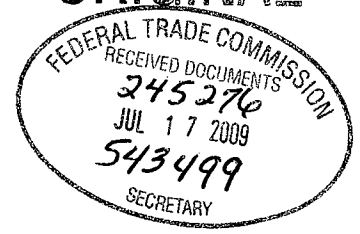


ORIGINAL



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

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

PUBLIC

Docket No. 9327

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INTRODUCTION

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

As Douglas Gillespie of Exide testified:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bearing in mind that the full remedy in this case is warranted if the evidence shows a mere likelihood that the acquisition lessens competition substantially in any one of these four markets, additional evidence showing Daramic’s undisputed, brazen conduct has taken us far beyond what it required by the law, and is essentially un rebutted. For example, Daramic failed to offer any evidence to counter Complaint Counsel’s evidence of monopoly, except to say that it simply raised prices to recover cost increases and forced customers into exclusionary contracts for planning purposes. Yet, no other competitor has ever been able to raise prices to the levels Daramic was able to impose on its customers. [REDACTED]

[REDACTED] (Seibert, Tr. 4278, *in camera*). Thus, cost cannot be the real basis for the amount of increases.

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

⁵ Daramic’s hard-ball tactics are simply astounding. *See e.g.*, PX1793 at 001, *in camera* (Hauswald: Make [REDACTED] sign the contract or “no product today,” show them “no mercy”); Hauswald Tr. 743-744, 1132-1133, *in camera* [REDACTED] Bregman, Tr. 2901-2903, 2906; PX1050, *in camera* (Hauswald told [REDACTED]

[REDACTED] Roe, Tr. 1267-1268 (offer “all or nothing” to C&D); Hall,

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

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

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

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

[REDACTED]

* * *

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

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

I. Factual Background

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

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

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

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

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

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

[REDACTED] (PX0168 at 002). Daramic decided that it should fight this threat because [REDACTED]

[REDACTED] (PX0694 at 001). [REDACTED] [REDACTED] [REDACTED] }

[REDACTED] [REDACTED] } (*Id.* at 001; PX1211 at 001, *in camera*; PX0456 at 001-002).

When Daramic learned that another customer, [REDACTED]

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

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

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

Daramic thus believed that it needed to [REDACTED] (PX0168 at 002; PX0694 at 001). Daramic believed an acquisition would [REDACTED] [REDACTED]. (PX0932). Daramic finally acquired Microporous on February 29, 2008.⁶

Daramic's documents analyzing the 2008 acquisition of Microporous demonstrate its anticompetitive intent. Presentations to Daramic's Board highlight that: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] PX0203 at 088 (Hauswald, Tr. 776-781). Indeed, Daramic management asserted to the Daramic Board that [REDACTED]

[REDACTED] (PX0203 at 089, *in camera*;

Hauswald, Tr. 781, *in camera*). All of the financial projections that were done at Daramic and

presented to the Daramic Board of Directors incorporate expectations and assumptions that the

merger would [REDACTED]. The

management of the former Microporous conveyed similar analyses to their board, asserting that

as a result of the acquisition,

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

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

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

(PX1109 at 003).

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

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

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

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

II. Daramic's Illegal Acquisition of Microporous

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

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

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

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

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

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

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

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

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

1. Deep-Cycle Battery Separators are a Product Market

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

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

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

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

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

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

⁹ {PX0319-003 [REDACTED]

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

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

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

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

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

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

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

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

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

Microporous's CEO reminded Daramic's counsel that CellForce was "unique" as well. (Gilchrist, Tr. 519, *in camera*). Yet, Flex-Sil and HD [REDACTED] [REDACTED] (Whear, Tr. 4839, *in camera*). Indeed, [REDACTED] [REDACTED]. (See Whear, Tr. 4783).

Under the law, mere uniqueness of a product, however, does not result in a distinct product market if it competes against substitutes. *See, e.g., Hack v. The Presidents and Fellows of Yale College*, 237 F.3d 81, 86 (2d Cir. 2000) (an admittedly unique product, a Yale education, is not its own product market); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 675 (6th Cir. 1986) (small business computers was the relevant market, not just those that would run on BOSS software); *see also SPAHR v. Leegin Creative Leather Products*, 2008 WL 3914461, at *11 (E.D. Tenn. Aug. 20, 2008) (For a single product to constitute its own market, it must be "so unique that there are no substitutes reasonably interchangeable with them in the market."). Flex-Sil, CellForce and HD may each have unique properties, but all compete against each other for the use in deep-cycle batteries, which is thus a market with just these three competitive products.¹¹

