

**ORIGINAL**



**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**Docket No. 9327**

**PUBLIC**

**RESPONDENT'S PRE-TRIAL BRIEF**

**Counsel for Respondent:**

William L. Rikard, Jr.  
Eric D. Welsh  
Deborah L. Edney  
Adam C. Shearer  
Brian R. Weyhrich  
PARKER POE ADAMS & BERNSTEIN LLP  
401 South Tryon Street, Suite 3000  
Charlotte, NC 28202  
Telephone: (704) 372-9000  
Facsimile: (704) 335-9689  
williamrikard@parkerpoe.com  
ericwelsh@parkerpoe.com

John F. Graybeal  
PARKER POE ADAMS & BERNSTEIN LLP  
150 Fayetteville Street  
Raleigh, NC 27602  
Telephone: (919) 835-4599  
Facsimile: (919) 828-0564  
johngraybeal@parkerpoe.com

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## I. INTRODUCTION

Polypore International, Inc. (“Polypore”) acquired the stock of Microporous Holdings Company, the parent of Microporous Products, LP (“MPLP”), on February 29, 2008. At that time, Polypore’s Daramic subsidiary produced polyethylene (“PE”) battery separators for which it had sales in 2007 of \$283 million. MPLP primarily sold rubber-based separators. Its total worldwide sales in 2007 were only \$39 million. Daramic’s PE separators did not compete with MPLP’s rubber-based separators. As a result, the transaction was market extension rather than horizontal. Accordingly, the loud and persistent claims by Complaint Counsel that this transaction produced monopoly market positions for Daramic are huge distortions of reality.

Key facts ignored by Complaint Counsel include that, in 2007 in North America (the geographic area claimed by Complaint Counsel to be relevant), Daramic’s PE separator sales were just over \$72 million. {REDACTED}.

MPLP was a high cost producer and its PE separator sales were a mere \$2 million. MPLP’s PE product was the only one for which there was an overlap with any Daramic product. MPLP’s sales of PE, which resulted in a North American market share of {REDACTED} gave it no market power, no ability to constrain pricing and certainly no ability to be a market “maverick.” Thus, in the only overlap market in this case, the acquisition had no market or competitive effects.

The real “other” player in this market is not MPLP, but {REDACTED} is the competitive “winner” of this story – it recently won the business of Daramic’s second largest customer, {REDACTED}<sup>1</sup>, and {REDACTED}<sup>2</sup>

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<sup>1</sup> The significance of JCI to Daramic is emphasized by the fact that {REDACTED}.

<sup>2</sup> Expert Report of Henry J. Kahwaty, PH.D., Attachment 5. JCI accounted for 16% of Daramic’s sales of PE separators in 2007 and {REDACTED}. Percentages are calculated on Daramic’s worldwide sales.

{REDACTED} separator production in recent times has been focused on the auto battery sector and { REDACTED}In short, {REDACTED} has demonstrated its vigor as a market competitor sufficient to constrain any anticompetitive events { REDACTED}.

Notwithstanding these current industry realities, the FTC's expert, John Simpson, unrealistically attempts to contend that in the post-transaction world competition is threatened both by coordinated interaction and unilateral effects.<sup>3</sup> Dr. Simpson, however, fails to explain how, in light of the events noted above, Daramic {REDACTED} can realistically be expected to engage in brotherly anticompetitive coordination or how, { REDACTED}.

Daramic can be expected to increase prices unilaterally as a result of the merger. The weakness of Dr. Simpson's competition theories may best be evidenced by the fact that *he rates not one mention* in the FTC Brief and his report is referred to only as PX0033. F.T.C. Br. p. 10.

Perhaps the absence of Dr. Simpson's name in Complaint Counsel's Brief is related to the fact that it is devoid of any economic analysis of pre- and post-transaction market events. This is particularly striking given that this acquisition closed 14 months ago. Complaint Counsel's Brief does not show that competition has been lessened but, instead, only contends that it "is likely" to be lessened. FTC Br. p. 16. Although Dr. Simpson argues that prices have been increased, the Brief shows no estimate of the extent of any price increases, but merely asserts that Daramic has raised them. FTC Br. p. 2. Without any analysis of competitive effects, Complaint Counsel's brief is woefully insufficient.

## **II. SUMMARY OF ARGUMENT**

Complaint Counsel cannot support either the four product markets, or the geographic market, they claim, thus they fail in a "necessary predicate" of a claim under Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 ("Section 7"). United States v. E.I. duPont de Nemours & Co., 353 U.S.

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<sup>3</sup> Export Report of John Simpson at 19-22.

586, 593 (1957) Further, this acquisition does not threaten to “substantially lessen competition” and Daramic has no monopoly power – either in the proper market of “PE Separators” or in the incorrect markets on which the FTC and its expert attempt to rely. Finally, entry will be sufficient, timely and likely to resolve any competitive concerns. Specifically:

- The relevant product market in this case is “PE separators.” Complaint Counsel cannot sustain their alleged product markets because, among other things, they are not based on the Horizontal Merger Guidelines (herein “Guidelines”) hypothetical monopolist test for defining a market. Moreover, the facts relied upon for the FTC’s markets are in error.
- The relevant geographic market is worldwide. The FTC does not apply the Guidelines system for determining a geographic market and fails to credit the ability of foreign suppliers to market and sell in North America in response to a SSNIP.
- No anticompetitive effects have been demonstrated as a result of the acquisition and none is likely. There is no basis for any claims that either coordinated interaction or unilateral effects have been or will be seen as evidenced {REDACTED} vigorous competitive efforts. Further, Daramic did not acquire additional market power from its acquisition of MPLP or use any such market power to increase prices. There are no substantial barriers to entry into the production of battery separators and the likelihood { REDACTED} is a significant procompetitive factor.
- Substantial efficiencies specific to the merger have been realized, and have had, and will continue to have, the effect of reducing production costs and prices. Additional efficiencies specific to the merger that will further benefit consumers are imminent.
- Daramic does not have monopoly power in any markets, including the FTC’s alleged markets. Daramic lacks the power to control prices or exclude competition.
- Daramic has not used exclusionary conduct to monopolize any markets. Its alleged use of exclusive contracts has no foundation given the fact that the contracts pointed to by Complaint Counsel have not had an exclusionary effect.
- Daramic’s agreement with Hollingsworth & Vose (“H&V”) was a legitimate and productive joint venture that had no adverse effect on competition between the two companies and, in any event, was reasonably ancillary to their joint selling activities.
- The remedies proposed by Complaint Counsel are vastly broader than would be required to remedy the impacts on competition that they have alleged.

### III. BACKGROUND

A. Transaction Background

On February 29, 2008, a subsidiary of Polypore acquired 100% of the stock of the parent company of MPLP pursuant to an agreement with MPLP's stockholders (the "Acquisition"). Polypore paid approximately \$76 million, \$29 million in cash and \$47 million in debt.

On March 7, 2008, the FTC initiated a non-public investigation into the Acquisition. A complaint was issued on September 9, 2008, claiming the Acquisition violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 ("Section 5") and Section 7, and that Polypore monopolized certain product markets in North America. Polypore denies these claims.

B. Factual Background

i. **Batteries, Battery Separators and the Industry**

Batteries generally have four key components - an anode and cathode, an electrolyte that flows between them (usually acid, but some are alkaline) and separators to keep the anodes and cathodes apart and prevent short circuits while allowing ions to flow between them. Separators are commodities<sup>4</sup> and can be made of paper, glass, wood, sintered polyvinyl chloride ("PVC"), polyethelene. rubber and plastic for use in a wide variety of batteries. The process of storing electricity in a battery is not dependent on the separator, which is essentially a passive element, but separators are needed in order to compact space and extend the life of a lead acid battery.

Batteries with separators are manufactured for a myriad of end uses including for example for use in automobiles, trucks, buses, boats, RVs, motorcycles, forklifts, floor scrubbers, golf carts, and backup for electrical and telecommunication systems. Some of these uses require a short, intense discharge, like the starting of an automobile engine and are often referred to as SLI for "starting-lighting-ignition". Other batteries require a deeper discharge such as a battery used in floor scrubbers or golf carts and are sometimes referred to as "deep cycle." Some batteries need to operate under

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<sup>4</sup> PX2110-033.

conditions of great vibration. Still others may lie dormant for long periods of time and then have to provide power for a short period (such as back-up batteries). While each of these operational requirements lends itself to a particular type of separator, manufacturers often do not know the end use to which a particular separator will be put. Kawhaty Report at ¶119. Deposition of Kevin Whear, p. 12:19-13:1, 23:9-23:12, 46:8-47:5.

