evidence supporting this argument. RAB at 43. The record shows that in 2003, East Penn tested and approved a separator from Anpei, a Chinese manufacturer, for a small engine battery, such as those used in lawn mowers, though it never purchased any of the separators. IDF 1108; Leister, Tr. 3992, 4032-33; RX0079. Otherwise, the evidence Respondent cites shows only that North American customers have conducted the first steps of the testing and qualification process. IDF 1001, 1004-05.

evidence of customers inquiring about producers' willingness to supply products is not sufficient to establish an entry defense. 138 F.T.C. at 1102.

We also find that the evidence does not support Respondent's argument that entry by Entek is likely to alleviate the anticompetitive effects of Daramic's merger to monopoly in the deep-cycle and motive markets. Entek exited the motive market years ago and has since shown little interest in pursuing opportunities in that market. IDF 398, 1029. To the contrary, it has committed itself to an SLI strategy. *Id.* Entek has acknowledged in post-acquisition commercial communications that it is unlikely to be price-competitive in other markets. IDF 1035; Gillespie, Tr. 3040, *in camera;* Weerts, Tr. 4509, *in camera.* An Entek representative testified that Entek would face costly technical difficulties producing the thicker non-SLI separators. IDF 1030; Weerts, Tr. 4515-16, *in camera.* These price and cost considerations suggest not only that Entek is unlikely to enter the motive market, but that if it did, entry would not be sufficient to constrain Daramic's pricing unless or until these disadvantages were overcome. Moreover, Entek would also face the delays associated with qualification, which, for motive separators, are particularly lengthy. IDF 402, 1011-13; Gillespie, Tr. 3038-39, *in camera.*

Additionally, while recent evidence suggests that Entek is taking some steps to enter the deep-cycle market, there is no evidence that Entek's separators have been qualified. Qualification in deep-cycle markets typically takes between eighteen and twenty-four months. IDF 1018-24. Even if we assume that Entek's deep-cycle products will be qualified and that Entek eventually will enter the market, Daramic's own history of entry in the deep-cycle market suggests it will take several years before Entek's participation in the market would restore lost competition. IDF 993. Thus, evidence of Entek's recent steps towards entering the deep-cycle market is not sufficient to show that a merger to monopoly in the deep-cycle market is not likely to cause substantial competitive harm.

2. Power Buyers

Respondent argues that large buyers like JCI, Exide, EnerSys, and Trojan Battery will prevent the exercise of market power that Daramic gained through the acquisition. RAB at 4-5. However, even large and sophisticated customers cannot alleviate the anticompetitive effects of a merger if the customers have no competitive options. Buyers now face a monopoly in the deep-cycle and motive markets. JCI, Exide, EnerSys, and Trojan Battery each testified that they have no alternatives to Daramic in these markets. IDF 206, 210, 555, 574, 579; Hall, Tr. 2703-07. Although Respondent argues that large customers have demonstrated their past ability to constrain prices, the evidence shows that buyers previously negotiated lower prices by relying on the competition between Daramic and Microporous that no longer exists. IDF 523, 562, 529, 593-95. The evidence shows these customers now lack any leverage with Daramic and are paying higher prices post-acquisition. IDF 555-57, 574. The evidence also fails to show that these putative power buyers have leverage in the SLI market. The post-acquisition supply proposals to Exide are less favorable on pricing than what Exide was paying pre-

acquisition.[47] IDF 903-05. Overall, Exide's analysis shows that it will "pay more, in the millions of dollars more" for its separator supply in 2010 than it would have had to pay in the pre-acquisition environment. Gillespie, Tr. 3049-50, *in camera*.

While some customers have continued to bargain with Daramic for lower prices, a customer's struggle to avoid immediately acceding to a price increase does not render it a power buyer. The mere failure to acquiesce silently is hardly equivalent to a successful constraint of market power. Here, buyers typically responded to announcements of price increases by asking Daramic to justify the price increase or seeking to engage in negotiations to reduce its size,[48] but this is far from a showing of any substantial constraint on price. Similarly, even when customers attempted to use stronger tactics, they remained unable to avoid Daramic's price increases.[49]

Moreover, even if we were to assume that the four claimed power buyers somehow would be able to avoid price increases as a result of their size and sophistication, there is no reason to believe that other Daramic customers would fare as well. Separator sales are individually negotiated for each customer, and the separators are manufactured with customer-specific designs. IDF 117. In these circumstances, smaller buyers would not be protected by the resistance offered by larger, more powerful customers. *See, e.g.*, *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (large customers that could protect themselves would not shelter smaller buyers from increased prices); *FTC v. Bass Bros. Enterprises, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 66,041 at 68,616 (N.D. Ohio 1984) (large buyers could not protect remainder of purchasers).