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

¹¹ Daramic also argued that deep-cycle separators (HD and CellForce) are in the same market as SLI separators because two examples of these products overlapped in backweb thicknesses. That argument ignores the other aspects of these separators, such as rubber content, flexibility, cost and other factors that make the products competitive for their purposes. No one testified that he or she would use an SLI separator in a deep-cycle battery. Moreover, Daramic's claimed overlap in backweb thicknesses is misleading, because over 99% of SLI separators are less than 10 mils, and no deep-cycle separators are less than 12 mils. (Roe, Tr. 1312-1315; Hauswald, Tr. 678-679). [REDACTED]

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

2. Motive Separators are a Relevant Market

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

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

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

PX1790 at 001 (emphasis added).

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

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

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

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

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

There are no other competitors in this market. Entek does not make motive separators today. [REDACTED]

[REDACTED] (Weerts, Tr. 4507, 4509, *in camera* [REDACTED]). [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] } (Weerts, Tr. 4520, *in camera*; PX1823, *in camera*; *see also* Simpson, Tr. 3461-3462, *in camera* [REDACTED]
[REDACTED] }).

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

3. UPS Separators are a Product Market

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

The market for flooded UPS battery separators consists of separators made from Daramic's PE or Darak or Microporous's CellForce. (See CCFOF ¶¶ 145-146). Microporous recognized that there were only two competitors for UPS battery separators – Daramic and Microporous. (Gilchrist, Tr. 306, 343; *see also* CCFOF ¶¶ 134, 501). Microporous had made some sales of UPS separators for over a “year and a half” to C&D and had already agreed to sell to EnerSys, which would have given Microporous 40-50% of the UPS market in North America.¹⁴ (Gilchrist, Tr. 398-399; Axt, Tr. 2104) Entek made the product years ago but has

[REDACTED] (Gillespie, Tr. 3037, *in camera*).¹⁵ [REDACTED]

[REDACTED] (Gillespie, Tr. 3041, *in camera*). [REDACTED]

[REDACTED]

[REDACTED] (Gillespie, Tr. 3018-3020, 3041, *in camera*). [REDACTED]

[REDACTED] (Gillespie, Tr. 3048). Yet, there is no one else that Exide can turn to for these separators. (See CCFOF ¶¶ 503, 507). Without Microporous, Exide and other customers have lost the only leverage they had.

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

¹⁴ Executives at Microporous anticipated revenues from the product as early as 2008 or 2009. ({PX0664 at 001, *in camera* [REDACTED]

Since the acquisition however, [REDACTED]

[REDACTED] PX0579 at 003, *in camera*}).

[REDACTED] (Weerts, Tr. 4492-4493) [REDACTED] (Gillespie, Tr. 3037)

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

4. Starting, Lighting, Ignition (“SLI”) Battery Separators

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

In North America, separators for SLI batteries are made from PE. (See CCFOF ¶¶ 293-294). SLI batteries contain little or no antimony and do not require a rubberized separator. SLI separators must also have a very low electrical resistance (“ER”) to provide the surge in current. (PX0913 at 004, *in camera*; PX0669 at 004, 019, *in camera*). [REDACTED]

[REDACTED] }¹⁶ PE
battery separators for SLI batteries are, for all of these reasons, a relevant product market in which to assess the competitive impact of Daramic’s acquisition of Microporous.

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

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

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

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

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

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

Daramic also regarded Microporous as a competitor in SLI. Indeed, it repeatedly reacted to the threat of Microporous as a SLI separator. (Roe, Tr. 1242-3; PX0258; PX0255, *in camera*; Roe, Tr. 1285-1286, 1289-1290, 1292-1294, 1350-1354, *in camera* (the “MP Plan”)). [REDACTED]

[REDACTED] (Weerts, Tr. 4517, *in camera*). Microporous was thus a very real competitor in SLI. But, at the very least, Microporous was, using the definition in the Merger Guidelines, an “uncommitted entrant,” which should thus be included in the market definition as a participant. {(Kahwaty, Tr. 5413-5414, *in camera* [REDACTED]; Simpson, Tr. 3461-3462, *in camera* [REDACTED]}.¹⁸

