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	
	Public Record Version
a corporation,	
	Docket No. 9300
and	
PITT-DES MOINES, INC.	
a corporation.	

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION FOR DIRECTED VERDICT ON THE ISSUE OF REMEDY

During the Hearing, Complaint Counsel presented substantial evidence that the merger of PDM's Water and EC Divisions with Chicago Bridge & Iron may lessen competition in the relevant markets: *e.g.*, evidence of high concentration, attempted and actual collusion, higher post-merger prices and margins – any of which evidence independently warrants a liability finding against Respondents. Respondents, however, assert in their Motion for Directed Verdict[1] that Complaint Counsel has to somehow prove that

[1] This so-called "Motion for Directed Verdict" makes little sense considering that this is not a jury case, where such motions may be filed in some courts. *See* Black's Law Dictionary (7th ed. 1999) ("Motion for Directed Verdict" means "A party's request that the court enter judgment in its favor before submitting the case to the jury"). We could find only one reported instance in which a party tried such a motion here at the FTC, and in that case, Judge Teetor treated it as a Motion To Dismiss under Rule 3.22, and ruled that

divestiture is the only available remedy, and that if it does not do so, this Tribunal should either dismiss the case or order some kind of "mentoring" program for the beleaguered thermal vacuum chamber industry. These assertions have no basis in law and ignore the evidentiary record in this case.

Respondents' motion forces this Tribunal to answer a simple question: In over five decades since the amended Clayton Act, did both the Federal Trade Commission and U.S. Supreme Court simply get the law wrong when they assumed that the Clayton Act means what it says? Section 11(b) states:

> "If upon such hearing the Commission...shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it ***shall*** . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and ***divest*** itself of the . . . assets, held . . . in the manner and within the time fixed by said order." 15 U.S.C. § 21(b) (Emphasis added).

Surely Administrative Law Judge Hyun did not miss the boat in the *Olin* case when he stated without equivocation: "It is axiomatic that the normal remedy in Section 7 cases is the divestiture of what was acquired unlawfully. Indeed, divestiture is the remedy specified in Section 11(b) of the amended Clayton Act." *In re Olin Corp.*, 113 FTC 400, 584 (1990). What about the dozens of other reported cases on this very topic – Were they all wrong?

Respondents' motion never mentions any of the five decades of precedent under the Clayton Act, however. Indeed, they never even mention the governing provision of the Clayton Act, § 11(b) at all! Instead, they explain that the law is now different because of the *Microsoft* case, with which Respondents' counsel claim intimate knowledge. *U. S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). Respondents' counsel specifically told this Tribunal that the *Microsoft* case governed this merger case and held that

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the motion was moot in light of the judgment against the Respondent. *In the Matter of Capax, Inc., et al.*, 91 F.T.C. 1048 (1978).

divestiture was some kind of extreme, "draconian" remedy. Counsel made it clear to this Tribunal that "the divestiture cases, authority relied on in the Microsoft case are [Clayton Act] Section 7 cases. It's the same." (Leon, Tr. 8314) This is not true.

Microsoft ***was not a merger case,*** and the D.C. Circuit expressly held that it was not applying merger case law, which is different. Ironically, it was the government attorneys in *Microsoft* who tried to equate that monopolization case to a merger case (as Respondents' Counsel has already done here). The D.C. Circuit rejected this analogy and chastised the plaintiffs:

> "By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture 'has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control,' and that '***complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws***.'" *Microsoft*, 253 F.3d at 105 (Emphasis added) (Citations omitted).

As the *Microsoft* Court recognized, merger cases are different. Under both the Clayton Act and Supreme Court law, divestiture is the proper remedy for illegal mergers. 15 U.S.C. § 21; *U.S. v. E.I. Du Pont de Nemours & Co.,* 366 U.S. 316, 326-27 (1960); *U.S. v. Greater Buffalo Press Inc.,* 402 U.S. 549, 556 (1971); *Ford Motor Co. v. U. S.,* 405 U.S. 562, 573 (1972). The Supreme Court has noted that "[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor Co.,* 405 U.S. at 573. Moreover, as explained above, Section 11(b) of the Clayton Act grants the Commission a specific mandate to order divestiture of assets when a violation of Section 7 is found. In addition, Section 5(b) of the FTC Act expressly authorizes the Commission to award any further relief that would restore competition. And the Commission has determined that this authority allows it to order "broad divestiture" including divestiture of assets outside of the relevant product market "in order to increase the likelihood of a restoration of competition." *Olin*, 113 F.T.C. 400, 619, *aff'd* 986 F.2d 1295 (9th Cir. 1993).

