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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
Polypore International, Inc., a corporation,	)	Docket No. 9327 (Public Version)
Respondent.	)	

INTERVENOR HOLLINGSWORTH & VOSE COMPANY'S BRIEF ON REMEDIES AFFECTING ITS CONTRACTUAL RIGHTS

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I. INTRODUCTION

The Complaint issued against Polypore International, Inc. ("Polypore") in this matter alleges that Polypore's acquisition of Microporous Holding Corporation is an illegal merger under Clayton Act, Section 7 and Section 5 of the Federal Trade Commission Act and that it also constitutes an unlawful merger to monopoly. The Complaint alleges further that Polypore engaged in a pattern of conduct – the merger being just one aspect – of thwarting competition and monopolizing various battery separator markets. As part of this scheme, the government contends that Polypore's subsidiary, Daramic, solidified an unlawful monopolization of several polyethylene ("PE") battery separator markets by inducing Intervenor, Hollingsworth & Vose Company ("H&V"), to enter into a restrictive covenant contained in a Cross Agency Agreement, "in order to prevent H&V from entering the PE separator market." (Compl. ¶ 47.). The essence of the government's claim against Daramic on the Cross Agency Agreement is that Daramic did not have a legitimate procompetitive purpose that could justify the restraint on H&V's competitive activities with respect to PE battery separators. (CC Post-Trial Brief at 65-68.). It is the non-competition provision concerning the PE battery business – not the overarching cross agency arrangement – that the government contends is an "unfair method of competition." Notably, the Complaint did not name H&V as a Respondent and did not allege that H&V engaged in unlawful conduct with respect to {[redacted]}

H&V submits this brief pursuant to the Order on Motion to Leave to Intervene by Non-Party Hollingsworth & Vose Company (the "Intervention Order") to address the propriety of the relief requested by Complaint Counsel to the extent the remedy improperly deprives H&V of its property rights under the Cross Agency Agreement. Complaint Counsel proposes to remedy Polypore's alleged unfair method of competition with respect to the restriction on PE

battery separator competition by requiring Polypore to cease and desist from enforcing or implementing and to nullify *both* the non-competition restrictions relating to PE battery separators and the {[redacted]} Fundamental principles of due process and limitations on the remedial authority of the Federal Trade Commission prohibit an order nullifying the contractual rights of H&V which have not been litigated in this matter.

II. CROSS AGENCY AGREEMENT AND CLAIM AGAINST POLYPORE

In March 2001, Daramic and H&V entered the Cross Agency Agreement. Daramic makes PE battery separators for flooded lead acid batteries, while H&V makes absorptive glass mat ("AGM") battery separators for valve regulated lead acid ("VRLA") batteries. PE separators cannot be used in VRLA batteries, and AGM battery separators cannot be used in flooded batteries. (H&V FOF ¶2.) The Agreement provided that {[redacted]} (H&V FOF ¶ 3.)

{[redacted]}

(H&V FOF ¶¶4-5.) H&V engineers frequently participate in sales calls and assist customers in resolving manufacturing problems. (H&V FOF ¶¶ 4- 5.) Since the cross-agency relationship would {[redacted]}

[redacted]

(H&V FOF ¶6.) Section 4(b) provided that {[redacted]

[redacted] Section 4(a) provided that {[redacted]

(H&V FOF ¶¶7-8.)

Complaint Counsel alleges that Daramic did not have a proper procompetitive purpose to enter the Cross Agency Agreement and that its sole purpose was to solidify its unlawful monopolization of several PE battery separator markets. Complaint Counsel does not contend that H&V and Daramic were competitors, but that H&V was a potential competitor of Daramic in the PE battery separator business.[1] Specifically, Complaint Counsel has alleged with respect to Daramic's lack of a legitimate procompetitive purpose that:

- "*Daramic's principal purpose* in contracting with H&V was to keep H&V out of the PE separator market." (CC Pre-Trial Br. at 32) (emphasis added)).

- "[T]he evidence establishes that *Daramic induced H&V to agree not to compete in several markets – markets that have long been dominated by Daramic.*" (CC Post-Trial Br. at 67 (emphasis added)).

- Upon learning that H&V was exploring the possibility of entering the PE business, "*[i]n order to block this competitive threat, Daramic approached H&V* and proposed an 'alliance." (*Id.* at 63 (emphasis added).

Without a proper purpose relating to the expansion of PE battery sales, the government contends that the restraint on H&V competing in PE battery separators was an unlawful

[1] H&V takes issue with the proposition that H&V had any plans to begin making or selling PE battery separators, as well as many other of Complaint Counsel's allegations. For example, H&V does not concede that Daramic's motives were improper or that the non-compete in Section 4(b) was not a reasonable ancillary restraint. However, those issues are outside of the scope of H&V's intervention.

restraint. (CC Post-Trial Br. at 67-68.) This tribunal has not adjudicated whether {[redacted]} Moreover, in the context of H&V's response to third-party discovery requests from the government, H&V was informed that it was not being targeted in this case, that its conduct was not at issue and that it was not considered the "bad actor" with respect to the Cross Agency Agreement.

