UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
CHICAGO BRIDGE & IRON COMPANY N.V., a foreign corporation,	)	
CHICAGO BRIDGE & IRON COMPANY, a corporation,	)	Docket No. 9300
and	)	
PITT-DES-MOINES, INC., a corporation.	)	

RESPONDENTS' MOTION FOR DIRECTED VERDICT ON THE ISSUE OF REMEDY

The Federal Trade Commission (FTC) has spent more than two years investigating and litigating Chicago Bridge and Iron's (CB&I's) acquisition of the assets of Pitt Des Moines, Inc.'s, Engineered Construction Division (PDM EC). This investigation and litigation has focused entirely on trying to prove liability, *e.g.*, that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. §18. Despite all of the effort that Complaint Counsel has expended attempting to prove liability, it has failed to present a shred of evidence during this trial to support the remedy it seeks to have imposed. Specifically, Complaint Counsel has not presented *any* evidence from *any* witness which shows that its proposed remedy of splitting up the CB&I Industrial and Water Divisions into two separate companies would be feasible, desirable or effective in restoring the alleged lack of competition, nor has Complaint Counsel

presented *any* evidence which would suggest that the alternate remedies proposed by CB&I would be undesirable or ineffective.

The remedy Complainant seeks is clearly injunctive in nature, and Complaint Counsel, as the plaintiff in this proceeding, bears the burden of proof regarding injunctive relief, every bit as much as the plaintiff in a private damages proceeding bears the burden of proving the amount of damages. See Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 883 F. Supp. 1247, 1263 (W.D. Wis. 1995) (finding in a section 7 case that "it is the plaintiffs' burden to prove they are entitled to injunctive relief."). Complaint Counsel's failure to present any evidence regarding remedy is all the more remarkable in light of the recent D.C. Circuit decision in United States v. Microsoft, where, as here, the Government sought to break-up Microsoft into separate companies. See United Stated v. Microsoft Corp., 253 F. 3d. 34, 46 (2001). At the District Court level, Judge Thomas Penfield Jackson imposed the Government's proposed break-up remedy without taking any evidence concerning the feasibility, desirability or effectiveness of the remedy. See United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.C. Cir. 2000). The United States Court of Appeals for the District of Columbia reversed Judge Jackson's remedy order based in large part on his failure to take evidence concerning remedy. See Microsoft, 253 F. 3d. 34, 46 (2001).

This case, should it ever get to the United States Court of Appeals, would surely be reversed if any remedy were to be imposed based upon the case put on by the FTC staff in this case, which is as bereft of evidence regarding remedy as was the initial decision in Microsoft. It is noteworthy that after remand from the D.C. Circuit, Judge Kollar-Kotelly held a hearing solely on the issue of remedy that lasted longer than this entire proceeding. See New York v. Microsoft Corp., 224 F. Supp. 2d 76, 87 (D.C. Cir. 2002).

Complaint Counsel, without presenting any evidence in this case on the issue of remedy cannot, as a matter of law, prove that the remedy it seeks is feasible, desirable or effective. As a result, CB&I is entitled to a directed verdict on the issue of remedy pursuant to Federal Trade Commission Rule 3.22 and Federal Rule of Civil Procedure 52(c).

I. Complaint Counsel Seeks A Remedy Including The Break-Up Of CB&I Into Two Competing Companies

In the current action, Complaint Counsel seeks the most draconian remedy imaginable - - the breakup of CB&I into two separate constituent companies. In its complaint, Complaint Counsel sought the "[r]establishment by CB&I of two distinct and separate, viable and competing businesses . . . ." See Notice of Contemplated Relief, FTC Complaint (Oct. 25, 2001). In opening statements, Mr. Krulla on behalf of Complaint Counsel stated "[r]elief in this matter must re-establish two independent viable and competitive entities." Trial Tr. 101:18-19 (11/12/02). It has been clear to Complaint Counsel that, since the filing of its complaint on October 25, 2001, it would be required to present evidence in order to support its suggested remedy of breaking CB&I into two separate companies.