There is nothing novel in the remedy sought by Complaint Counsel. The Commission has ordered, and the Commission's Compliance Division has implemented and enforced, divestiture of integrated assets in consummated merger cases many, many times over the last five decades of the amended Clayton Act.[2] Contrary to Respondents' assertions, testifying customers, competitors and company documents demonstrate that divestiture is the only relief that has any chance of restoring competition to premerger levels. In short, the appropriate remedy is quite simple: what was bought from PDM, including the EC and Water Divisions, their engineers, intellectual property, fabrication plants and ongoing business must be restored and divested. The resulting company can then be sold to another company that has the capital and wherewithal to make the restored PDM the competitor it was before the merger.

Respondents propose, in their motion, to prevent this Tribunal from undoing the acquisition and restoring competition through divestiture. For the reasons stated herein, Respondents' motion should be denied.

I. Under Controlling Law, Divestiture Is Required If a Section 7 Violation Is Found

[2] *See, e.g, Olin*, 113 F.T.C. at 619 (Order to divest relevant product as well as a corollary one as well); *Crown Zellerbach Corp.*, 54 F.T.C. 769, 808 (1957) (Order to restore whatever assets "as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition"); *Fruehauf Trailer Co.*, 67 F.T.C. 878, 939 (1965) (Order to divest "all assets of its Strick Trailers Division and such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent"); *Ekco Products Co.*, 65 F.T.C. 1163, 1228-29 (1964), *aff'd* 347 F.2d 745 (7th Cir. 1965) (Order to divest "all other assets as may be necessary to reconstitute McClintock Manufacturing Company as a going concern and effective competitor").

A. The Clayton Act and the Supreme Court Have Established Divestiture as the Standard Relief for Consummated Acquisitions Under § 7

Section 11(a) of the Clayton Act confers on the Commission the authority to enforce compliance with Section 7 of the Act. 15 U.S.C. § 21(a). Section 5 of the FTC Act gives the Commission additional injunctive authority and responsibility. The Commission issued its Complaint in this matter in accordance with Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b) and Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), based on the Commission's reason to believe that Respondents are violating and have violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Complaint at 1. Section 11(b) of the Clayton Act expressly provides:

> "If upon such hearing the Commission...shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the . . . assets, . . . in the manner and within the time fixed by said order." 15 U.S.C. § 21(b).

Section 5(b) of the FTC Act similarly provides:

> "[i]f upon such hearing the Commission shall be of the opinion that the method of competition . . . is prohibited by [Section 5], it shall . . . issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition." 15 U.S.C. § 45(b).

If this Tribunal finds that Respondents have violated Clayton Act § 7, this Tribunal must issue an order to undo the anticompetitive acquisition and require Respondents to divest the fruits of their unlawful acquisition. The U.S. Supreme Court has held that divestiture is "authorized, ***indeed required***" upon showing that a consummated acquisition violates Section 7, to ensure that "those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship and inconvenience." *E.I. Du Pont de Nemours & Co.*, 366 U.S. 326-27; *Greater Buffalo Press, Inc.*, 402 U.S. at 556 ("Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power."); *Ford Motor Co.*, 405 U.S. at 573 ("Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws."). "Divestiture is a start towards restoring the pre-acquisition situation," *Ford Motor Co.*, 405 U.S. at 573, and is the only relief in Section 7 cases that can "eliminate the anticompetitive consequences" of the acquisition. *Id.* at 574.