VII. REMEDY

To remedy Respondent's violation of Section 7, the ALJ ordered complete divestiture of Microporous' assets, which included the manufacturing plants in Piney Flats and Feistritz, as well as the line in boxes. ID at 330-31; Order at ¶¶ I.AA, II.A, II.B. The divestiture also included any technology and intellectual property that Microporous owned before the acquisition, along with additions or improvements that Respondent made to those assets since the acquisition. ID at 338; Order at ¶ II.A. To ensure a divestiture buyer could continue operating the Piney Flats and Feistritz plants without

[47] The other putative power buyers do not have a recent pricing history with Daramic for SLI separators. EnerSys and Trojan Battery do not sell SLI batteries. IDF 56-57, 60. JCI's SLI business is covered by a 2007 exclusive contract with Entek. IDF 734, 736.

[48] In the deep-cycle market, Daramic announced a post-acquisition price increase of 15% on CellForce and 13% on Flex-Sil despite a contract that limited price increases. Trojan responded with a counterproposal accepting only much smaller increases. Daramic reduced its announced increase only slightly, to 13% on CellForce and 10% on Flex-Sil. When no agreement was reached, Daramic sued Trojan. The dispute had not been resolved as of the time of trial. IDF 557-60.

[49] EnerSys and Exide have short-paid invoices in response to price increases but have no choice but to pay the increases when Daramic threatens to cut off supply. IDF 562-63 (in the post-acquisition deep-cycle market, Exide ultimately agreed to pay a surcharge); IDF 205-06 (in the motive market, at the time of the trial, Daramic was seeking price increases that EnerSys would have no choice but to pay if Daramic threatened to cut off supply).

disruption, the ALJ also ordered Respondent to grant the acquirer a perpetual, worldwide, royalty-free license to Daramic technology that Respondent used at these manufacturing facilities. ID at 338; Order at ¶ II.C.4. Respondent was ordered to agree that it would not sue the acquirer to block access to technology that Respondent owned at the time of divestiture, where the lawsuit would interfere with the acquirer's ability to compete in the relevant markets. ID at 338; Order at ¶ II.F.1. The ALJ also ordered other ancillary relief to support the divestiture and restore competition that was lost as a result of the acquisition.[50] ID at 339-41.

Assuming liability, Respondent argues that divesture of the Feistritz plant is not necessary to restore competition in North America. RAB at 50-56; RRB at 16-17. Respondent also challenges the portion of the ALJ's order requiring it to grant the acquirer a license to certain Daramic intellectual property used since the acquisition. Respondent also takes issue with two of the ancillary provisions: Paragraph VI, regarding customer contracts executed after the acquisition, and Paragraph V.B.1., regarding maintenance of the Microporous workforce. RAB at 57-58.

The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. *See Evanston Northwestern*, Comm'n Op. on Remedy at 3 (Apr. 28, 2008), *available at* www.ftc.gov/os/adjpro/d9315/080428commopinionon remedy.pdf; *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972). We recognize that complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961); *Chicago Bridge*, 534 F.3d at 441. Moreover, because Complaint Counsel have established a strong case of liability in three of the relevant markets, any doubts as to remedy should be resolved in favor of broader relief. *See E.I. du Pont de Nemours*, 366 U.S. at 334; *Chicago Bridge*, 138 F.T.C. at 1164.

In accordance with these well-established principles, we conclude that complete divestiture is the most appropriate remedy. As discussed in more detail below, complete divestiture provides the greatest likelihood that the asset package will restore competition and be sufficiently viable to readily attract an acceptable buyer. We therefore order Daramic to divest all the assets it acquired from Microporous, including the plant in Feistritz. We also adopt the remaining provisions of the ALJ's Order with certain modifications.