Battery separators come in many shapes and sizes. Some are made with ribs, others without; some with additives, other without. They are made in differing thicknesses, in roll and cut form, with different rib spacings, with glass mats and without. Different battery separators will effectively do the same job – keeping the positive and negative plates in a battery apart while allowing the charged particles to flow between them. Battery manufacturers develop their own unique “profiles” for the separators they use in their batteries. Profiles are often unique to specific battery manufacturers, rather than the applications in which they are used.<sup>5</sup>

The tooling required to make the profiles for specific customers is inexpensive and can be obtained quickly, and the “technology” needed to make PE battery separators is publicly available and not subject to any unrestricted patents. Deposition of Peter Gaugl, p. 146:2-147:5; Whear Depo., p. 316:18-317:6. In fact, PE separators have been on the market for over 40 years and the original patent on PE separators expired in 1984. US Patent No. 3,351,495 (issued Nov. 7, 1967). Production lines are also highly flexible and can easily be shifted to produce different types of separators simply by changing the tooling (called “calendar rolls”) to make the specific profiles. Tools can be switched quickly and easily.<sup>6</sup> Thus, battery separator manufacturers that can produce a PE separator for one application has the skill to produce any other type of PE separator.

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<sup>5</sup> See, e.g., { REDACTED }; Trevethan Depo., p. 114:24-115:2.

<sup>6</sup> { REDACTED } The FTC Complaint incorrectly states that there are barriers to switching between production of SLI separators and industrial separators. Complaint ¶12. This is incorrect and is refuted by significant testimony. See also Gilchrist Tr. p. 61; Riney Tr. p. 194-195; Gaugl Depo., p. 179:24-180:25; Gilchrist Depo., p. 61:11-24.

The industry is characterized not by the size of its suppliers, but by the size and power of its customers on the market. { REDACTED} For instance, in 2007 Daramic's two largest customers were Exide, whose revenues for the quarter ending December 31, 2008 were \$914.2 million<sup>7</sup> and JCI, whose net sales for the quarter ending December 31, 2008 were \$7.336 billion.<sup>8</sup> Conversely, Daramic's total separator sales worldwide in all of 2007 were only \$283 million. Similarly, prior to the merger, MPLP sold 81% of its total worldwide sales of \$39 million to two customers – EnerSys and Trojan Battery Company. Trojan is not a public company, but EnerSys reported sales of approximately \$461 million for the three months ending December 28, 2008. The size of these customers, in addition to a keen understanding of the businesses of their suppliers, gives customers tremendous bargaining power and influence regarding entry and exit of separator producers.<sup>9</sup>

This industry is also characterized by its global reach, including the rise in Asia's consuming power and Asian battery and separator manufacturers. Since 2003, at least 43 new battery manufacturers have emerged in Asia, and since 1998 approximately 16 battery separator manufacturers have either joined the market or expanded.<sup>10</sup> Separators from several of these Asian companies are considered “globally acceptable”<sup>11</sup> and are sold worldwide.<sup>12</sup>

Further, the entire industry has recently lost millions of square meters of sales leaving enormous excess capacity, and the global automobile industry – accounting for the majority of separators produced in the world<sup>13</sup> – is in a catastrophic situation.<sup>14</sup> Deposition of Christophe Thuet,

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<sup>7</sup> <http://ir.exide.com/financials-income.cfm>. Exide's fiscal year ended on March 31 and its annual report has not yet been released. This is the most recent quarterly information announced by Exide.

<sup>8</sup> <http://www.johnsoncontrols.com/publish/etc/medialib/jci/corporate/investors.Par.69333.File.dat/Q408factsheet.pdf>. JCI's fiscal year ends on September 30, and it has not yet released its annual earnings report. This is the most recent available information.

<sup>9</sup>

<sup>10</sup> See, e.g., Expert Report of Henry J. Kahwaty, Ph.D., Attachments 8 and 9.

<sup>11</sup> Kahwaty Report p. 52, fn. 169, 170. RX01512, RX01523.

<sup>12</sup> Id.

<sup>13</sup> PX02110-004, 009; { REDACTED}

p. 68:24-69:23, 72:9-73:11. Without the Acquisition, it is doubtful that MPLP would have survived, given the current global economic situation and MPLP's failure to fill its new capacity. Deposition of Larry Trevethan, p. 99:13-100:17; Deposition of Matt Wilhjelms, p. 86:4-87:14.

**ii. The Merging Companies**

*a. Polypore International, Inc.*

Daramic, a division of Polypore, manufactures and sells battery separators for various applications within the battery manufacturing industry.<sup>15</sup> Before the Acquisition, all of Daramic's products except one<sup>16</sup> were made with ultra-high molecular weight polyethylene, a plastic that is generally referred to simply as "PE." PE separators are found in a wide range of end-uses including batteries for cars, trucks, buses, lawn mowers, golf carts, floor scrubbers and other electric vehicles as well as back-up in critical buildings.<sup>17</sup> Separators intended for use in SLI batteries comprised 74 percent of Daramic's global separator revenue and 68 % of its North American revenue in 2007.

Although most of Daramic's revenue is derived from the sale of separators targeted for SLI batteries, it also makes separators for low-end after market batteries sold for deep-cycle uses, as well as separators for back-up power. Daramic's PE-only products can be, and are, used in each of these types of batteries.<sup>18</sup> In addition, Daramic's DARAK product may be used in stationary applications or industrial applications, and Daramic's "HD," PE with a latex additive, can be used in after market deep-cycle batteries and back-up batteries.

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<sup>14</sup> See also [www.bizjournals.com/dallas/stories/2009/04/20/daily56.html?t=printable](http://www.bizjournals.com/dallas/stories/2009/04/20/daily56.html?t=printable) (GM closing 13 North American assembly plants, an action that will remove 190,000 vehicles from the company's production schedule).

<sup>15</sup> Only Daramic, a company in Polypore's energy storage segment, is implicated by the FTC's Complaint.

<sup>16</sup> Daramic's "DARAK" product is made by saturating a scrim with phenolic resin. There is no PE in this product, despite Dr. Simpson's incorrect assertions to the contrary. Simpson Report, fn. 3.

<sup>17</sup> See Kahwaty Report p. 8, fn. 14.

<sup>18</sup> { REDACTED } Keith Depo., p. 127:7-12; RX00678; See also PX0798 ("for most traction batteries the polyethylene separator is an excellent choice and does not impose any restrictions on the cell...")

{REDACTED} Daramic's primary competitor for many years. As of June 2007, and effective January 1, 2009, {REDACTED} and is now the largest supplier of SLI separators in North America and the world.<sup>19</sup>

b. *Microporous Products, L.P.*

MPLP was founded in 1953 when the American Hard Rubber Company, which had been making its rubber ACE-SIL® separator since 1934, formed Amerace Corporation. Amerace introduced its FLEX-SIL® rubber separator product in 1978 and did not install its first production line capable of producing non-rubber separators until 2001. PX0072-005. That line produced a PE product with a rubber additive called "CellForce." At the time of the Acquisition, MPLP sold no PE-only battery separators.<sup>20</sup> The rubber-only products that MPLP produces are unique in the world.<sup>21</sup> Its prices and costs were generally higher than other battery separator manufacturers.

Before the Acquisition, MPLP operated only one manufacturing facility. It was in the process of expanding into Europe in February 2008, although that plant, in Feistritz Austria, was not yet operational. MPLP had a plan to expand in the United States, but it had never been approved by the MPLP Board, and had been shelved prior to the Acquisition. Further, the MPLP board issued a mandate in November 2007 declaring that the "long term MPLP strategy" was to be a "*specialist* separator player" and not to compete with "larger, entrenched competitors with products that are not differentiated." PX0092-002; Wilhelm Depo., pp. 53:9-21, 117:21-118:2. It went on to declare that "the Board does not endorse a pure PE growth strategy competing head to head with larger competitors (ie: Daramic{REDACTED})." *Id.* Further, the Board declared that "MPLP must prove out the financial viability of [the pending Austrian plant] before further capital will be committed to

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<sup>19</sup> Complaint Counsel seems unable to decide what position each company holds in North American SLI business – declaring that Daramic is the largest supplier on p. 1, reducing that to a less than {REDACTED}{REDACTED}FTC Br. 1, 2, 19 fn. 10.

<sup>20</sup> In fact, it has only had one such sale in its entire 75 year history and has chosen not to pursue that product. Investigational Hearing of Steve MacDonald, May 21, 2008, pp. 33:20-37:18.

<sup>21</sup> See PX1124-001; McDonald Depo., p. 25:18-26:3; PX0072-005; RX01128.

the business in either Europe or the United States.” Id. See also Investigational Hearing of Steve McDonald, p.107:22-109:8; Deposition of Michael Gilchrist, pp. 143:1-16, 144:23-146:6; Trevethan Depo., p. 77:1-79:21; Wilhelm Depo., p. 34:25-36:19. The MPLP Board never approved the purchase of any equipment for a new “third” line either in the United States or Europe. Trevethan Depo., 77:1-79:21; Deposition of Eric Heglie (IGP), p. 156:9-157:12.