Following the Supreme Court, lower courts have similarly held that divestiture is the standard relief in consummated mergers under Section 7. "The very words of § 7 suggest that an undoing of the acquisition is a ***natural remedy*** . . . . It should always be in the forefront of a court's mind when a violation of § 7 has been found." *Ash Grove Cement Co.*, 577 F.2d 1368, 1380 (9th Cir. 1978) (emphasis added) (court ordered divestiture although the acquisition had occurred over ten years ago); s*ee also Olin,* 113 F.T.C. at 584 ("It is axiomatic that the normal remedy in Section 7 cases is the divestiture of what was acquired unlawfully. Indeed, divestiture is the remedy specified in Section 11(b) of the amended Clayton Act."); *Crown Zellerbach Corp.*, 54 F.T.C. at 807 (ordering divestiture, to ensure "the substantial restoration of the competitive entity destroyed. A remedy of this nature is necessary since one of the adverse effects of the acquisition was to remove St. Helens as a competitor"); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1086 (D. Del. 1991) (ordering divestiture of assets after finding a § 7 violation); *see also Seeburg Corp. v. FTC,* 425 F.2d 124, 129 (6th Cir. 1970); *RSR Corp.*, 88 F.T.C. 800 (1976); *American Medical Int'l,* 104 F.T.C. 1, 222-23 (1984); *Hospital Corp. of America*, 106 F.T.C. 361, 513 (1985).

Absent divestiture, any lesser relief would be a slap on the wrist and is simply not countenanced by Section 11(b). By moving for lesser relief, Respondents are asking this Tribunal to disregard established precedent on both liability and relief, to limit itself in the relief that it may order, and to allow Respondents to continue to enjoy the benefits of an unlawful acquisition. Should this Tribunal find a § 7 violation, the law is clear that divestiture is warranted to undo its effects. Accordingly, Respondents' motion must be denied.

B. In Order to Restore Competition, Divestiture Must Be Complete

Once this Tribunal finds that Respondents' unlawful acquisition warrants divestiture, this Tribunal must order a divestiture that is both complete and broad enough "to restore the competition that existed before the unlawful acquisition." *Olin*, 113 F.T.C. at 619. *See In re B.F. Goodrich Co.*, 110 F.T.C. 207, 345 (1988) ("In Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger") (citations omitted).

In order to restore competition, an effective divestiture must be complete, that is, sufficient to create a viable entity that operates independent of Respondents. *Ford Motor Co.*, 405 U.S. at 573. Anything less is a waste of time.[3] "[R]emedies short of divestiture have been uniformly unsuccessful in meeting the goals of the Act." *Ford Motor Co.*, 405 U.S. at 582 (Stewart, J., concurring).

In order for divestiture to be successful, a *complete* divestiture that reestablishes the acquired firm as a viable competitor is necessary. The Commission "will require a divestiture that will likely create a viable business entity (rather than the creation of lawyers) to resolve the competitive problems posed by

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[3] *See* Elzinga, The Antimerger Law: Pyrrhic Victories, 12 J. Law & Econ. 43, 55 (1969) ("In practice, the results of partial divestitures have often been so defective as to indicate that this sort of relief order should be avoided whenever possible."); Robert Rogowsky, The Economic Effectiveness of Section 7 Relief, 31 Antitrust Bull. 187, 195 (1986) (Same).

the merger,"[4] where a Section 7 violation has been found. In fact, the Commission has extensively studied divestitures[5] and has determined that the most successful divestitures are those that create an ongoing, viable entity:

> "[T]he divestiture of an entire business (that is, an on-going, stand-alone, autonomous business, and which may include assets relating to operations in other markets) . . . is most likely to maintain or restore competition in the relevant market . . . . The divestiture of an intact, on-going business generally assures that the buyer of such a package will be able to operate and compete in the relevant market immediately, thereby remedying the likely anticompetitive effects of the proposed acquisition and minimizing the Commission's risk that it will be unable to obtain effective relief."

Frequently Asked Questions About Merger Consent Order Provisions, at 5, March 15, 2002 (available at http://www.ftc.gov/bc/mergerfaq.htm). *See* Rogowsky at 194 ("[W]hen firms already have combined, *the highest probability of restoring competition comes from full divestiture* of the acquired entity.") (emphasis added); Elzinga at 45-47 ("Whenever an anticompetitive increment in market power is attained by merger, structural relief requires the restoration of the acquired firm through a divestiture order" that requires "the acquired firm [to be] reestablished as an independent entity.").