Complaint Counsel's proposed remedy with respect to the Cross Agency Agreement extends beyond the claim actually litigated in this case – *namely, whether the restriction on competition in PE battery separators was a reasonable ancillary restraint.* In seeking relief, Complaint Counsel fails to distinguish between the restraints on competition in {[redacted]} Complaint Counsel proposes that Respondent be required to do as follows:

> 1. Within fifteen (15) days after the date this Order becomes final: (a) *modify and amend the H&V Agreement in writing to terminate and declare null and void,* and (b) cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing, *the covenant not to compete set forth in Section 4 of the H&V Agreement*, and all related terms and definitions, as that covenant applies to North America and to actual and potential customers within North America.
>
> 2. Within thirty (30) days after the date this Order becomes final, file with the Commission the written amendment to the H&V Agreement ("Amendment") that complies with the requirements of Paragraph VI.A.1 *[sic]* . . . .

(CC Proposed Order VIII.A, at 26-27 (emphases added)).

The Proposed Order would not only require Polypore to nullify the entirety of Section 4 by written amendment but would also, within 15 days, require that Polypore not "implement" Section 4. In other words, Polypore would be ordered to cease and desist from complying with the {[redacted]} in Section 4(a).

If entered, the proposed remedy would necessarily and immediately effect H&V's contract rights arising under Section 4(a).[2] During the life of the Cross Agency Agreement, {[redacted]} (H&V FOF ¶¶ 911.) Daramic representatives have worked closely with H&V representatives in developing and maintaining these customer relationships and goodwill. (H&V FOF ¶¶ 5,9.) {[redacted]} (H&V FOF ¶11.) H&V's valuable and valid contract rights would be negated by the proposed remedy.

III. THE PROPOSED RELIEF VOIDING H&V'S CONTRACTUAL RIGHTS VIOLATES PROCEDURAL DUE PROCESS

A. The Commission May Not Adjudicate the Rights of a Non-Party

It is black-letter law that a tribunal may not adjudicate the rights of a non-party. *Richards v. Jefferson County, Alabama,* 517 U.S. 793, 798 (1996) ("In Anglo-American jurisprudence. . . one is not bound by a judgment. . . in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 110 (1969) (similar); *Hansberry v. Lee,* 311 U.S. 32, 40 (1940) (similar); *Lohr v. Conseco, Inc.,* Civ. No. 07-374, 2008 U.S. Dist. LEXIS 102344, at *15 (M.D.N.C. 2008) ("[J]udicial action that attempts to enforce a

[2] H&V submitted its proposed Findings of Fact relating to its right under the contract in compliance with the Intervention Order. H&V cited record evidence to which it had public access or which itself possessed. The evidence cited is by no means a complete record concerning H&V's rights or concerning the purpose, necessity, effect or validity of the restraints contained in the Cross Agency Agreement since H&V did not have rights of discovery or presentation of evidence in this matter and does not have access to the complete record, which is largely *in camera.*

judgment against an absent party runs afoul of the due process requirements of the Fifth and Fourteenth Amendments."). Without adequate notice and a meaningful opportunity to be heard, a party cannot be deprived of a constitutionally protected property interest.

B. The Government Did not Provide Notice to H&V of its Proposed Nullification of H&V's Contract Rights and H&V was Without a Meaningful Opportunity to be Heard.

H&V's rights under its contract with Daramic constitute a legally protected property interest. *E.g.*, *Lynch v. United States*, 292 U.S. 571, 579 (1934). As such, the Due Process Clause requires that H&V be provided adequate notice that its property interest is to be affected and a meaningful opportunity to be heard. *In re Kellogg Co.*, Dkt No. 8883, 1978 FTC LEXIS 280, at *11-*12 (June 9, 1978); *see Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In order to be adequate, notice must describe "the *nature and scope* of the contemplated inquiry." *Murphy Oil Corp. v. Fed. Power. Comm'n*, 431 F.2d 805, 813 (8th Cir. 1970) (emphasis added); *Shell Oil Co. v. Fed. Power Comm'n*, 334 F.2d 1002, 1012 (3d Cir. 1964). Such notice must sufficiently identify of the allegations *against a party*. *Soule Glass & Glazing Co. v. NLRB,* 652 F.2d 1055, 1074 (1st Cir. 1981) ("Failure to clearly define the issues and advise [a litigant] charged with a violation of the specific complaint he must meet and provide a full hearing on the issue presented is to deny due process of law."). Applying the Supreme Court's balancing test set forth in *Mathews v. Eldridge*,[3] meaningful opportunity to be heard in this setting must mean the full rights of a party: an opportunity to submit evidence, object to evidence and to cross-examine. *See, e.g.*, *Murphy Oil Corp,* 431