#### IV. ANALYSIS

##### A. Complaint Counsel Cannot Meet Their Burden Under the Applicable Law

Complaint Counsel’s claims under both Section 5 and Section 7<sup>22</sup> require them to prove, by a preponderance of the evidence, the relevant product and geographic markets in which to assess the Acquisition, and that, in those markets, the Acquisition is “reasonably likely to have ‘demonstrable and substantial anticompetitive effects.’” New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995).<sup>23</sup> Complaint Counsel have the ultimate burden of persuasion on every element of their challenge; “a failure of proof in any respect means the transaction should not be [divested].” FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 116 (D.D.C. 2004).<sup>24</sup>

Importantly, the probability of anticompetitive effect is judged at the time of trial – not at the time of the Acquisition. Complaint Counsel largely ignore the fact that the realities of the post-Acquisition world are vastly different than they were prior to February 29, 2008. Thus, the consideration of post-Acquisition evidence is crucial for a realistic and accurate determination of the probable effects of this merger. See, e.g., Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7<sup>th</sup>

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<sup>22</sup> The legal standard under both Section 7 and Section 5 are the same. See, e.g., F.T.C. v. PPG Indus. Inc., 798 F.2d 1500, 1501 n. 2 (D.C. Cir. 1986)(“for present purposes [Section 5 is] . . . assumed to be merely repetitive of [Section 7] of the Clayton Act.”)

<sup>23</sup> Quoting U.S. v. Atlantic Richfield Co., 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969), aff’d, 401 U.S. 9986 (1971).

<sup>24</sup> The fact that here the FTC is challenging a consummated merger may make its burden even higher. See Interview with Timothy Muris, Global Competition Review (December 21, 2004)(“the FTC has to face a very high hurdle to bring a consummated merger case. If the merged entity has been operating for a while, it’s not enough to asset that the transaction was anticompetitive – you have to prove it.”).

Cir. 1981)(“[p]ost-acquisition evidence favorable to a defendant can be an important indicator. . . where the evidence . . . could not reflect deliberate manipulation by the merged companies...”).

**B. Complaint Counsel Cannot Meet their Burden of Proving a Relevant Market**

**i. Complaint Counsel are Required to Define and Prove a Relevant Market**

The proper definition of a relevant market is a “necessary predicate” to a legitimate Section 7 claim. See E.I. duPont de Nemours & Co., 353 U.S. at 593. It is impossible otherwise to identify the alternatives available to consumers and evaluate whether competition has been adversely affected in light of those alternatives. The language of Section 7 itself is clear and unequivocal. A merger is only prohibited where competition may be substantially lessened in a relevant market.

**ii. Applying the Correct Standard Proves a “PE Separators” Relevant Market**

The Guidelines identify the “hypothetical monopolist test” as the method for defining a relevant market.<sup>25</sup> Complaint Counsel ignore the Guidelines system of economic substitutes and argue for functional substitution instead. They fail even in this incorrect application as set forth below. Applying a correct “hypothetical monopolist test” to the four markets alleged by the FTC shows that those markets are not valid relevant markets in which to analyze the Acquisition. Instead, the “alternative” all PE separator market alleged by the FTC is the correct relevant market here.<sup>26</sup> Complaint ¶6; Kahwaty Report ¶¶72-123.

Pricing for PE separators is dictated by the thickness of the product – thicker product is typically more expensive. A SSNIP imposed on a 10 mil SLI separator would likely lead to substitution by buyers to an 11 mil non-SLI separator where that price is held constant. Id. at ¶82. A 10% SSNIP added to Daramic's average price of \$0.76 for 6 mil PE SLI separators sold in 2008 is higher than the average price for 8 mil SLI separators (\$0.751). Id. at ¶83. Attachment 10 to Dr.

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<sup>25</sup> Horizontal Merger Guidelines, 57 Fed.Reg. 41552, 41560, S 2.22 (1992) (herein “Guidelines”) § 1.11.

<sup>26</sup> Complaint Counsel’s entire argument supporting competitive harm in its alternative PE market comprises less than half a page. FTC Br. p. 23. This is clearly not enough to support its Section 7 claim in that market.

Kahwaty's Report shows the extent of separators overlap among the categories advocated by the FTC and the extent to which the actual characteristics of the separators refuse to comply with Complaint Counsel's descriptions of them. Given these overlaps, the FTC should submit detailed economic analysis to support its market definitions, but it has failed to do so.

*a. The FTC's Proposed Markets Overlap*

Complaint Counsel base their argument for the four alternative markets on the statement that "separators manufactured for a particular application cannot be effectively used for other applications." Complaint ¶13. This statement is not true.

Many individual separators are used in more than one of the FTC's relevant markets.<sup>27</sup> For instance, Daramic CL is used in the FTC's "motive" and "UPS" categories, Daramic HD is used in "motive," "UPS" and "deep-cycle" and CellForce is used in "deep-cycle" and "motive." Kahwaty Report ¶79; Deposition of Bill Keith, p. 127:7-12. In 2008, Daramic sold an individual PE profile called "FC" with a backweb thickness of 11 mils {REDACTED} for use in a UPS application, to {REDACTED} for use in a deep-cycle application and to {REDACTED} use in an SLI application.<sup>28</sup> This leads to another problem for Complaint Counsel and their expert – until PE (or rubber or PE with a rubber additive) passes through rollers fitted with a profile pattern tool and adjusted to a certain width, all PE is identical to all other PE. It is these "patterns" that are added to the material, along with the thickness of the material, that differentiates PE separators.<sup>29</sup>

Considering the characteristics of separators – primarily backweb thickness and overall product thickness – it is impossible to classify them into distinctive "buckets." A separator for a UPS application may be as thin as 8 mils – a size that easily fits into SLI applications. Similarly, a

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<sup>27</sup> This discussion does not take into account AGM and PVC separators which work effectively in all the FTC's alleged relevant markets, but, as the FTC concedes are not "economic" substitutes.

<sup>28</sup> Similarly, profile "TH" is used in automotive and industrial batteries. Kahwaty Report p. 28, fn. 94.

<sup>29</sup> Contrary to the FTC's incorrect understanding, 'molds' are not used to make separators. Kahwaty Depo., p. 189:2-23.

separator of 11 mil thickness coded as 'industrial' is just as functionally effective in a car battery as an SLI separator of 10 mil thickness.<sup>30</sup> Typically, however, the extra thickness is not worth the additional cost. Kahwaty Report ¶¶81-83. The only real difference between industrial and automotive separators is thickness. Layered automotive separators work efficiently for industrial applications. Further, because some separator profiles are unique to individual customers, a separator manufactured for one customer's deep-cycle application may not be substituted into the same type of application for another customer. PX1124-003; Trevethan Depo., p. 114:24-115:2; Kahwaty Report ¶116; Gaugl Depo., p. 146:21-148:6. Thus the FTC's "functional substitution" theory would produce the ridiculous outcome that two separators produced for different customers but used in the same application are in their own product markets because, by its theory, they are not substitutable. Id.

The high degree of supply-side substitution that exists in the production of PE separators also supports their designation as the relevant product market here. It is easy to shift between production of different kinds of separators and courts have recognized that where one facility can easily switch from producing one product to another, they may belong in the same relevant market.<sup>31</sup>

*b. Ace-Sil and Flex-Sil Comprise Their "Own" Markets*

The parties agree that Ace-Sil comprises its own product market. The FTC does not even mention Ace-Sil in its relevant markets discussion. FTC Br. pp. 8-13. The Acquisition had no effect in this market. Ace-Sil is a product without competitors that simply moved from MPLP to Daramic. Kahwaty Report ¶¶88-92; Gilchrist Investigational Hearing, pp. 24:23-25:15; 27:15-28:12.

Flex-Sil is also its own relevant market and Complaint Counsel's own logic proves this. In attempting to define its "UPS" market, the FTC argues that Daramic's DARAK product is not a

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<sup>30</sup> Daramic includes the FTC's UPS and motive categories under the term "Industrial" in many of its business documents.

<sup>31</sup> Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9<sup>th</sup> Cir. 1995)(holding full-serve gasoline sales and self-serve sales in the same market since stations could easily convert from full-serve to self-serve); Kraft General Foods, 926 F. Supp. at 361 (holding all ready-to-eat cereals in the same product market because of production flexibility); Frank Saltz & Sons v. Hart Schaffner & Marx, 1985 WL 2510 (S.D.N.Y. 1985)(holding all men's suits in the same product market because plants could easily switch from producing low quality to higher quality suits).

substitute for PE UPS separators because a SSNIP “in Daramic’s PE product to North American customers would not cause switching to DARAK or rubber because of the significant price difference.”<sup>32</sup> FTC Br. p. 12.<sup>33</sup> Applying the same logic to Flex-Sil effectively puts Flex-Sil alone in its relevant market.