In *Ford*, the district court found that a divestiture of assets would be insufficient to restore competition. In order to reestablish Autolite, the acquired company, as a viable, independent competitor, the district court determined that a complete divestiture, consisting of the divestiture of a spark plug plant,

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[4] Timothy Muris, "Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity," Remarks at the American Bar Association, Antitrust Section Annual Meeting, at 7 (Aug. 7, 2001) (available at http://www.ftc.gov/speeches/muris/murisaba.htm).

[5] In 1999, the Commission released a Divestiture Study, which analyzed all Commission-ordered divestitures over a ten-year period. Based upon its study, the Commission concluded that the preferred relief is "the divestiture of an on-going business with a customer base [rather than] the divestiture of assets that facilitate entry." A Study of the Commission's Divestiture Process, prepared by the staff of the Bureau of Competition, at 42, (1999) (public version available at http://www.ftc.gov/os/1999/9908/divestiture.pdf).

as well as ancillary injunctive relief, was warranted. On appeal, the Supreme Court upheld divestiture as necessary to give the new company "at least a foothold in the lucrative *aftermarket* and [to provide the new company] an incentive to compete aggressively for that market." *Ford Motor Co.*, 405 U.S. at 574. Moreover, the Supreme Court held that the ancillary injunctive relief was necessary and appropriate to the effectiveness of the remedy. "They are designed to give the divested plant an opportunity to establish its competitive position," *Id*. at 575, and "to restore the pre-acquisition competitive structure of the market." *Id*. at 576.

The only relief that Respondents have proposed to this court as an alternative to divestiture is a technical assistance agreement that falls woefully short of the Supreme Court's standard in *Ford*. Respondents' proposed relief allows Respondents to retain the assets and benefits of an anticompetitive acquisition.[6] *See Diamond Alkali Co.*, 72 F.T.C. 700, 744-45 (1967) (Rejecting Respondents' offer to mentor another potential competitor); *United Tote*, 768 F. Supp. at 1086 (Finding that divestiture is proper and that respondents presented "no reasonable alternatives to the Court" other than retaining the assets from the proscribed acquisition).

Moreover, an effective divestiture must be sufficiently broad to ensure that an acquirer can be a viable competitor. "The relief which can be afforded under these statutes cannot be limited to the restoration of the status quo ante." *Ford Motor Co.*, 405 U.S. at 573 n.8; *accord, Hospital Corp. of*

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[6] Respondents' proposed relief does not even address all the relevant products. Even within the one market it does address – thermal vacuum chambers – the record shows that it requires more than technical assistance to restore competition in this market. As Mr. Gill of Howard Fabrication testified, he has received technical assistance from experienced people in the TVC industry and it has not helped him overcome the "hurdle" of being able to compete in the field-erected TVC market. (Gill, Tr. 202)("It would take more than mentoring").

America v. FTC, 807 F.2d 1381, 1393 (7th Cir. 1986) ("[T]he Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of law and ensure against its repetition."). In prior cases, the Commission "has ordered broad divestiture in order to increase the likelihood of a restoration of competition." *Olin*, 113 F.T.C. at 619.

"[In order to] ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success," divestiture must be broad. *Id.* In *Olin,* the Commission ordered respondents to divest a facility that manufactured the relevant product, isocyanurate (ISOS) and a product outside the relevant market, cyanuric acid (CA). As is the case with PDM's EC and Water Divisions, the two operations in *Olin* were intertwined; thus, the Commission concluded that "the CA facility must be divested together with a related ISOS facility *in order to ensure the viability of the divested entity* as an ISOS producer." *Olin Corp. v. FTC*, 986 F.2d 1295, 1307 (9th Cir. 1993)(emphasis added). "Anything less [would] be a divestiture in name only and would" not restore competition. *Olin*, 113 F.T.C. at 585. Similarly, the Commission in *Ekco Products* found that the elimination of an important competitor would not be cured by the divestiture of the acquired assets, and that a broader divestiture was warranted:

> "The Commission might order such divestiture of other assets as is required to recreate a viable concern having approximately the competitive strength of the acquired firm at the time of the acquisition; in addition, . . . the Commission could require that the acquired firm be recreated in such form as would reflect the firm's probable growth." *In re Ekco Products Co.*, 65 F.T.C. at 1217.