Daramic feared Microporous’s competition in SLI, and its documents express concern that “unlike prior years, we have a true legitimate big competitor entering the market (MP [Microporous]) and for sure they will capture volume at whatever it takes. This is an element we have not faced in many years.” (PX0238). Absent the acquisition of Microporous, Daramic predicted that Daramic would have had to [REDACTED]

[REDACTED] (PX0174 at 003, 016, *in camera*). In fact, the Polypore Board [REDACTED]

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

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

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

B. The Relevant Geographic Market is North America

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

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

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

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

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

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

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

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

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

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

Separator prices are ██████████. (Gillespie, Tr. 2998, *in camera*; see CCFOF ¶¶ 164, 166, 168-169). Indeed, Daramic's Roe insisted that comparing prices from these different regions was ██████████ ██████████ (Roe, Tr. 1797, 1799, *in camera*; Seibert, Tr. 4252, *in camera* (Daramic tracks sales by region). Daramic prices its products locally, based on numerous factors, including local plant costs. For example, Enersys bought product from Europe and found that the prices were 20% higher there. (Burkert, Tr. 2334; see also CCFOF ¶ 167)

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██████████ (See Simpson Reports, PX0033 at 005-007, *in camera* (using SSNIP (critical loss analysis) and price discrimination, PX2251 at 005-006, *in camera* (same); *Merger Guidelines*, ¶ 1.21 (using SSNIP) and ¶ 1.21 (Price Discrimination); Simpson, Tr. 3183). Because manufacturers of deep-cycle, motive, UPS, and SLI battery separators can ██████████

██████████

(Simpson, Tr. 3183). Dr. Simpson concluded from reviewing the testimony of buyers and the

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

Asian separator suppliers simply do not sell any products in North America. (Seibert, Tr. 4267, *in camera*; Thuet, Tr. 4379-4382, *in camera*; Weerts, Tr. 4500; Roe, Tr. 1236 (No Asian suppliers have ever supplied PE separators to North America)). As Mr. Toth admitted to the FTC staff during the investigation, the reason no Asian producers have ever competed here is that the margins “aren’t high enough” for them to be competitive. (Toth, Tr. 1404). [REDACTED]

[REDACTED] (Hall, Tr. 2727, *in camera*) [REDACTED]

[REDACTED] (Hall, Tr., 2734-2736, *in camera*; PX0907 at 21 (Kung, Dep. at 153, 155-156, *in camera* [REDACTED], 176, *in camera* [REDACTED]); PX1522 at 005 [REDACTED]

[REDACTED] (Hall, Tr. 2745; Gillespie, Tr. 3028-3030, *in camera* [REDACTED]

[REDACTED] *see also* CCFOF ¶¶ 203, 205). [REDACTED]

[REDACTED] (Gillespie, Tr. 3025 3029, *in camera* [REDACTED]

[REDACTED])}

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

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

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

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

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

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

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

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

The fundamental reason for the lack of entry is that these markets are characterized by high barriers to entry, [REDACTED].

[REDACTED]. (PX0265 at 004, 011, *in camera*; see also CCFOF ¶ 996). Respondent has repeatedly admitted that these markets are characterized by barriers to entry,²¹ including: “significant capital investment,” “sophisticated production processes,” “extensive customer relationships,” “patent-

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

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

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

²² Dr. Simpson noted that [REDACTED]
[REDACTED]

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

Significantly, Daramic's own conviction that [REDACTED]

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

a. Entry Would Not Be Timely

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

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

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

patent/IP position. The testing requirements to gain customer approval add significantly to the amount of time it takes to enter each of the product markets. (*See generally* CCFOF ¶¶ 881, 883, 886-888). Testing for motive and UPS products typically takes two-to-three years. (Whear, Tr. 4798; Gagge, Tr. 2490-2492; Gillespie, Tr. 2973-2974; *see also* CCFOF ¶¶ 889-892). Testing for deep-cycle separators typically take 18-24 months. (Gillespie, Tr. 2934; Godber, Tr. 163; *see also* CCFOF ¶¶ 897-901, 903). Customer testing of SLI testing can last from 18-24 months. (Gillespie, Tr. 2973; RX00013 at 009). Just as Daramic spent many years²³ trying to design a battery separator that would work well in deep-cycle applications, it would be impossible for a new entrant to develop and design a deep-cycle separator from scratch and have it tested and ready for commercial sales within two years. (*See, e.g.*, PX0433 at 001; CCFOF ¶¶ 877-879).

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

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

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

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

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

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

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

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

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