The price of Flex-Sil in 2008 was \$3.64, while the price for Daramic HD, the product with which the FTC contends Flex-Sil competes, was only \$2.92 – a “significant” 25% difference. See PX00442. Flex-Sil is a niche product used in deep-cycle applications, particularly in OE golf carts. Flex-Sil has very different (and superior) technical capabilities than PE and PE/rubber separators because it is made of pure rubber.<sup>34</sup> Furthermore, it cannot be “enveloped” putting it even more squarely into a unique ‘niche’ market. See, e.g. Deposition of {REDACTED}.<sup>35</sup> Finally, approximately 83% of all 2008 Flex-Sil sales were made to two customers which position their products as high end and unique – in large part because of the inclusion of Flex-Sil as opposed to a cheaper (and less effective) PE or PE/rubber separators. Both these customers have continued to purchase Flex-Sil despite the 25% price difference between it and HD – suggesting that a further SSNIP increase would not lead to a substitution from Flex-Sil to HD. HD has not been qualified for use in OE batteries so is only used in low end after-market deep cycle batteries;<sup>36</sup> simply because it can also be used in a ‘deep-cycle’ application does not make the product economically substitutable

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<sup>32</sup> The FTC goes on in that sentence to say there would also be no switch “because Daramic controls the prices and sales of both” however, this is irrelevant in a market definition test and suggests Complaint Counsel does not understand its own test. In a SSNIP test all other prices are fixed and the price of interest is raised in order to see whether a customer will switch to another product. Who controls the other fixed prices is immaterial.

<sup>33</sup> Similarly, in relation to its SLI market, the FTC argues at p. 12 of its brief that “North American battery manufacturers would not switch to these inferior SLI materials in response to a SSNIP.” This is just as easily applied to Flex-Sil, for which the evidence is uncontroverted that it is a superior product to HD. Gilchrist Depo., p. 117:19-118:8; {REDACTED}

<sup>34</sup> McDonald Depo., 25:18-26; 29:13-20; 30:5-23; PX0034-02; PX0037-016, 042, 055.

<sup>35</sup> See also PX0433-022; {REDACTED}; PX0428-003.

<sup>36</sup> {REDACTED}.

as the SSNIP test requires.<sup>37</sup> See, e.g., FTC v. Swedish Match, 131 F.Supp.2d 151, 165 (D.D.C. 2000)(concluding that chewing tobacco and snuff were not in the same market despite similar uses because consumers would not switch for price reasons or in response to a SSNIP).

**iii. Complaint Counsel Cannot Define and Prove the Alleged Geographic Market**

Like its inability to define valid relevant product markets, the FTC is also unable to define a valid relevant geographic market. Complaint Counsel claim a relevant North American geographic market, but cannot support this statement when a proper hypothetical monopolist SSNIP test is applied. The relevant geographic market is the “area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.” Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961). It is the area in which “antitrust defendants face competition.” FTC v. Freeman Hosp., 69 F.3d 260, 268 (8<sup>th</sup> Cir. 1995)(citations omitted). Importantly, “determination of the proper geographic market . . . must involve a dynamic as opposed to static analysis of ‘where consumers could practicably go, not on where they actually go.’” California v. Sutter Health Sys., 130 F.Supp. 2d 1109, 1120 (N.D. Cal. 2001)(citations omitted).

In this case, Complaint Counsel seem to have made up their own test for determining a relevant geographic market instead of applying the SSNIP test. FTC Br. p. 13.<sup>38</sup> Complaint Counsel fail to notice that the producers of PE separators sell globally. {REDACTED} RX01530-003. It has chosen to operate from only two locations but maintains a worldwide reach despite an inability to

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<sup>37</sup> This is highlighted by the behavior of {REDACTED} was in bankruptcy and requested that Daramic purchase {REDACTED} facility in order to get an infusion of cash. In exchange for agreeing to purchase a facility – and its significant additional capacity, that Daramic had not been in the market for – Exide agreed to a long term contract to ensure capacity utilization at that new facility. The contract requires {REDACTED} per year. If {REDACTED} to purchase the required amount it may offset amounts it would otherwise owe with the purchase of HD separators. It receives a credit toward its deficit for the HD separators it purchases. In 2008, the purchase of HD separators (instead of Flex-Sil) generated a credit of – meaning the HD separators {REDACTED} percent less expensive than the price it pays for Flex-Sil. Despite this enormous incentive {REDACTED} not purchase any meaningful quantities of HD until after the FTC began its investigation into the Acquisition, and still purchased {REDACTED} meters of Flex-Sil – meaning it was willing to spend an additional \${REDACTED} for Flex-Sil over HD. It is illogical to suggest that Flex-Sil and HD are economic substitutes under these circumstances.

<sup>38</sup> The FTC cites to Section 1.21 of the Guidelines, which relates to market definition in the absence of the ability to price discriminate based on the location of customers. But the test they claim to use appears to be based on the location of customers and, therefore, follows a price discrimination approach.

offer “local” supply. Daramic, on the other hand, operates its business from 6 manufacturing facilities located throughout the world and supplies customers on every continent. RX00677; RX01084. Likewise, Asian PE separator manufacturers like Anpei, located in Taiwan, supply separators to South America and Italy, while the Indonesian supplier, Separindo, sells to customers in Korea.<sup>39</sup>

Notably, in 2008 Daramic exported 24 percent of its product and of its product from North America.<sup>40</sup> Thus, applying a SSNIP in North America, while holding other prices constant, it is highly likely that Daramic’s customers in South America would choose to switch to suppliers in Asia and Europe, while {REDACTED} manufacturer. Switches by these customers alone would be significant and well outside the “critical loss” needed to sustain a profitable SSNIP. Complaint Counsel make much about the advantages of “local supply” but then ignore their own argument when it comes to applying a SSNIP to determine a geographic market. For {REDACTED} South American customers of {REDACTED}Daramic, supplies from the United States are not “local.” The FTC cannot simply ignore these market realities and myopically focus only on Daramic {REDACTED} customers in the United States. MPLP itself sold a large portion of its product outside North America. In its 75 year history it sold globally while operating only one small facility in Piney Flats, Tennessee. Battery separators have been shipping around the world for years – to suggest that it only makes economic sense to ship products “out” of North America, but that shipping costs, tariffs and freight “into” North America would be prohibitive in response to a SSNIP

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<sup>39</sup> See Kahwaty Report, Attachments 8 and 9.

<sup>40</sup> Daramic exported primarily to South America (80 percent of exports) while {REDACTED}, with the remaining amount spread across the globe.

ignores market realities.<sup>41</sup> Moreover, recent strengthening of the US dollar against other currencies enhances the prospects for imports.

There are several suitable Asian separator producers and although consumers may not yet have turned to those suppliers, they could and would do so in response to a SSNIP.<sup>42</sup> See, e.g., Kahwaty Report ¶¶137-144, 343-346, Attachment 9; Thuet Depo., p. 80:12-82:8; {REDACTED}. See also Sutter Health Sys., 130 F.Supp. 2d at 1124 (looking to whom consumers could practically turn if faced with anticompetitive pricing, not just those to which consumers currently turn). In fact, applying a 10% SSNIP to an 8 mil product produced at one of Daramic’s US plants, while holding the price of the same product from Daramic’s Prachinburi plant constant, shows, even using the import costs relied on by Dr. Simpson, that customers would find it economically feasible to import that product from Thailand to North America. Kahwaty Report ¶139.

The valid and proper relevant market is worldwide. See also Kahwaty Report ¶¶124-149.

C. Complaint Counsel Cannot Meet Their Burden of Showing Competitive Harm as a Result of the Merger

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

The “participating firms” for the PE Separator and worldwide relevant markets are set out in Dr. Kahwaty’s report at Attachment 15. Dr. Kahwaty’s HHI calculations show a pre-merger HHI of

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<sup>41</sup> Shipping costs are considered to be minimal. See Investigational Hearing of Tucker Roe, p. 372 (trans-oceanic shipping takes “a couple of weeks.”); Investigational Hearing of Pierre Hauswald, pp. 74-75 (trans-oceanic shipping costs are minimal); Investigational Hearing of Tim Riney, p. 424-39 (shipping prices are “negligible”).

<sup>42</sup> Remarkably, Complaint Counsel claims that there “is not a single producer of separators for lead acid batteries who manufactures or sells a deep-cycle battery separator outside of North America” but cites to deposition testimony that does not support this proposition. There is ample evidence showing the claim by Complaint Counsel is flatly untrue. FTC Br. p. 13; PX0906-28; Gilchrist Depo., p. 95:2-13.

3,731 and a post-merger HHI of 3,920 – a delta of 189. The FTC claims that a “North American all PE market . . . is significantly more concentrated . . . [and] would therefore result in a significantly larger increase in HHI as a result of the transaction” without doing a single calculation to support this statement. The actual calculations show that the FTC is wrong. Using data collected by the FTC in the form of CID responses, the increase in the HHI of the claimed North American market is only 143 – smaller than in the worldwide calculation. See Exhibit 1 hereto. This is because Complaint Counsel ignore, or do not understand, that MPLP exported a significant amount of its production outside of North America, so its worldwide share was more than its North America share.