II. Complaint Counsel Bears The Burden To Prove A Remedy For A Violation Of The Clayton Act

Case law has clearly established that Complaint Counsel bears the burden to prove that it is entitled to its requested injunctive remedy. By simple analogy, just as the plaintiff in a classic contract dispute is required to provide evidence to support a request for damages, Complaint Counsel in this proceeding must also support its request for relief with evidence before this Court grants such a remedy. See e.g. Schroeder v. Barth, 969 F.2d 421, 424 (7th Cir. 1992) (citing Michiana Mack, Inc. v. Allendale Rural Fire Protection Dist., 428 N.E.2d 1367 (Ind. App. 1981)). It is well established that a complainant in an antitrust case bears the

burden of proving the need for, and effectiveness of, equitable relief. See Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic, 883 F. Supp. 1247, 1263 (W.D. Wis. 1995) rev'd and remanded in part on other grounds, 65 F. 3d 1406 (7th Cir. 1995); Ocean State Physician Health Plan, Inc., v. Blue Cross & Blue Shield of R.I., 692 F. Supp. 52, 73-74 (D. R.I. 1988) (demonstrating that the plaintiff bears burden to show it is entitled to equitable relief).

Courts have made clear that this burden is not satisfied merely by proving that an antitrust violation exists. In Marshfield Clinic, the United States District Court for the Western District of Wisconsin found that, despite its findings that the acquisition at issue constituted an antitrust violation, insufficient evidence had been presented by the plaintiff to support its requested remedy of a break-up of the acquired assests. Id. at 1263-64. The court held that a finding of liability does not by itself meet the burden of proving the need for equitable relief. See Id. at 1264. The Marshfield Clinic district court did not impose the complainant's remedy because "[d]ivestiture would have a large impact on third parties such as patients, Marshfield doctors and others that have not been before this Court to protect their interests." Id.

Here, the proposed break-up remedy would similarly have a large impact on the lives of CB&I's employees, customers for the "relevant products" at issue in this case, as well as on the customers of other products made by CB&I. This Court must balance the feasibility of the proposed remedy, its impact on CB&I employees and customers, and whether the requested relief could achieve its goal of doing more good than harm. Record evidence is required for the Court to make such an equitable determination.

III. Complaint Counsel Has Failed To Present Any Evidence Regarding Remedy

Over the course of 18 trial days which began on November 12, 2002, Complaint Counsel presented before this Court 17 live witnesses who are customers or competitors of

CB&I. Additionally, Complaint Counsel has read into evidence the depositions of seven additional customers or competitors of CB&I. Remarkably, Complaint Counsel failed to ask any of these 24 witnesses any questions related to the feasibility, desirability or effectiveness of its proposed remedy. During the nearly six weeks that Complaint Counsel took to present its case to this Court, not one whisp of evidence has emerged regarding the feasibility, desirability or effectiveness of its proposed remedy.

The only "testimony" in support of Complaint Counsel's requested remedy was provided by its expert economist Dr. John Simpson who, despite testifying for over three days encompassing over 600 pages in the trial record, testified regarding remedy for a mere eight pages.[1] It is not surprising that Dr. Simpson was unable to provide extensive testimony regarding Complaint Counsel's remedy in light of the fact that the 24 witnesses he relied upon in arriving at his opinions failed to provide him with any evidence regarding remedy. Dr. Simpson is not a fact witness, he has no background in breaking-up companies, and did not have any fact evidence available to him to offer any opinions regarding remedy. Trial Tr. 5715:2-22 (12/24/02). These eight pages of testimony from Dr. Simpson are clearly insufficient by themselves to satisfy Complaint Counsel's legal burdens regarding its requested relief.