A. DIVESTITURE

The Commission is "clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist." *FTC v. National*

[50] Paragraph III of the Order provides for the appointment of a Monitor Trustee to ensure compliance with the Order. Paragraph IV provides for a divestiture trustee in the event Respondent does not divest within the required time frame. Paragraph V requires Respondent to maintain the Microporous assets pending divestiture. Paragraph VI requires Respondent to permit customers to reopen and negotiate or terminate contracts entered into by Daramic after its acquisition of Microporous. Paragraph VII relates to Count II and is not at issue on appeal. Paragraph VIII prevents Respondent from introducing any battery separator using the Microporous cross-linked rubber technology for a period of two years following the divestiture.

Lead Co., 352 U.S. 419, 428 (1957). In the exercise of that discretion, the Commission may order divestiture of assets outside the relevant market where divestiture of those assets is necessary to restore competition within the relevant market. *See Chicago Bridge*, 138 F.T.C. at 1163-64 (ordering divestiture of assets for building water tanks although the relevant product market was cryogenic tanks, because cryogenic tank sales were irregularly timed and water tank sales would provide the regular income stream needed for the divestiture buyer's viability), *aff'd*, 534 F.3d at 442. We find that complete divestiture of the former Microporous battery separator business, including the Feistritz plant, is warranted here.

As an initial matter, a divestiture package that includes the Feistritz plant will allow the acquirer to maintain sufficient capacity at the Piney Flats facility to ensure that it can effectively compete for business in North America. Prior to the acquisition, Microporous produced CellForce for its foreign customers at its Piney Flats plant, which constrained its capacity to compete for additional business within North America. IDF 769, 795. In 2005 and 2006, the CellForce line at Piney Flats was operating at full capacity. RX0741 at 65; Trevathan, Tr. 3667-68. As a result, Microporous was unable to respond to new North American customer demand. For example, EnerSys was using CellForce in Europe but was unable to obtain CellForce for North America because of this capacity constraint. Axt, Tr. 2126. Similarly, Trojan Battery's ability to expand its use of CellForce for its deep-cycle batteries was limited by the capacity constraint at Piney Flats. Godber, Tr. 276. Once the Feistritz plant was under construction, Microporous became a more vigorous competitor in North America. Microporous was able to commit to additional North American CellForce sales to EnerSys, Trojan Battery, and U.S. Battery. IDF 787, 1280; Godber, Tr. 226-27; PX1741 at 4, *in camera*. Microporous also entered into discussions with other battery separator customers who had not yet made purchase commitments at the time of the acquisition. IDF 797.

Absent divestiture of the Feistritz plant, an acquirer is likely to face the same capacity constraint Microporous faced before it constructed the Feistritz plant. CellForce production in 2008 totaled nearly [redacted]. RX0677, *in camera*. Microporous' backfill efforts that began after 2008 led to additional commitments from EnerSys, Trojan, and U.S. Battery that would have added more than 3.3 msm to sales. RX0207, *in camera*; Godber, Tr. 226-27; PX1741, *in camera*; Wallace, Tr. 1977; Qureshi, Tr. 2037. The 2008 production plus the additional commitments exceeded the Piney Flats plant's CellForce capacity of 11 msm. RX0561, *in camera*. Beyond the existing commitments, Microporous executives had no doubt they would be able to backfill the remaining freed capacity at Piney Flats after production for European customers was transferred to Feistritz. Microporous' President at the time of the acquisition testified that in 2007 "we had more offers for business than we were going to be able to handle under the scenario of backfilling." Gilchrist, Tr. 344. Because the purpose of any divestiture is to create an effective future competitor that would restore lost competition, it is important to avoid saddling the divestiture buyer with capacity constraints that would hinder its ability to seek future sales and limit its competitive significance in the relevant markets.