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

The FTC’s claims regarding anticompetitive effects in alleged individual markets (deep cycle, motive, SLI and UPS) lack foundation because these are not relevant markets. See *supra* pp. 10-13. The FTC’s claim that the Acquisition gave Daramic a monopoly in the deep cycle segment has no basis since MPLP’s Flex-Sil separator and Daramic’s HD were not competitive and were not in the same relevant market. See *supra* pp. 13-14.

Since the motive segment also does not qualify as a relevant product market, Daramic could not have achieved a monopoly as a result of the Acquisition. Moreover, the FTC improperly fails to grant {REDACTED} market share in this alleged segment based on {REDACTED} uncommitted entrant. Numerous Asian producers of industrial separators are also in a position to supply the alleged North American market, a factor ignored by the FTC. See Kahwaty Report, ¶¶ 334-350.

Complaint Counsel argue that MPLP would have begun selling SLI separators but for the Acquisition. However, in addition to the fact that “SLI” fails as a relevant market, the arguments regarding competitive impact also fail for several reasons. MPLP was not producing SLI product at the time of the Acquisition and the FTC’s argument that MPLP “was very close to making

commercial sales” is not based on fact. MPLP had no contracts for the sale of SLI products. It signed a non-binding Memorandum of Understanding {REDACTED} in July 2007, which contemplated such sales, but the MOU expired with no discussion. In November 2007, the MPLP board directed that there be no further capital expansion without board approval. Although the MOU was renewed in February 2008,<sup>43</sup> no action occurred and it expired in March 2008. These events do not show that MPLP was “very close” to market participation in North America at the end of February 2008.

Further, the production line considered for Piney Flats consisted of 11 msm capacity in a market segment where existing capacity (300 msm) dwarfed demand (150 msm). The addition of such minimal capacity under such circumstances would have been a de minimus competitive move. By comparison, {REDACTED} has been major. In fact, {REDACTED} purchases of SLI separators as all of Daramic’s sales {REDACTED} shipped to Mexico. Further, {REDACTED} business from Daramic is a competitive move that reduced the significance of any possible entry by MPLP to irrelevance.

Complaint Counsel rely on a pure potential competition claim regarding the UPS segment,<sup>44</sup> contending that MPLP “was nearing the successful conclusion of a three year project to enter this market.” FTC Br. p. 21. However, this argument fails: (1) MPLP’s alleged entry into this segment was highly uncertain and of minimal significance;<sup>45</sup> (2) the “three year project” was with {REDACTED} and contemplated MPLP shipping or producing product in Europe with no North American impact;<sup>46</sup> (3) {REDACTED} actual participant in this segment with {REDACTED} impact present and future competitive conditions than MPLP. Kahwaty Report ¶¶ 328-30, 333.<sup>47</sup>

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<sup>43</sup> It should be noted that the MOU was “renewed” on February 14, 2008 – only days before the Acquisition closed. It was put in the “black box” as part of the due diligence, ostensibly to inflate MPLP’s value to Daramic. Gilchrist Depo., p. 231:25-233:11.

<sup>44</sup> The FTC Brief characterizes MPLP as a “potential” entrant while Dr. Simpson characterizes MPLP as actual competition.

<sup>45</sup> {REDACTED}, but MPLP had not even entered into “preliminary talks” with any other potential customers regarding this potential product. Investigational Hearing of Steve McDonald, p. 202-208.

<sup>46</sup> LENO was to be a “DARAK replacement.” For UPS batteries DARAK is sold only in Europe and LENO was intended to be produced and sold in Europe. Deposition of George Brilmyer, p. 60:15-61:6. Further, Daramic did not “halt” or “kill” the LENO

ii. **Complaint Counsel Cannot Show Unilateral Effects**

The facts here do not support any theory that Daramic could, because of the acquisition of MPLP, unilaterally exercise market power after the merger to increase prices and decrease output, resulting in “unilateral” anticompetitive effects.<sup>48</sup> MPLP was a high cost producer and was a factor only in deep cycle where Daramic was not competitive. MPLP posed no market threat in sales of pure PE separators. Guidelines § 2.22.

{REDACTED} since the Acquisition has brightly illuminated Daramic’s lack of any market power. {REDACTED} demonstrated great competitive prowess vis-a-vis Daramic, and has shown that the PE separator market need not fear that Daramic would be able to raise prices unilaterally as a result of the merger. {REDACTED} See Kahwaty Report ¶¶164-77. .

On the other hand, MPLP's extremely modest PE market share {REDACTED} in Complaint Counsel's North American geographic market and its high cost structure confirm that Daramic's ability to impose unilateral effects was not enhanced by the Acquisition. It is the effect of the acquisition itself that is the question. The Guidelines themselves explain that a market share of is not likely to be of concern.<sup>49</sup> In short, the FTC’s argument that Daramic is an effective market predator because of the Acquisition has no merit.<sup>50</sup>

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project – samples of the product are out {REDACTED} not approved the product or request supply. Brilmyer Depo., pp. 59:13-61:6, 95:7-15, McDonald Depo., p. 74:3-23; Whear Depo., p. 227:5-21.

<sup>47</sup> Complaint Counsel's argument that MPLP would have entered the SLI and UPS segments faces substantial legal hurdles as well as the factual hurdles described. In cases involving potential competition, the FTC itself has required “clear proof” of entry and has looked for “subjective evidence” that entry was likely, e.g., management studies and capital expenditure plans. In re B.A.T. Industries, 104 F.T.C. 852, 926-28 (1984). The FTC cannot produce that kind of evidence here. In addition, Marine Bancorp established the requirement that the would-be entrant “offer a substantial likelihood of ultimately producing deconcentration of that market or other significant pro-competitive effects.” United States v. Marine Bancorp., 418 U.S. 602, 633 (1974). In light of the size of both Daramic {REDACTED} in the SLI and UPS segments, MPLP's alleged entry at the small scale available and high costs it faced could not have provided sufficient competitive impact to satisfy this standard.

<sup>48</sup> The FTC does not address “coordinated” effects in its brief. Accordingly, Respondent will not address coordinated effects here, but submits that in any case, the FTC cannot show any likelihood of such effects in this industry. See Kahwaty Report ¶¶160-63.

<sup>49</sup> “The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable.” Guidelines § 2.0

<sup>50</sup> The Guidelines and the cases impose several preconditions for application of the unilateral effects concept. E.g., United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004). While many of these may not be satisfied here, one in particular is not. The Guidelines require that “repositioning of the non-parties’ product lines to replace the localized competition lost through the

This analysis is supported by the fact that Daramic has been unable to increase prices after the Acquisition. In 2008, Daramic's attempt to increase prices {REDACTED} reflect its raw material cost increases was completely unsuccessful. Kahwaty Report ¶216-17. Similarly, in 2009 it sought a {REDACTED} increase from {REDACTED} was forced to settle for a {REDACTED}. *Id.* at ¶¶220, 332. Other customers also rejected the 2008 price increase, many rejecting any increase. *Id.* at ¶217. Overall, Daramic's worldwide attempt to increase prices was only 72% successful and its North American success was only 60%, notwithstanding that these increases were entirely justified by increases in raw material costs and by contract. *Id.* at ¶217-18. Plainly Daramic lacked power to control prices.

**iii. Complaint Counsel Have Been Unable To Show Post-Acquisition Price Increases Attributable To Increased Market Power**

Complaint Counsel's claims about post-acquisition price increases are inconsistent and unsupported. On the one hand, they claim that Daramic "raised prices immediately after the acquisition of Microporous." FTC Br. p. 1. Elsewhere they claim only "that the acquisition *will allow* Daramic to increase prices." *Id.* at 22. (emphasis added) They also claim that Daramic sued a customer for not agreeing to higher prices and threatened to sue another. *Id.* at 1. The brief also makes vague claims that Daramic feared price competition from MPLP in the years before the acquisition. *Id.* pp. 21-23. Interestingly, the brief distances itself from Dr. Simpson's failed effort to document post-acquisition price increases.

That is the total of Complaint Counsel's showing regarding post-acquisition price increases and it does not make an effective price increase argument because: (1) no documentation shows Daramic increased prices immediately after the acquisition; (2) there is no showing (or allegation) that any post-acquisition price increase was out of line with pre-acquisition increases or was not cost

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merger be unlikely." Sec. 2.21. As has been shown repeatedly in this brief, {REDACTED} "reposition" its product line so as to replace any allegedly localized competition lost as a result of this acquisition. {REDACTED}; Kahwaty Report ¶¶166-173.

justified; (3) it fails to show that there were post-acquisition price increases that resulted from enhanced market power; (4) the fact that Daramic sued one customer and considered suing another hurts, rather than helps, Complaint Counsel's position - lawsuits and threats against customers are not evidence of market power but the absence of same; (5) claims regarding Daramic fears about price competition with MPLP pre-acquisition say nothing about whether such claims had any rational basis and provide no evidence regarding market power pre- or post-acquisition.