Dr. Simpson offered no evidence to suggest that creating an independent company from the ribs of CB&I would be practical, desirable or effective. Dr. Simpson cited no evidence that the customers for whose benefit any remedy would be imposed would favor the disassembly of CB&I into two separate companies. In fact, when asked "Do you believe that customers

[1] Dr. Simpson's entire testimony spans the trial record from page 2980 through page 3613, however, only pages 3606 through page 3613 contain any discussion relating to the remedy sought by Complaint Counsel. The trial testimony was briefly suspended by mutual agreement for the convenience of a witness when Complaint Counsel called Robert Davis on December 3, 2002. Mr. Davis' trial testimony appears from pages 3174-3206. Other than these 32 pages of testimony, the entirety of the trial record spanning pages 2980 through page 3613 consists of Dr. Simpson's direct examination testimony.

would benefit by reconstituting a competitive company," Dr. Simpson answered in three words, "Yes, I do," without any further elaboration. Trial Tr. 3611:7-9 (12/6/02). He failed to cite any testimony from any customer to support his "opinion," and he presented no evidence that a break-up would actually establish a viable second company, would not hurt CB&I's ability to service industry customers, would result in lower pricing or better quality, or would in any way accomplish the objectives of Complaint Counsel's proposed remedy. In fact, when asked on cross examination to "name one customer that's testified in this proceeding that they think that CBI should be broken up into two companies," Dr. Simpson responded by stating "None come to mind." Trial Tr. 5718:13-16 (12/24/02). It is impossible to know if customers would benefit from such a remedy without carefully studying record evidence relevant to all of these issues. However, there is no such evidence contained within the record.

In addition to failing to provide any evidence regarding the appropriateness of Complaint Counsel's contemplated remedy, Dr. Simpson has also admitted he does not even know how the remedy proposed by Complaint Counsel would be implemented. Further, he admitted that he is not qualified to oversee such a break-up. During Respondents' cross examination of Dr. Simpson, he stated the following:

> Q. Sir, are you qualified -- and I should back up. You know that if a remedy, the remedy you propose, is implemented, there will have to be some sort of a trustee appointed to implement it; correct?
> A. I don't know exactly how it would be implemented.
> Q. You don't even know how the remedies are implemented, sir?
> A. No, I do not.
> Q. Sir, are you qualified to act as a trustee to oversee splitting up CBI into two companies?
> A. I don't believe I am.
> Q. Yet, sir, you've testified that it's feasible to do that, split CBI into two companies, you've testified to that?
> A. I don't recall exactly what I said on that point.
> Q. Sir, do you think it's feasible to split CBI into two companies or not?
> A. I believe it is.

Trial Tr. 5715:2-22 (12/24/02). As a matter of law, it is clear that Dr. Simpson's testimony regarding remedy cannot carry Complaint Counsel's burden of proof as a matter of law.

IV. The Imposition Of A Remedy Without Supporting Evidence In The Record Is Reversible Error As A Matter Of Law

As has been recently illustrated by the D.C. Circuit in Microsoft, any remedy from this Court or the Commission will be reversed unless evidence is taken which addresses "remedies - specific factual disputes." United Stated v. Microsoft Corp., 253 F. 3d. 34, 46 (2001). The D.C. Circuit held that "a remedies decree must be vacated whenever there is 'a bona fide disagreement concerning substantive items of relief which could be resolved only by trial.'" Id. (citing United States v. Ward Banking Co., 376 U.S. 327, 330-31 (1964)). Specifically, the Court of Appeals held that:

> A hearing on the merits--*i.e.*, a trial on liability--does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability, or unless there are no disputed factual issues regarding the matter of relief.
>
> This rule is no less applicable in antitrust cases. The Supreme Court "has recognized that a 'full exploration of facts is usually necessary in order (for the District Court) properly to draw (an antitrust) decree' so as 'to prevent future violations and eradicate existing evils.' " *United States v. Ward Banking Co.*, 376 U.S. 327, 330-31, 84 S.Ct. 763, 11 L.Ed.2d 743 (1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 22, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945)). Hence a remedies decree must be vacated whenever there is "a bona fide disagreement concerning substantive items of relief which could be resolved only by trial." *Id.* at 334, 84 S.Ct. 763; *cf. Sims*, 161 F.2d at 89 ("It has never been supposed that a temporary injunction could issue under the Clayton Act without giving the party against whom the injunction was sought an opportunity to present evidence on his behalf.").
>
> Despite plaintiffs' protestations, there can be no serious doubt that the parties disputed a number of facts during the remedies phase. In two separate offers of proof, Microsoft identified 23 witnesses who, had they been permitted to testify, would have challenged a wide range of plaintiffs' factual representations, including the feasibility of dividing Microsoft, the likely impact on consumers, and the effect of divestiture on shareholders.