Respondent argues that even if Piney Flats does not provide the acquirer with enough capacity to compete effectively in North America, divestiture of the line in boxes

is the proper solution. We disagree. The line in boxes is not yet operational at Piney Flats. IDF 1269. Although design and planning work has been done and much of the long-lead equipment has been acquired, not all of the necessary equipment is on hand. IDF 775, 1268. As of the time of the trial, no work had been done to install the line. IDF 777. On average, it takes about four months to install equipment and about two months to start up and debug a separator line. IDF 975. Even after installation, more time will be necessary for the line to operate efficiently, and it will take six months to fully train the manufacturing line workforce. IDF 985. The acquirer would also need time for customers to qualify any material produced on the new production line. Gilchrist, Tr. 322-23, 348. Thus, the line in boxes would not provide the acquirer with the timely or certain production capacity it would need to compete effectively in North America when the order takes effect. Moreover, while the line in boxes and the CellForce line at Piney Flats would provide sufficient capacity to produce the current worldwide volume of CellForce, if that capacity were largely employed to produce CellForce for motive and deep-cycle customers, the acquirer would not have meaningful capacity to compete for SLI business with either CellForce or a pure PE separator, as Microporous was doing at the time of the acquisition.[51]

In addition to eliminating the capacity constraint in North America, a divestiture package that includes the Feistritz plant will also allow the acquirer to offer North American customers benefits they find attractive, and that Microporous would have offered absent the acquisition. The evidence shows that some customers prefer suppliers with multiple plants as insurance against supply disruptions at any one location. IDF 313 (finding that EnerSys imported separators from Daramic's Feistritz plant for use in Mexico during a 2008 strike at Daramic's Owensboro plant); Hauswald, Tr. 1073-74 (describing how Daramic shifted production from Owensboro to Piney Flats to partially compensate for the strike at Owensboro). EnerSys, Trojan Battery, Exide, and Crown Battery all testified that it was important to have a supplier with more than one plant for an essential input like a separator. IDF 1273; Axt, Tr. 2129-31; PX1660 at 2-3; Godber, Tr. 225-26; Gillespie, Tr. 2993; Balcerzak, Tr. 4125-26. Indeed, when Microporous had only the plant in Piney Flats, EnerSys would not commit to additional volume unless Microporous had another manufacturing facility. IDF 1277. Daramic itself considers multiple plants an advantage and emphasizes its multi-plant operations as a selling point to customers.[52] Roe, Tr. 1318.

Customers also prefer suppliers with global operations. Two of Microporous' largest global customers expressed their preference to work with a supplier that can provide local supply for their global operations. Larry Axt, Vice-President of Global Procurement for EnerSys, testified that his company had large manufacturing operations in both Europe and North America, and he preferred to do business with a supplier that

[51] The capacity of the line in boxes is 11 msm, which can be used for either CellForce or a pure PE separator. PX0063 at 3. The CellForce line in Piney Flats, plus the line in boxes, would provide capacity of 22 msm.

[52] Respondent now argues that customers could gain equivalent protection through other steps such as acquiring and holding backup supplies. This, however, would increase the customers' warehousing and inventory costs and make it more difficult for the supplier to compete effectively.

could provide supply locally to both regions. Axt, Tr. 2108-09. Although EnerSys does more business in Europe than in North America, it is the largest producer of industrial batteries in the world, with three plants producing motive batteries located in North America. IDF 56-59, 278. Similarly, Melvin Gillespie, Vice-President of Global Procurement for Exide, testified that because Exide has large operations in both North America and Europe, a Microporous with production capacity in both North America and Europe "would be the best model for us." Gillespie, Tr. 3131-3132, *in camera*. Exide is also one of the largest buyers of battery separators in the world. IDF 52-55. At the time of the acquisition, Microporous was able to offer all its customers the insurance of multiple plants and the cost advantages associated with global operations. These attributes would have made Microporous a more attractive option for North American customers, and a more effective competitor in the relevant markets. Divestiture of the Piney Flats plant alone, even with the line in boxes, would not restore the more attractive competitor lost through the unlawful acquisition.[53]

Respondent also claims that a divestiture package that includes the Feistritz facility will not be viable in the marketplace because Feistritz is currently operating at a loss. According to Respondent, an order that requires divestiture of Feistritz without a minimum price is punitive. RAB at 56. We agree with Respondent that we must consider the viability of the asset package in the marketplace. We conclude, however, that excluding Feistritz from the divestiture package creates the greater risk to marketplace viability. As we explain above, a divestiture package that does not include the Feistritz plant will not provide the acquirer with sufficient capacity to expand in the North American markets for motive and SLI separators. Moreover, since the acquisition, Daramic has transferred CellForce production for EnerSys' foreign plants from its Piney Flats plant to Feistritz, which Microporous was planning to do at the time of the acquisition. Gaugl, Tr. 4569-70; Trevathan, Tr. 3762-63. EnerSys is also currently an important CellForce customer in North America. Axt, Tr. 2099-2101, 2108. Excluding the Feistritz facility from the divestiture package would result in a buyer acquiring the entire CellForce business, including the EnerSys contracts, but not the production facilities that Daramic currently operates to fulfill those contracts. Without both production facilities, the associated disruption to the ongoing CellForce business will likely diminish rather than enhance the marketability of the former Microporous business.[54]