Dr. Simpson's efforts, although apparently abandoned by the FTC, fail under scrutiny. Kahway Report ¶226-244. Dr. Simpson improperly relied on cost indices rather than evidence relating to Daramic's actual raw material costs. Simpson Rebuttal p. 12. For his other before-and-after model, Dr. Simpson analyzed contracts entered into pre-acquisition but, improperly, used contracts that had also been finalized pre-acquisition as his control group. Thus, his post-acquisition price increase claim based on enhanced market power evaporates.

The FTC's price increase case evidences no post-acquisition anticompetitive effect and may be considered by the court. The FTC's attempt to show post-acquisition price increases in Chicago Bridge was rejected as "unreliable" and "speculative." Chicago Bridge & Iron Co., 138 F.T.C. 1392, 1552 (2003)(initial decision), *aff'd*, 138 F.T.C. 1024 (2004). Other courts have received post-acquisition evidence that showed no anticompetitive effect.<sup>51</sup>

**iv. New Entry Would be Timely, Sufficient and Likely to Counteract any Anti-Competitive Effects of the Acquisition**

Since barriers to entry in this industry are low, Daramic has no market power. See, e.g., PX2110-033 ("low barriers to entry in [] SLI..."). "In the absence of significant [entry] barriers, a

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<sup>51</sup> United States v. International Harvester Co., 564 F.2d 769 (7<sup>th</sup> Cir. 1977)(post-acquisition evidence showed no anticompetitive conduct); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7<sup>th</sup> Cir. 1981)(post-acquisition evidence showed that defendant's profits and market shares declined); Vaney v. Coleman Co., 385 F. Supp. 1337 (D.N.H. 1974)(post-acquisition evidence showed that defendant lost market share); United States v. Falstaff Brewing Corp., 383 F. Supp. 1020 (D.R.I. 1974)(evidence showed decline in market share and profits).

company probably cannot maintain supracompetitive pricing for any length of time." Baker Hughes, 908 F.2d at 987.

Where entry would be timely, likely and sufficient, "the merger raises no antitrust concern and ordinarily requires no further analysis. Guidelines § 3.0; F.T.C. v. PPG Indus., 798 F.2d 1500, 1503 n. 4 (D.C. Cir. 1986). To be sufficient entry must offset the competition potentially lost. To be timely it must occur within two years, and to be likely it must be profitable. Guidelines §§ 3.2-3.3.

A new entrant here need only be of MPLP's scale in order to sufficiently<sup>52</sup> replace the competitive effects of concern – in other words entry must only replace one small PE line in the FTC's North American relevant market. MPLP's one line had been at 100% capacity for several years prior to the Acquisition and, even if some capacity was freed up by MPLP's European expansion, it could replace no more than the capacity of that one line.<sup>53</sup> Thus, to prove sufficient entry to offset any lost competition, Respondent need only show that a new entrant could infuse this amount of production into North America. Guidelines § 3.4.

The special case of potential expansion and/or repositioning {REDACTED} must be mentioned first. {REDACTED} Section 2.212 of the Guidelines, which provides that "[a] merger is not likely to lead to unilateral elevation of prices of differentiated products if, in response to such an effect, rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines" is directly on point here. {REDACTED}{REDACTED}. Given these factors, "the merger is not likely to lead to a unilateral elevation of prices." Guidelines § 2.212.

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<sup>52</sup> Complaint Counsel's argument on the "sufficiency" of entry is a perfect example of the inaccuracies that pepper their brief. The FTC implies that entry cannot be of a sufficient scale to compete on the same playing field as Daramic, citing to FTC v. Chicago Bridge. FTC Br. p. 27. The facts here are not the same as in Chicago Bridge where the acquirer and the acquired firm were "the dominant suppliers" in the marketplace. FTC v. Chicago Bridge, 534 F.3d 410, 420 (2008).

<sup>53</sup> Wilhelm Depo., p. 103:17-104:7 ("approximately 2-1/2 to 3 msm would have been available for existing or new customers or different customers . . . [i]n North America").

Further, Complaint Counsel's repeated references to "*de novo*" entry is misplaced. Entry need not be *de novo* in order to counteract anticompetitive effects. Thus, a current Asian PE supplier could enter the FTC's North American market and it would only need to build one PE line to sufficiently replace the competitive effects allegedly lost in North America by the Acquisition.

Such entry would be timely. It would take less than 18 months to set up and begin production on a new PE line. {REDACTED}Daramic and MPLP<sup>54</sup> have all developed and set up new production lines in 18 months or less. {REDACTED}; RX00147-001; RX01314-001; RX01045-001. The equipment and technology needed to set up a new PE line is not proprietary and is generally known and available in the industry. Gaugl Depo., pp. 6:12-7:25, 97:10-99:1, 167:15-19; Deposition of Frank Nasisi, p. 74:3-9, 37:21-39:5; US Patent No. 3,351,495 (issued Nov. 7, 1967). The FTC and Dr. Simpson seem to imply that building a new PE separator line and testing the products from that line must be done consecutively. This is belied by the facts which show that much of this testing can be done concurrently – and within the applicable two year time frame. RX01045-001. Testing time tends to depend on the customer's needs. The evidence shows that testing can be, and has been, done within two years for all separator uses. Kahwaty Report ¶¶186-87.

New entry is also likely. Complaint Counsel shortsightedly focus on China and criticize the value added taxes and other impediments to exporting from that country. This ignores other Asian countries and manufacturers, including Thailand, where it would be profitable for a supplier to export product to North America even with additional shipping costs because of low labor rates. Kahwaty Report ¶139; Thuet Depo., p. 80:12-83:23.

Contrary to the FTC's assertions, several Asian separator manufacturers are considered to be "on par" with their North American counterparts in terms of quality, technology and capability.

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<sup>54</sup> Complaint Counsel again ignore significant evidence and proclaim that MPLP's "entry in Europe took more than three years to accomplish." FTC Br. p. 26. In fact, the evidence is that once the decision had been made to proceed in December 2006, it took less than 18 months before the facility in Feitritz was built and operating. Trevethan Depo., p. 94:2-7.

Furthermore, pointing to one separator manufacturer in Colombia does not foreclose the many Asian competitors whose products have been globally approved and have already been qualified by North American battery makers. {REDACTED}. The FTC argues that no potential entrants are likely to “replicate the competitive presence of MPLP,” but ignores the fact that MPLP had an infinitesimal “competitive presence” in PE separators in North America with only \$2 million of CellForce sales in 2007. RX01120. Just because some battery separators in the world lag Daramic in know-how does not mean they all do.

Additionally, given the size and strength of the buyers in this industry, it easily lends itself to "sponsored entry." An example is {REDACTED}<sup>55</sup> See also RX00239; McDonald Depo., p. 34:15-36:17; Gilchrist Depo., p. 100:15-21.

Complaint Counsel also misleadingly suggest that there are intellectual property impediments to entry with a PE/rubber product.<sup>56</sup> However, an independent inventor has developed and patented several additives for PE separators for antimony suppression.<sup>57</sup> As noted by Dr. Kahwaty, a current PE separator manufacturer {REDACTED} could produce a PE/rubber deep-cycle separator<sup>58</sup> easily with a small capital cost of approximately \$84,000 in six-months or less. Kahwaty Report ¶¶206-210. Given the profitability of CellForce at the current prices and {REDACTED} excess capacity, it would be economically sensible to invest the capital and time to produce these separators for the low-end deep-cycle products in order to fill idle lines. Kahwaty ¶¶208; RX01120.

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<sup>55</sup> "[L]arge, sophisticated buyers can counteract potentially anticompetitive postmerger behavior by encouraging entry. A 'power buyer' may subsidize new entry of incumbent expansion in order to increase market output or lessen the likelihood of seller coordination. The power buyer itself may become a seller via vertical integration with an existing producer." ABA Section of Antitrust Law, Mergers and Acquisitions at 196, n.27 (3d ed. 2008); United States v. Country Lake Foods, 754 F. Supp. 669, 680 (D. Minn. 1990).

<sup>56</sup> Complaint Counsel also incorrectly asserts that Daramic's attempts to use wood lingin "failed" as an additive, but, in fact, wood lingin worked perfectly well in that role. The reason it was replaced with liquid latex (not rubber) in HD was because the supply of wood lingin was inconsistent. Whear Depo., p. 105:1-25.