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> . . . a prediction about future events is not, as a prediction, any less a factual issue. Indeed, the Supreme Court has acknowledged that drafting an antitrust decree by necessity "involves predictions and assumptions concerning future economic and business events." *Ford Motor Co. v. United States*, 405 U.S. 562, 578, 92 S.Ct. 1142, 31 L.Ed.2d 492 (1972). Trial courts are not excused from their obligation to resolve such matters through evidentiary hearings . . . .

Microsoft, 253 F. 3d. at 101-02; see also Ford Motor Co., 405 U.S. at 571 (affirming antitrust merger injunctive relief after "nine days of hearing on remedy").[2] The legal standard requiring evidence on the issue of relief is also supported by the FTC's own Complaint which states that "the Commission may order such relief against respondents *as is supported by the record* and is necessary and appropriate . . . ." See Notice of Contemplated Relief, FTC Complaint (Oct. 25, 2001)(emphasis added).

In this proceeding, the mater of remedy was an important part of the trial on liability. Respondents elicited testimony touching on the issue of remedy from a dozen witnesses. This uncontradicted evidence establishes several significant issues regarding remedy against which Complaint Counsel put up no evidence, including:

- Will customers assign their new contracts to the newly created company?[3]

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[2] In fact, CB&I proposed to Complaint Counsel this Spring to bifurcate these proceedings into a liability and remedy phase. That proposal was rejected by Complaint Counsel as unworkable and inconsistent with the Commission's *de novo* review. Respondents' Counsel have separately been told that the purpose of the proceedings before this Court are to make a complete evidentiary record for further review. Complaint Counsel knows that this trial is its one and only chance to present remedy evidence, and it has not presented any.

[3] See Trial Testimony of Gerald Glenn (CB&I):

> Q. Are there factors that you would like the Court to consider in determining the outcome of this case?
> A. Yes, there are.
> Q. And would you identify what factors those are, please, for the Court?
> A. There are several factors that I would like the Court to consider. One is the factor of many of our contracts have non-assignability classes. A number of our contracts have key employee provisions. We have been advised by investment bankers and others that CB&I today is too small to qualify for projects. I think that's a factor. The fact that CB&I employees work on a number of projects simultaneously is a factor to be considered, and also is the factor to be considered of all of the other projects and the other business that CB&I has that is not under contention here.
> ****

- Will customers waive their key personnel clauses?[4]

- How can a break-up be implemented without disrupting the over 300 projects that CB&I is constructing at any given time?[5]

> Q. I want you to take a moment and explain, what is a meant by the term non-assignability clause?
> A. A non-assignability clause is quite common in our industry. If you qualify for a project, and CB&I's experience and qualifications are the basis for that award, the customer expects CB&I to execute that project the way that they have promised to do that and the basis for their selection. So they have a clause there that you are not able to assign any or all of the requirements under that contract to a third-party without their permission.
> Q. And with respect to language and contracts that you referred to as a factor regarding key individuals, just identify what that means?
> A. Well, it's protection for the owner in what's known as bait and switch. If we follow a team that they find acceptable for their work, they will often write into the contract that you are not allowed to remove any of those personnel from the job without their written permission.

4168:3-4169:18 (12/16/02); Trial Testimony of Larry Izzo (Calpine):

> Q. As you sit here today, sir, as an LNG customer, have you considered the potential impact of a breakup of CBI on your construction project?
> A. Yes, sir.
> Q. And what consideration have you given it as you sit here today?
> A. I'd be concerned about whether either of the two residual companies would have the bonding or guarantee ability to make our bid list, and unless a company could guarantee what we were asking them to do, which I feel comfortable with with the Skanskas and Technigazes and TKKs, I don't know -- I seriously doubt PDM's ability being able to backstop a large enough project as we're talking about. I don't even think PDM would make my bid list, and whether a split company -- whether CBI would make it would depend on what was left of the company. I think they would be disadvantaged compared to the other companies I'm talking about from an ability to guarantee the work to the owner.