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[53] Respondent also contends that because Microporous was "viable" before operations at Feistritz commenced, a divestiture buyer would not need the Feistritz plant for viability. But even if that were true, Respondent's contention is beside the point. Creating a firm whose operations are merely viable would not fully replicate the competition that Daramic unlawfully eliminated.

[54] *See* FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (Apr. 2, 2003), *available at* http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm. In policy guidance materials, the Commission's Bureau of Competition has stated that divestiture of an autonomous ongoing business increases the likelihood that a divestiture package will be viable and sufficient to restore competition in the relevant market because it requires the agency to make the fewest assumptions about the market and its participants. This same logic applies with even greater force to this consummated merger, where we know for a fact that Microporous, as it was constituted in February 2008, was a marketable business. *See*

Finally, Respondent argues that the Feistritz divestiture is unjustified because the plant was not in operation at the time of the acquisition. But the Feistritz plant was in operation and producing commercial output within a week of the acquisition. IDF 1266. At the time of the acquisition, Microporous had employees in place and was testing the components of the production lines. IDF 1265. And, as discussed above, the backfill efforts associated with Microporous' planned expansion impacted competition in North America for at least several months prior to the acquisition as they allowed Microporous to secure additional business.

We thus conclude that complete divestiture of Microporous, including the Feistritz plant, is necessary to restore lost competition to the relevant North American markets.

B. ANCILLARY RELIEF

Respondent contests three additional provisions in the ALJ's Order. Respondent first objects to the requirement that it maintain a workforce equal to that in place at the time of the acquisition. RAB at 56, n.33; Order at ¶ V.B.1. Respondent explains that the workforce has already dropped below the February 2008 level due to the recession, efficiencies implemented at the Piney Flats plant, and employees that have quit. *Id.* Paragraph V.B.1. is designed to prevent Respondent from depleting the workforce once a divestiture is ordered. It does not appear that Daramic had any general incentive to deplete the Microporous workforce in a manner that might adversely impact the viability and competitiveness of the Microporous business prior to the date of the Order, March 1, 2010. Accordingly, we modify Paragraph V.B.1. to require that Respondent maintain a workforce that is at least equivalent in size, training, and expertise to what was associated with the former Microporous as of March 1, 2010.

Respondent also objects to the scope of post-acquisition customer contracts that are terminable pursuant to Paragraph VI.A. The ALJ's Order allows customers to reopen and negotiate or terminate Daramic contracts that reflected the exercise of post-acquisition market power. Respondent objects to the ALJ's definition of "Terminable Contracts" because it would include contracts entered into by Daramic prior to the acquisition that are in effect between the date of a final order and the effective date of the divestiture. RAB at 57. Complaint Counsel agree that pre-acquisition contracts should not be terminable so long as post-acquisition changes to such contracts remain terminable. CCAB at 61. We therefore modify the definition of "Terminable Contracts" to exclude contracts entered into by Daramic prior to the acquisition, while preserving the customer's ability to terminate post-acquisition modifications to such contracts.

Finally, Respondent objects to Paragraph II.C.4. of the ALJ's Order, which requires that it grant to the divestiture buyer a license to certain intellectual property that

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Chicago Bridge, 138 F.T.C. at 1164 ("[W]hat we know with certainty is that this combination of assets has made a saleable package in the past."); *RSR Corp.*, 88 F.T.C. 800, 894 (1976) ("[A]bsent clear proof, which is generally likely to come only at the compliance stage when a good faith effort to divest has been made, the presumption should be that an acquired competitive entity can be viably restored to its pre-acquisition status.").

was owned or used by Daramic *prior* to the acquisition. RAB at 57. Complaint Counsel have clarified that they interpret the definition as only including such "intellectual property that Respondent *voluntarily* chose to use in and commingle with Microporous' operations." CCAB at 61 (emphasis in original). The license is not, therefore, meant to extend to all of Respondent's pre-acquisition intellectual property, but only to such intellectual property as Respondent may have chosen to use or incorporate in Microporous operations or Microporous battery separators during the course of the investigation, litigation, and pending divestiture.