<sup>57</sup> U.S. Patent No. 6,824,926 (issued Nov. 30, 2004); U.S. Patent No. 6,777,131 (issued Aug. 17, 2004); U.S. Patent No. 6,770,401 (issued Aug. 3, 2004); U.S. Patent No. 6,818,355 (issued Nov. 16, 2004); U.S. Patent No. 6,767,460 (issued July 27, 2004).

<sup>58</sup> Separators with rubber added is not technically needed for a deep-cycle batteries and at least one battery manufacturer uses plain PE separators in its golf car batteries. Whear Depo., p. 55:9-25; Keith Depo., PX442.

**iii. Complaint Counsel Ignore Market Realities, Efficiencies and Pro-Competitive Effects of the Acquisition**

*a. Efficiencies Have Generated Procompetitive Effects*

Price reductions and significant efficiencies have already been generated and demonstrated by the Acquisition. Daramic eliminated a significant price increase planned by MPLP for at least one customer due to the efficiencies it achieved in purchasing larger volumes of raw materials than MPLP was able to purchase. RX00537; RX00538; RX00689.<sup>59</sup> The annualized savings on raw materials alone are upward of \$1.5 million annually. Deposition of Tim Riney, p. 46:4-17; Kahwaty Report 196. Furthermore, Daramic has implemented significant efficiencies in production by shifting HD production to Piney Flats (thereby locating all products using a rubber additive in one facility) and shifting Daramic's Potenza production to Feistritz.<sup>60</sup>

In light of the discussions herein showing that no competitive harm has resulted, or is likely to result, from the Acquisition, any and all efficiencies achieved are directly pro-competitive. The efficiencies are merger specific, verifiable and not the result of reductions in output or service. Guidelines § 4.0. Moreover, the efficiencies here will result in marginal cost reductions, which either have been, or will be, passed on to customers. Riney Depo., p. 200:23-201:10; FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054 (8<sup>th</sup> Cir. 1999)(enhanced efficiencies should be considered “in the context of the competitive effects of the merger”); Country Lake Foods, 754 F. Supp. at 674, 680 (efficiencies involving lower plant and transportation costs and “other savings” found as “further evidence that the proposed acquisition will enhance competition”).

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<sup>59</sup> Daramic has also implemented programs to make Piney Flats and Feistritz more efficient, better able to monitor their scrap usage, better able to use recycled material, improve their extraction and extrusion techniques and reduce the use of solvent, among others. Kahwaty Report, ¶ 196.

<sup>60</sup> As noted in the Guidelines “efficiencies resulting from shifting production among facilities formerly owned separately, which enable the merging firms to reduce the marginal costs of production, are more likely to be . . . verifi[able], merger-specific, and substantial. . .” Guidelines § 4.

b. *MPLP was in a Precarious Financial Position that Would have been made Worse by the Current Economic Climate*

At the time of the Acquisition MPLP was in a highly leveraged position following the building of the Feistritz plant and it had at least one, if not two, separator production lines that were destined to be empty by early 2008. RX00996; RX00999; Deposition of Harry Seibert, p. 150:20-152:5. MPLP's board had lost faith in management and had mandated that the success of Feistritz be "proven" before any additional funds would be expended. RX00401; RX00244. Furthermore, MPLP did not have a good grasp of its actual costs for producing separators and had low margins on a number of products. It was in fierce negotiations over proposed price increases with its largest customer, {REDACTED} {REDACTED}. RX00560; RX00559; RX00565. Several members of the upper management team were seriously concerned with the ultimate viability of MPLP as a stand alone company in light of the European expansion path on which it had embarked. Trevethan Depo., p. 77:1-15; Wilhelm Depo., pp. 36:1-19, 42:5-43:2, 44:1-23, 53:9-54:7, 57:8-59:24.

Add to all of the above the global recession that is a stark reality today, and it is a very real possibility that without the Acquisition MPLP would no longer exist as a going concern. Over 72 percent of MPLP's sales in 2007 were to the golf car industry which, today, is in a downturn unmatched in twenty years and trending along with the general automobile industry. Further, as more and more car manufacturers worldwide lay off workers and reduce production it is highly unlikely that MPLP – a new entrant into an old business in Europe – would be able to fill its new lines with SLI type separators, particularly when {REDACTED} Daramic {REDACTED} millions of square meters of excess capacity in Europe and the United States.<sup>61</sup> Even with the Acquisition, if Daramic had not closed its Potentza plant in Italy and shifted that production to Feistritz, the former MPLP's Austrian location would be running at less than half capacity. This would not be sufficient

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<sup>61</sup> Kahwaty Report ¶¶47-49; {REDACTED} Deposition of Pierre Hauswald, p. 60:2-13.

to sustain a company with considerable debt, mounting raw material costs and no long term contracts for its excess capacity. Daramic's North American excess capacity is also significant. The "CellForce" line at Piney Flats is running at 60% capacity – and that only with a shift of production from Owensboro.

MPLP's frailty is further evidenced by the fact that immediately after the Acquisition, Daramic discovered that MPLP's internal budget was lower than had been represented in due diligence. Riney Depo., p. 229:3-230:231:20; RX01562. Taking the "true" MPLP financials into account anticipated a loss of over \$1 million from its estimated EBITDA. MPLP's former management team recognized the danger and devised a "ruse" to do everything they could to get Daramic to purchase MPLP. RX00283; RX00402. This is not the sign of a healthy company engaged in 'maverick' competition, but the sign of an overextended weak rival that knows its viable days are numbered. An acquisition of a failing business can result in assets that would otherwise have exited staying in the industry. Rather than result in anticompetitive harm, the Acquisition of MPLP by Respondent preserved a potentially failing company and its assets.

**V. DARAMIC DID NOT ENGAGE IN MONOPOLIZATION WITH ALLEGEDLY EXCLUSIONARY CONTRACTS**

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

The FTC alleges that Daramic had monopoly power in the alleged UPS and motive markets, and, albeit only in a footnote, that it "was able to exercise monopoly power" in the SLI market as well. FTC Br. p. 33 and note 16. These claims are false. Monopoly power is "the power to control prices or exclude competition." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). Daramic had neither.

Complaint Counsel’s attempt at painting Respondent’s conduct as exclusionary and monopolistic fails when viewed in the context of the facts. For example, as noted above Daramic was unable to increase prices even when they were cost justified.<sup>62</sup>

Daramic also lacked power to exclude competition. On January 1, 2009, Daramic lost business from {REDACTED} {REDACTED}, which added production lines to supply . Kahwaty Report ¶223. Furthermore, as a result of current economic conditions, {REDACTED} “[E]xcess capacity in the hands of a rival is always a threat to a producer that wishes to raise its prices.”<sup>63</sup> Kahwaty Report ¶¶337-342. Entry conditions are such that other producers could also feasibly commence production of battery separators. In short, Daramic lacked power to exclude competition.<sup>64</sup>

Since Daramic lacked “the power to control prices or exclude competition,” it lacked monopoly power in the FTC’s alleged markets or in the PE separator market.

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

After attempting to show that Daramic had monopoly power (although in which markets is uncertain), Complaint Counsel claim that the monopolization offense was complete because Daramic also engaged in exclusionary conduct.<sup>65</sup>

Complaint Counsel misrepresent the actual contracts that they contend are “exclusionary,” and the market realities at the time those contracts were negotiated:

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<sup>62</sup> Daramic’s inability to control prices is also summarized in the Kahwaty Report at ¶¶ 214-222, 302-306 and 331-332.

<sup>63</sup> United States v. UPM-Kymmene Oyj et al., No. 03 C 2528 (N.D. Ill., 7-25-03)

<sup>64</sup> The facts relating to actual entry, ease of entry and Daramic’s inability to preclude others from entering production of separators are set out in the Kahwaty Report at paras. 166-173, 176, 178-193, 223-225, 333, 337-350 and 356-360.

<sup>65</sup> In their Brief Complaint Counsel alleges that Daramic began its “exclusionary behavior” almost 10 years ago and attempts to tie this falsehood in to MPLP’s acquisition of its first PE battery separator technology from Jungfer. This attempt fails. While MPLP did purchase a production line in 2001 from Jungfer it was intended to make CellForce, and, to this day has been used almost exclusively for that task. McDonald IH, pp. 33:20-37:18; {REDACTED} To suggest that Daramic purchased Jungfer to “shut it down” is absurd – Jungfer was in bankruptcy at the time Daramic acquired it and it was not shut down for almost 5 years. Nasisi Depo. p. 46:11-12; Gaugl Depo., 69:18-20. Further, the lawsuit brought by Daramic against MPLP for breach of contract referred to by Complaint Counsel in the same paragraph was in October 2006 – 5 years after Jungfer was purchased. To suggest that all of these events were somehow related, and part of a grand “plan” of exclusionary behavior by Respondent, is disingenuous at best.