6511:19-6512:13 (1/3/03).

[4] See Trial Testimony of Gerald Glenn (CB&I) 4168:3-4169:18 (12/16/02)(cited in Note 3 above).

[5] See Trial Testimony of Gerald Glenn (CB&I):

> Q. Sir, how many projects in various stages of development do the industrial and water tank businesses have going on at any given time, if you know?
> A. Well, potentially several hundred.
> Q. Is that the best -- that's the extent of your knowledge at this time?
> A. I can't tell you specifically today. In the year 2001, the company overall completed 700 contracts, and we probably have something approaching 2,000 contracts at this point in time, but I can't tell you specifically how many are involved in this area.

4170:8-18 (12/16/02); Trial Testimony of John C. Kelly (CMS):

> Q. Have you heard whether it's a possibility that the Federal Trade Commission might seek to break PDM and CBI up into separate companies if it's successful in its lawsuit?
> A. I've heard that that's a possibility, but I'm not sure how real that possibility is.
> Q. Does CMS or Panhandle Eastern have any opinion as to whether such a breakup would be desirable or undesirable?

- Is there enough personnel to divide between CB&I and a new company?[6]
- Will the newly created company be accepted by customers?[7]
- Will the newly created company be able to meet customer demands for financial guarantees?[8]

> A. I have to look at it from our standpoint, from our, CMS's, standpoint. The individuals currently working on our project are both ex-CBI and PDM employees. A breakup, if it's during our project, would be -- certainly would be disruptive to our organization and perhaps disruptive to our project. So from our project's standpoint and the problems that might cause, I see as a disadvantage.

6265:2-18 (12/31/02)(By Deposition).

[6] See Trial Testimony of Gerald Glenn (CB&I) 4168:3-4169:18 (12/16/02)(cited in Note 3 above); Trial Testimony of Larry Izzo (Calpine) 6511:19-6512:13 (1/3/03)(cited in Note 3 above); Trial Testimony of Jeffrey H. Sawchuck (BP):

> Q. And if that engineering design department were instantly cut in half, would they have enough people in your judgment to service customer needs?
> A. We would have some real concerns about that actually. If the design department was split in half, because they are a small group of people, and they have -- they are a fairly expert group, it's real difficult to split one person in half when they may have one or two -- only have one or two people in certain disciplines.
> Q. And I take it the same would be true for the other company that received the other half of the CBI design and engineering group, that the half that remained with CBI would give up PDM and that the half that would go would not be big enough to meet all of BP's needs either on its own?
> A. Yeah, I would have to say we would have some concerns about that.

6077:12-6078:4 (12/30/02)(By Deposition); Trial Testimony of Richard Byers (CB&I):

> Q. Okay. Sir, the Water and EC Divisions, I believe you testified earlier, were being sold together as one unit. Do you recall that?
> A. Yes.
> Q. Can you explain to the Court why that was the case?
> A. That they shared many services. They shared human resources, they shared physical plant. It was -- at that time it was considered impossible to split the two.
> Q. Sir, were you personally involved in looking at whether it would be practical to split apart the two divisions, EC and Water, for purposes of selling them separately?
> A. Yes.
> Q. And what was your conclusion regarding the practicality of pulling the EC and Water Divisions apart and selling them separately?
> A. It was not practical to split them and sell them separately.
> Q. And why is that?
> A. For the reasons I just stated, they shared services, and they shared resources.

6780:11-6781:8 (1/6/03).

[7] See Trial Testimony of Larry Izzo (Calpine) 6511:19-6512:13 (1/3/03)(cited in Note 3 above).