We retain the licensing provision because it protects the divestiture buyer from having to, in effect, remove any improvements or alterations that Respondent has incorporated in the products by using Daramic pre-acquisition intellectual property. Removal of the incorporated intellectual property could adversely impact customers of the divestiture buyer and undermine the divestiture buyer's reputation. In addition, the threat of removal could harm sales of the battery separators that would be divested if customers were to perceive that such improvements would be removed from products delivered after divestiture. However, we modify the definition of "Shared Intellectual Property" to make it clear that not every "Retained Asset" is included in the license to the divestiture buyer. The scope of the license extends only to such intellectual property that the Respondent chose to use or incorporate in the operations or separators that will be divested.

In the Matter of
POLYPORE INTERNATIONAL, INC.,
a corporation
Docket No. 9327

Concurring Opinion of Commissioner J. Thomas Rosch

I concur with the Commission's thorough and well-reasoned decision finding that Daramic's acquisition of Microporous violated Section 7 of the Clayton Act. I also concur with the Commission's conclusion that only complete divestiture will remedy this violation. I write separately to describe an alternate analytical framework that would focus on the competitive effects of this transaction instead of focusing initially on defining the precise contours of the relevant market and only then considering the transaction's competitive effects.

I also write separately to address Daramic's assertion that the Commission should consider first and foremost the testimony of the economic expert it retained and the economic tools described in the Horizontal Merger Guidelines in defining the relevant market. I would focus instead on the direct evidence of competitive effects, including the parties' motives for the merger and their post-merger behavior, and let that direct evidence define the market that is relevant in this case.

I. THE LAW

The Commission's decision acknowledges that both the courts and the Commission have recognized that the traditional burden-shifting framework that begins with defining the relevant market "does not exhaust the possible ways to prove a § 7 violation on the merits." Opinion at 11 (quoting *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.)). Nevertheless, the Commission's opinion embraces a traditional analytical framework in this case, including precise upfront market definition. Opinion at 10-11.

The ultimate inquiry in this case, as in any Section 7 case, is whether the transaction is likely to result in anticompetitive effects, not what the precise metes and bounds of the relevant market are. In rule of reason cases brought under Section 1 of the Sherman Act, the courts have long analyzed the analogous issue of whether it is appropriate to determine the lawfulness of completed or ongoing conduct by evidence of anticompetitive effects, rather than by requiring precise upfront market definition. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *Ball Mem'l Hosp. v. Mut. Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) ("*Toys 'R' Us* [and] *Indiana Federation of Dentists* . . . stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power—in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.").

In that context, the courts have recognized that the purposes of market definition, on the one hand, and direct evidence of anticompetitive effects, on the other hand, are consistent—

both techniques seek to determine whether an agreement by competitors is likely to facilitate the exercise of market power, or whether a completed agreement has enabled the exercise of market power. *See Toys "R" Us*, 221 F.3d at 937. Thus, for more than a decade, scholars have declared that in Section 1 rule of reason cases, market definition is not an end in itself but rather an indirect means to assist in determining the existence or likelihood of the exercise of market power. *See* IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 532a, at 242-43 (3d ed. 2007); Herbert Hovenkamp, *Federal Antitrust Policy* § 12.8, at 550 (3d ed. 2005). Put differently, both the courts and scholars have recognized that in Section 1 rule of reason cases, market definition is a tool for analyzing market power, but it is not the only tool, either as a matter of law or economics.

There is no principled reason why the same analysis should not be used in Section 7 cases. Indeed, two decades ago, Judge Posner observed that judicial interpretation of Section 1 of the Sherman Act and Section 7 of the Clayton Act had converged. *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1281-83 (7th Cir. 1990); *see also* IV Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 913b (3d ed. 2009) ("In cases where a merger facilitates a significant 'unilateral' price increase for a grouping of sales that was not an obvious relevant market prior to the merger, the appropriate conclusion is that the merger has identified a new grouping of sales capable of being classified as a relevant market. This formulation meets the statutory requirement [in Section 7] that the 'effect' of a merger is anticompetitive in some 'line of commerce' and in some 'section of the country.'"). At the same time, Judge Thomas (now Justice Thomas) emphasized in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990), that the ultimate inquiry in a Section 7 case is whether the transaction is likely to result in anticompetitive effects, not simply to define the relevant market.