(1) {REDACTED} contract with Daramic was not exclusive as it allowed {REDACTED} purchase some of its North American needs from other vendors. In any case, nothing about this contract foreclosed MPLP's ability to contract with {REDACTED} as evidenced by the fact that it did contract with {REDACTED} for significant production. RX00965; RX00957. Importantly, in 2006 and 2007, the time at issue here, MPLP had no excess capacity for the products {REDACTED} in the United States. Gilchrist IH., p.46:23-48:9. Thus, MPLP could not have been foreclosed {REDACTED} because it was not capable of doing so. Id.

Dr. Simpson's claim that Daramic's actions somehow delayed MPLP's plans to expand in Austria is totally without support. Simpson Report p. 30-31. The Austrian expansion plans were not finalized until December 2006 after MPLP was purchase by IGP – its prior owner, Kelso, did not support those plans. The expansion was not delayed and production started on March 1, 2008, as planned all along. Trevethan Depo., p. 94:2-7;

Lastly, the FTC contends that Daramic declared a “pretextual” force majeure to force {REDACTED} hand. FTC Br. p. 35. This is false. First, {REDACTED} contracted with MPLP, so any action by Daramic was moot. Second, a force majeure was declared {REDACTED} Daramic's largest supplier of PE separators. Deposition of Tucker Roe, p. 197:17-200:12. Daramic declared a later force majeure to all its customers allocating its own limited supply fairly and according to legal guidelines. Id.<sup>66</sup>

(2) {REDACTED}. The contract negotiated between {REDACTED} Daramic in took many months to negotiate was a “complicated global contract negotiation” with both parties “persistent” in what they wanted. {REDACTED} Importantly, MPLP was neither being considered {REDACTED} for supply at this time, and when it had been previously considered, its product had

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<sup>66</sup> See also, Cliffstar Corp. v. Riverbend Products, Inc., 750 F.Supp. 81, 13 UCC2d 392 (W.D.N.Y., 1990)(concluding that allocating 31% to some buyers, but greater than 85% to others was reasonable as a matter of law as the seller based allocation on proper factors like customer loyalty, past performance, buyer needs and the seller's projections of potential future sales to the buyer).

failed {REDACTED} specifications. {REDACTED} Thus, MPLP cannot have been, and was not, excluded by any actions attributable to Daramic.<sup>67</sup>

Complaint Counsel amazingly fail to show how much of which alleged markets were foreclosed to MPLP by these allegedly exclusionary contracts. Indeed, the FTC claims such a showing is unnecessary.<sup>68</sup> FTC Br. at 34-36. This is contrary to the leading authorities, including the D.C. Circuit, which spoke precisely to this point in Microsoft, saying “it is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure.”<sup>69</sup> Further, “[t]he share of the market foreclosed is important because, for the contract to have an adverse effect upon competition, ‘the opportunities for other traders to enter into or remain in that market must be significantly limited.’”<sup>70</sup> Similarly, the Seventh Circuit Court of Appeals stated that the plaintiff in an exclusive dealing case “must prove . . . that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition.”<sup>71</sup>

Complaint Counsel’s case on this issue cannot achieve liftoff unless the relevant markets and the extent of alleged foreclosure in each is specified. This Complaint Counsel has failed to do.

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<sup>67</sup> Although not discussed by Complaint Counsel the long term contracts entered into by Daramic with {REDACTED} are also not “exclusionary.” For instance, {REDACTED} was entered into as part of Daramic’s ‘rescue’ of during its bankruptcy, and in any case was prior to the time that MPLP even had a PE line. Gaugl Depo., pp. 114:11-114:18; 169:6-169:14; 21:1-22:17. The {REDACTED} is not exclusive and allows purchase of up {REDACTED} separators from another supplier, and was entered into during a time that MPLP had no excess capacity so could not have supplied product to {REDACTED} PX0637-02; Gilchrist Depo., pp. 67:19-68:19; 53:5-53:13; 47:21-48:4; 69:8-69:17. The {REDACTED} contract was not exclusionary since {REDACTED} unequivocally that it had no interest in purchasing from MPLP or any other vendor. {REDACTED}

<sup>68</sup>This claim is not supported by the authorities cited by Complaint Counsel: U.S. v. Dentsply Int’l, Inc., 399 F.3d 181 (3d Cir. 2005), Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 394 (7<sup>th</sup> Cir. 1984) and In re Beltone Electronics Corp., 100 F.T.C. 68 (1982). The claim is keyed to an allegation that there is a “direct showing of competitive harm” because Daramic’s allegedly exclusionary contracts delayed the opening of Microporous’ plant in Feistritz, Austria. However, the two lines scheduled for the Feistritz plant were not delayed but opened on schedule. Gaugl Depo., p. 84:11-22.

<sup>69</sup> United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001).

<sup>70</sup> Id., quoting Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 328 (1961).

<sup>71</sup> Roland Machinery Co., 749 F.2d at 394. See also Dentsply, 399 F.3d at 191 (“[t]he test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.”); Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9<sup>th</sup> Cir. 1997), quoting Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 45 (1984)( O’Connor, J. concurring) (“Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.”).

## VI. THE HOLLINGWORTH & VOSE AGREEMENT

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

The FTC's claim that the 2001 Cross Agency Agreement ("Agreement") between Daramic and H&V "unlawfully restrained trade" is without foundation. Without citing to a full record or consideration of any of its pro-competitive benefits, the FTC condemns this productive joint sales agreement as "inherently suspect" if not unlawful per se. This argument cannot be sustained.

Pursuant to the Agreement, Daramic was to promote the sale of H&V's AGM separators, while H&V would promote the sale of Daramic's PE separators. The companies also planned potential sharing of technologies and development of new products at the outset of the Agreement.<sup>72</sup>

Importantly, Daramic makes PE separators; H&V did not, and does not. Conversely, H&V makes AGM separators; Daramic did not, and does not. Further, AGM and PE separators did not, and do not, effectively compete with each other, as evidenced by the FTC which does not define any of its relevant markets as including AGM.<sup>74</sup> Daramic had no plans to produce AGM separators and {REDACTED}.<sup>75</sup> No documents relating to any such possible entry have been produced or cited. Accordingly, since Daramic and H&V were not actual or potential competitors, the non-compete provisions in the Agreement had no adverse effect on competition and imposed no restraint of trade. See also FTC Br. at p. 13, fn. 4.

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<sup>72</sup> {REDACTED}

<sup>74</sup> {REDACTED} Nasisi Depo., p. 29:15 – 30:18.

<sup>75</sup> See, e.g., {REDACTED} The FTC cites to PX0035-005-006 and PX 0169-001 in support of its argument. These documents and the statements therein are dated in 2005, four years after the Agreement was negotiated, and were made by Pierre Hauswald who, in 2001, was a vice president of manufacturing for Daramic and was not involved "at all" in the negotiations (Hauswald Tr. p. 21:7-10; 22:1-3). Furthermore, he did not know why Daramic entered into the agreement (Id. p. 22:13-24:10). Further, the statements are hearsay and do not state that H&V actually planned to commence production of PE separators. The FTC has not, and cannot, cite to any evidence showing Daramic had plans to produce AGM separators, or that H&V planned to produce PE separators.

One of the primary motivations for the Agreement was to allow Daramic and H&V to compete with a similar agreement between Entek and Dumas, an AGM producer. Nasisi Depo., p. 67:9-68:20. Entek and Dumas {REDACTED}H&V and Daramic’s joint activities have included significant joint marketing, promotional efforts and joint exhibits at trade shows and conventions – {REDACTED}

The record shows that the Agreement promoted the businesses of both companies. Daramic represented H&V primarily {REDACTED} RX00381. {REDACTED} The joint activity by the two companies explains the necessity for the non-compete clause in the Agreement. As part of the joint activity the two companies shared a great deal of confidential product, marketing and customer information.<sup>76</sup> These exchanges promoted and facilitated the venture’s activities. But they could not and would not have occurred without some provision preventing their improper use.

Complaint Counsel improperly seek to apply the FTC’s “inherently suspect” doctrine to this agreement. That system, which was challenged on appeal in PolyGram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005), has not been accepted by the Supreme Court and is subject to limitations that are ignored by Complaint Counsel. See North Texas Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir 2008) as discussed below.

In Texaco Inc. v. Dagher, 547 U.S. 1 (2006), a joint sales venture case decided after Polygram, the Court did not recognize the “inherently suspect” system but endorsed<sup>77</sup> (without applying it) the historical “ancillary restraints” method for assessing collateral restraints in joint ventures. The Court said that the doctrine requires a court to determine whether it confronts “a naked restraint of trade . . . or one that is ancillary to the legitimate and competitive purposes of the business association.” 547 U.S. at 7. Here the non-compete does not rise to the level of an ancillary

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<sup>76</sup> Nasisi Depo., p. 108:9-109:3; {REDACTED}{REDACTED}

<sup>77</sup> The ancillary restraints concept is traced to Addyston Pipe & Steel Co. v. U.S., 175 U.S. 211 (1899)