- Will CB&I be accepted by customers after the proposed break-up is implemented?[9]

- What impact will the proposed break-up have on customers in markets other than the relevant products?[10]

- Will a newly created company restore the allegedly lost competition, or will it worsen customer welfare by creating two weak companies?[11]

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[8] See Trial Testimony of Larry Izzo (Calpine) 6511:19-6512:13 (1/3/03)(cited in Note 3 above); Trial Testimony of John C. Kelly (CMS) 6265:2-18 (12/31/02)(By Deposition)(cited in Note 5 above); Trial Testimony of Robert A. Bryngelson (El Paso):

> Q. Okay. If the FTC is successful in breaking up CB&I into two separate companies, would that concern El Paso?
> A. It would concern me, yes.
> Q. Why would it concern you?
> A. It would be, as I mentioned before, a smaller company, and in that situation, I would be less inclined to do any more than maybe one or two jobs with them total.
> ****
> Q. If CBI were split in two, would you be concerned that both of the newly created companies as a result of the breakup might not have a sufficient size to satisfy El Paso that they could back up, you know, the necessary work to be done?
> A. Yes. That would concern me.

6155:21-6156:11 (12/31/02)(By Deposition); Trial Testimony of Richard Byers (CB&I):

> Q. Sir, as of the time you left, what -- well, let me ask you this: What was the last division to be sold by PDM?
> A. PDM Bridge.
> Q. Okay. And did the Bridge Division sometimes require bonding to perform its projects?
> A. Yes, sir.
> Q. And was its ability to get bonding reduced by the fact that it was no longer associated with the four other divisions of PDM that had been sold before that time?
> A. Yes, sir.

6738:9-20 (1/6/03).

[9] See Trial Testimony of Larry Izzo (Calpine) 6511:19-6512:13 (1/3/03)(cited in Note 3 above); Robert A. Bryngelson (El Paso):

> Q. Has the merger between CB&I and PDM into one company, CBI, provided -- given any benefit -- provided any benefit to El Paso?
> A. It's given a -- some comfort in the bid process, yes.
> Q. And how -- Why has it given some comfort in the bid process?
> A. It's a larger company now, with more assets to go after if they do fail in the process of constructing a tank.

6154:15-24 (12/31/02)(By Deposition).

[10] See Trial Testimony of Gerald Glenn (CB&I) 4168:3-4169:18 (12/16/02)(cited in Note 3 above).

- Should the break-up remedy be imposed if liability is found in some but not all of the markets challenged by Complaint Counsel?[12]

CB&I has presented more than sufficient evidence to cast great doubt on Complaint Counsel's proposed remedy. Further, Complaint Counsel has failed to present any

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[11] See Trial Testimony of Larry Izzo (Calpine) 6511:19-6512:13 (1/3/03)(cited in Note 3 above); Trial Testimony of Dr. Harris:

> Q. Okay. Well, let's -- I have just one final question then. Would you just, again for the record, summarize your conclusion, your opinion, with respect to the remedy side of this case.
> A. Well, my overall conclusion is that remedy is not needed because I don't think there's a competitive issue in the first instance. The remedy proposal by the FTC is unsupported in the record for to help competition it needs to produce two low cost companies. It may very well hurt competition because to the extent it doesn't produce low cost companies and produces high cost companies you're going to hurt competition in all four markets. So as an example, let's say you do this whole remedy because you perceive a or the judge perceives a problem in the LIN/LOX market, just as one example, and effects this remedy to correct that perceived problem, you run the risk of harming competition in all the markets because you'll be eliminating a competitor and possibly creating high priced competitors and in coming to that conclusion you have to evaluate this with the same standards you use to evaluate the entry of all the firms and no one has done that. So -- and I think ultimately it comes down to the fact that the remedy proposals are completely unsupported.

7375:16-7376:18 (1/8/03); Trial Testimony of Dr. Harris:

> Q. Do you believe the proposed remedy would solve any problems allegedly created by the merger?
> A. I think there are very serious issues about that, and I also think, to answer that question, it's also inconsistent with the FTC's case. In order for it to solve problems, it has to recreate the two low-cost producers that the FTC says existed before the acquisition. It does no good to create two new competitors if with both of them having higher costs and it also does no good for one low cost and one higher cost. That's according to the FTC that's what we have now, we have a low cost CB&I and a bunch of new competitors that are high costly. So for this relief to have any impact you must have confidence that the two firms that will be the result will both, not one but both, be low-cost producers in the markets. And you know, there's no evidence in the record that I've seen to suggest that's true.

7367:16-7368:9 (1/8/03).