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[3] Due process generally requires consideration of three distinct factors. First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

F.2d at 813 ("[P]arties to a proceeding before an administrative agency are entitled to . . . an opportunity to be heard and present evidence. . . . A departure from [this] minimal requirement[] is a denial of procedural due process."); *Doe v. U.S. Civ. Serv. Comm'n,* 483 F. Supp. 539, 579 (S.D.N.Y. 1980) ("The right to cross-examine witnesses applies to administrative proceedings where an interest protected by the due process clause is at stake.").

In this case, Complaint Counsel did not provide H&V with notice that its contractual rights were at stake. The Complaint did not state a claim with respect to the {[redacted]} H&V was not a named party and throughout discovery in this matter it was informed by Complaint Counsel that it was *not* being targeted, that its motive was *not at issue* in the case and that H&V was *not considered* the "bad actor." H&V was without any of the discovery or trial rights of a party. Even today the record of the evidence submitted on the Cross Agency Agreement is largely *in camera*. Documents and testimony from Polypore relating to the Cross Agency Agreement are not reviewable by H&V. Much of the briefing on the claim is also redacted. H&V never offered evidence with respect to the legitimate purpose of the Agreement {[redacted]} never cross-examined key witnesses from Polypore or put on full testimony of its own witnesses relating to the valid purpose of the Agreement and the reasonable necessity of the restrictions on competition {[redacted]} The validity of the {[redacted]} were not at issue. It is violative of concepts of fundamental fairness for the government to purport to have adjudicated H&V's contract rights under these circumstances.

IV. THE PROPOSED NULLIFICATION OF H&V'S CONTRACT RIGHTS IS BEYOND THE COMMISSION'S REMEDIAL AUTHORITY

Remedies imposed by the Commission must bear a "reasonable relation to the unlawful practices found to exist." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957); In re *Ky. Household Goods Carriers Ass'n*, 139 FTC 404, 406 (2004) (Chappell, A.L.J.). Furthermore, the Commission's "orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public." *FTC v. Royal Milling Co.*, 288 U.S. 212, 217 (1933).

Complaint Counsel has overreached in its request for a remedy. The remedy must fit the claim. The claim that was tried was the legality of the non-competition restrictions relating to PE battery separators. Specifically the issues for proof as identified by the parties included: (1) whether there was a legitimate purpose relating to PE battery separators; (2) whether the PE restriction was reasonably necessary to advance a legitimate procompetitive purpose; and (3) whether there was there any anticompetitive effect on markets involving PE battery separators. The validity of the non-competition restrictions contained in Section 4(a) {[redacted]} were not tested. Any remedy necessarily must be limited to the provisions of Section 4(b) {[redacted]}. Requiring Respondent to "modify and amend the H&V Agreement in writing to declare null and void . . . the covenant not to compete set forth in Section 4 of the Agreement" is not properly tailored to redress the alleged wrongdoing by Daramic. A reasonably related and complete remedy is available in the event that this tribunal finds against Daramic on the validity of the PE battery separator non-compete. The relief requested by Complaint Counsel may be modified so that it is limited to Section 4(b) and will not, as such, affect or determine H&V's contract rights.

V. CONCLUSION

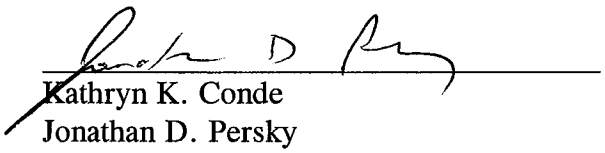
For the foregoing reasons, the Court should decline to adopt section VIII of Complaint Counsel's Proposed Order, or, in the alternative, modify paragraph VIII.A.1 of the Proposed Order to strike the words "Section 4 of the H&V Agreement" and insert in their place "Section 4(b) of the H&V Agreement."

Dated: September 30, 2009

Respectfully submitted,

HOLLINGSWORTH & VOSE COMPANY

By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2009, I filed via overnight delivery and electronic mail delivery an original and two copies of the foregoing Intervenor Hollingsworth & Vose Company's Brief On Remedies Affecting Its Contractual Rights (Public Version) and that the electronic copy is a true and correct copy of the paper original and that a paper copy with an original signature is being filed with:

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I hereby certify that on September 30, 2009, I filed via overnight delivery and electronic mail delivery two copies of the foregoing Intervenor Hollingsworth & Vose Company's Brief On Remedies Affecting Its Contractual Rights (Public Version) with:

The Honorable D. Michael Chappell
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