This is not to say that one can avoid defining the relevant market altogether. As the passage from Areeda & Hovenkamp makes clear, the text of Section 7 requires identification of the "line of commerce" and the "section of the country" that are likely to suffer anticompetitive effects as a result of a transaction. *See also Republic Tobacco,* 381 F.3d at 737 (in Section 1 cases, an antitrust plaintiff cannot "dispense entirely with market definition" but it is sufficient that the "rough contours" of the market be identified). In the case of a consummated merger, which this is, there is generally no need to predict whether the transaction is likely to result in anticompetitive effects because that will be apparent from what has actually occurred. When that is so, the competitive effects themselves may define the relevant market. Thus, at least in a case like this, market definition cannot properly be considered a gating item in the sense that competitive effects cannot be considered before the market is defined. Indeed, in the case of a consummated merger, the relevant market may generally be defined after the effects of the transaction are identified.

The authorities on which Daramic relies are not to the contrary. Daramic asserts, for example, that market definition is a "critical" requirement in antitrust cases generally, and it cites seven cases supporting that assertion. RAB at 9. That is correct, but it does not mean that the relevant market must necessarily be defined with precision upfront. Daramic also contends that Complaint Counsel bears the burden of proving the relevant market. *Id.* That is true too, but it does not mean that Complaint Counsel cannot bear this burden, at least in a consummated merger case, by proving that the challenged merger resulted in anticompetitive effects. In fact,

that is just what former Chairman Muris contemplated when he said that in a consummated merger case, "it's not enough to assert that the transaction was anticompetitive – you have to prove it." *Id.* at 9 n.7 (quoting *Interview with Timothy Muris*, Global Competition Review, Dec. 21, 2004).

Daramic repeatedly assails the ALJ's reliance on statements of the parties and other participants in the market, including customers, instead of on "economic" or "econometric" evidence. *Id.* at 1, 6-7, 9-24. Specifically, Daramic urges that the testimony of Complaint Counsel's expert be disregarded because he relied on "soft" qualitative evidence instead of "rigorous" economic tests like the "hypothetical monopolist test," the SSNIP test, and the Elzinga-Hogarty test. *Id.* at 1, 6-7, 10-15, 19-21, 23-24. Similarly, Daramic urges that the testimony of its own expert must be credited because it was "grounded" in such economic theories. *Id.* at 15-16, 21, 23-24.[1] In the same vein, at pages 10 and 16 of its appeal brief, Daramic describes as a "46-year old" historical relic the Supreme Court's decision in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), in which the Court specifically blessed the use of "practical indicia" of the market, like the views of market participants, to define the relevant market.[2] Presumably, Daramic would also dismiss the district court's decision in *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075, 1078 (D.D.C. 1997) and the D.C. Circuit's majority decision in *Whole Foods*, 548 F.3d at 1033 (Brown, J.); *id.* at 1044-45 (Tatel, J.), both of which relied on such "practical indicia" in the same fashion.[3]

To be sure, economic analyses like the "hypothetical monopolist" test, the SSNIP test, and the Elzinga-Hogarty test may be valuable predictive tools in unconsummated merger cases where there is a need to predict whether the transaction will result in anticompetitive effects. But, where, as here, the merger has been consummated, the need for predicting the effects of the transaction may be reduced or eliminated. That, in turn, may reduce or eliminate the need for economic tools to help make the prediction. There may be empirical evidence whether and to what extent customers regarded the parties' rivals as alternatives before and after the transaction; whether a price increase or a significant impairment in non-price terms or innovation occurred in the wake of the transaction; and whether and to what extent rivals were attracted by the changes resulting from the transaction and capitalized on them by entry or

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[1] I emphasize that I would not choose the testimony of Complaint Counsel's expert over the testimony of Daramic's expert, as such, or the use of the hypothetical monopolist and SSNIP tests, which these experts purported to use. Opinion at 17-18. I only credit the testimony of Complaint Counsel's expert insofar as that testimony accurately described the "practical indicia" endorsed in *Brown Shoe*.