[12] See Trial Testimony of Dr. Simpson:

> Q. Well, sir, the court has four product markets it has to consider. Do you have any guidance to give the court if it finds that competition was not harmed in some of the markets but was harmed in some of the other markets? And let me again be specific. If he finds -- if Your Honor finds that there was no anticompetitive effect in any of the four markets except for LIN/LOX, should he still consider a remedy of breaking up the company? What is your economic testimony regarding that issue, sir?
> A. I hadn't considered that issue. And the issue would actually require quite a bit of thought.

5586:2-16 (12/23/02).

evidence, in response, to prove that the remedy it seeks will be able to address the customer concerns expressed in the record. Based upon controlling case law and the FTC's own Notice of Contemplated Relief, Complaint Counsel cannot be entitled to its proposed relief unless it "is supported by the record . . . ." Id. Complaint Counsel's failure to present any evidence regarding the practicality, desirability, or effectiveness of the remedy mandates the rejection of its proposed remedy.

V. A Directed Verdict Motion Is Appropriate Under Commission Rules And Procedures

A directed verdict on the issue of remedy is appropriate under Federal Rule of Civil Procedure 52 and Commission Rule 3.22. Federal Rule of Civil Procedure 52(c) states:

> [i]f during a trial without a jury a party has been fully heard on an issue and the court finds against a party on that issue, the court may enter a judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue . . .

FRCP 52(c). Since this motion is being filed at the close of evidence, it is clear that Complaint Counsel has been "fully heard" on all issues including the issue of remedy. See Wsol v. Fiduciary Mgt. Assoc., Inc., 266 F. 3d 654, 656 (Ill. 2001) (stating pursuant to Rule 52(c) the Court "having heard all the evidence the plaintiff has to offer" is authorized to enter judgment as a matter of law and "to make findings of fact adverse to the plaintiff, including determinations of credibility").

Although the Commission Rules do not contain an exact corollary to FRCP 52(c), a directed verdict on the issue of remedy is also appropriate under Commission Rule 3.22. Rule 3.22(e) makes allowance for the filling of "a motion to dismiss. . .at the close of evidence offered in support of the complaint . . . ." See Commission Rule 3.22(e). Complaint Counsel offered evidence in support of its Complaint for over two months and has closed its case. Since

Complaint Counsel has completed its presentation of evidence, it is appropriate to consider a directed verdict at this time. In addition, granting a motion for directed verdict is also appropriate due to Complaint Counsel's failure to present any evidence regarding the practicality, desirability or effectiveness of its proposed remedy.

VI. Other Remedies Supported By Record Evidence Are Still Available Should There Be A Finding On Liability

A finding for CB&I on this motion does not preclude the entry of other remedies should this Court find a violation under Section 7. For example, CB&I's CEO has offered this Court a remedy plan regarding thermal vacuum chambers which was substantially supported by the thermal vacuum chamber witnesses. Also, there is record evidence which could support a remedy focused on assisting competitors in specific markets in becoming even better competitors. CB&I must be clear that it feels none of these potential remedies to be necessary. However, these alternatives to a break-up of CB&I can be supported by record evidence in the event this Court finds liability.

Conclusion

For the reasons stated herein, Respondents are entitled to a directed verdict on Complaint Counsel's proposed break-up remedy because Complaint Counsel has failed to met its burden to present evidence regarding the practicality, desirability or effectiveness of that proposed remedy. As a result, judgment should be entered as a matter of law in favor of Respondents on the issue of remedy.

Dated: Washington, D.C.
January 13, 2003

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CERTIFICATE OF SERVICE

I, David E. Dahlquist, hereby certify that on this 13th day of January, 2003, I served a true and correct copy of: Respondents' Motion For Directed Verdict On The Issue Of Remedy, by hand delivery upon:

The Honorable D. Michael Chappell
Administrative Law Judge
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_____
David E. Dahlquist

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and	)	
PITT-DES-MOINES, INC.,	)	
a corporation.	)	

ORDER

Upon consideration of Respondents' Motion for Directed Verdict on the Issue of Remedy, it is hereby ORDERED AND ADJUDGED THAT, Respondents' Motion is GRANTED.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: _____, 2002