[2] Daramic invokes "soft" evidence of the relevant market—*i.e.*, practical indicia of the relevant market of the sort blessed in *Brown Shoe*—when it considers it in its self-interest to do so. RAB at 8, 18, 20-23.

[3] Daramic's contention at page 12 of its appeal brief that reliance on such "soft" evidence did not permit Complaint Counsel's expert to "estimate cross-elasticities of demand" is wrong. As Daramic admits in footnote 11 of its brief, Complaint Counsel's expert specifically relied on "statements by the buyers that they had very little options to substitute" to find that "the demand curve was very inelastic."

repositioning. Evidence about what actually happened following the transaction may, in other words, reduce the need to employ economic theories in order to predict the relevant market or what is likely to happen—in particular, the SSNIP test described in the Horizontal Merger Guidelines. Put differently, economic theory is not a substitute for, or superior to, the empirical evidence about whether the transaction has actually resulted in anticompetitive effects. *See, e.g., FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68-72 (D.D.C. 2009); *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D. Del. 2006); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

Again, however, it cannot be said that the fact that a merger is consummated will always eliminate the need for these predictive tools. For one thing, in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court held that if and to the extent a relevant market was dynamic (or to put it simply, that the past or current circumstances in the market were not prologue), adjustments should be made in our assumptions about those circumstances. That may require predictions that can be aided by the use of economic tools. For another thing, drivers are more careful when they see a police car nearby (or think that one may be nearby). *See Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434-35 (5th Cir. 2008) (observing that post-acquisition evidence can be manipulated by respondents). Thus, what has actually occurred may be illusory. It may be that as soon as the police are gone (or in this context, as soon as an investigation or challenge is over), market conduct may change radically. For that reason too, predictive economic tools may be useful in some, but not all, consummated merger cases. But the record does not reflect the need for such tools in this case.

II. THE FACTS

The Commission opinion describes in detail evidence demonstrating that Daramic's acquisition was likely to and in fact did cause anticompetitive effects. I write separately to emphasize two types of evidence that are particularly helpful in illuminating the transaction's effects: Daramic's documents describing the transaction's purpose, and post-merger price increases.

Both the ALJ and the Commission found that Daramic's documents established that Daramic acquired Microporous (1) to eliminate a key competitive threat in the motive, deep cycle, and SLI markets; (2) to eliminate a threat to its revenues and profits; and (3) to enable price increases. Opinion at 28-30. The Supreme Court has held that the intent of a party can be considered to illuminate the effects of its conduct. *See Aspen Skiing Co v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) ("evidence of intent is . . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'"); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("Evidence of the intent behind the conduct of a monopolist is relevant . . . to the extent it helps us understand the likely effect of the monopolist's conduct."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("Evidence of intent *and* effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices."). Thus, I consider this evidence to be relevant in order to assess the transaction's competitive effects.

Both the ALJ and the Commission opinion also found that Daramic announced significant and wide-ranging post-acquisition price increases that were consistent with its pre-acquisition intent documents. Opinion at 30-31; IDF 897-918. Daramic argues that these price increases were justified by higher input costs, but both the Commission opinion and the ALJ found otherwise. Opinion at 31; IDF 917-22. Daramic also argues that the price increases were never implemented, but merely announced. RAB at 36. This ignores the surcharge that Daramic announced and instituted for most customers on July 1, 2008. IDF 906. In addition, Daramic announced increased prices in late 2008 and early 2009, which were effective for many customers. Opinion at 30-31; IDF 897-918. For other customers, the record was closed before a final price was reached. Yet even for these customers, the evidence shows that Daramic was seeking significant price increases and that customers had very limited success resisting those increases. And, perhaps most significantly, those price increases did not result in a single lost sale for Daramic. IDF 916.

III. CONCLUSION

In sum, especially where, as here, the merger at issue is consummated, it is generally preferable to determine whether a merger has had anticompetitive effects by reference to the parties' motives for the transaction and the actual effects resulting from the merger instead of trying first to define with precision the dimensions of relevant market based on the testimony of paid expert economists and the predictive economic tools described in the Merger Guidelines.