In short, a complete and broad divestiture is the appropriate remedy to successfully restore a viable competitor to the marketplace. Anything less will be ineffective, and should not be considered by this Tribunal.

II. Respondents' Cited Case Law Demonstrates Divestiture Is the Singularly Appropriate

Relief for a Violation of Section 7

As explained above, the Respondents' reliance on *Microsoft* is without basis. Under *Microsoft*, the direction this Tribunal should take is clear: divestiture is required.

To provide guidance to the district court on remand, the *Microsoft* appellate court distinguished divestiture as a well-established and appropriate remedy to an unlawful acquisition from divestiture to address unlawful conduct by a firm that has grown by internal expansion. Indeed, it explained that in contrast to the *Microsoft* case – a non-merger case, "complete divestiture is ***particularly appropriate where asset or stock acquisitions violate the antitrust laws.***" *Microsoft*, 253 F.3d at 105 (emphasis added; citations omitted). The D.C. Circuit also explained that it was much easier to order divestiture in a merger case, where "at least the identifiable entities preexisted to create a template for such division as the court might later decree." *Id.* at 106.

Under the circumstances of this case, the law mandates divestiture, and the extensive evidence in the record regarding the organization, personnel and tangible and intangible assets possessed by PDM's EC and Water Divisions prior to their acquisition by CB&I provides a template for reestablishing the competitive entity that was eliminated by the acquisition.

Respondents also fail to point out other differences between this case and *Microsoft*. For example, in *Microsoft*, the appellate court vacated the district court's remedies decree, because it had refused to allow Microsoft to present evidence on an appropriate remedy and for a lack of findings in the record.[7] *Id.*

[7] In two separate offers of proof before the district court, Microsoft had offered to produce 23 witnesses to testify regarding relief. *Microsoft*, 253 F.3d at 101. The district court denied defendant the opportunity to present this evidence. In vacating the district court's decree, the appellate court observed that "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." *Id.* at 101. The appellate court pointed to "the company's basic procedural right

at 103-105. Unlike in *Microsoft*, Respondents have had a full opportunity to present evidence on relief.[8] As acknowledged by Respondents in their motion, "[i]n this proceeding, the matter of remedy was an important part of the trial on liability. Respondents elicited testimony touching on the issue of remedy from a dozen witnesses." Motion for Directed Verdict at 9. As discussed below, evidence elicited by Respondents shows that in order to restore the competition eliminated by the acquisition, relief must include a complete divestiture of the acquired assets and businesses and including restoration by Respondents of sufficient personnel and resources to assure the viability and competitiveness of the divested business.

In its ruling, the appellate court in *Microsoft* also recognized that divestiture is warranted if there is a causal connection between the anticompetitive acts and Respondents' market dominance. Addressing the district court's failure to provide an adequate explanation of relief, the appellate court in *Microsoft* observed:

> "The Supreme Court has explained that a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct,'to "terminate the illegal monopoly,

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to have disputed facts resolved through an evidentiary hearing." *Id.* at 103.

[8] Respondents note that in *Ford Motor Co. v. U. S.*, relief was ordered after nine days of hearing on remedy. Motion for Directed Verdict at 8. They fail to note that this case was ***not*** brought by the FTC and was not governed by Section 11(b) of Clayton Act. Rather, the action was brought under Section 4 of the Sherman Act, 15 U.S.C. § 4, and Section 15 of the Clayton Act, 15 U.S.C. § 25. In the instant proceeding, the Tribunal has held 33 days of hearings and oral argument on all issues including remedy. The benefit of the Commission's consolidated approach, of combining the hearing on the merits with remedy, in assuring an expeditious resolution is demonstrated by looking at the protracted history of the *Ford* case in the district court. On June 7, 1968, the district court ruled that Ford's 1961 acquisition of certain Autolite assets constituted a violation of Section 7. *U. S. v. Ford Motor Co.*, 286 F. Supp. 407, 445 (E.D. Mich. 1968). After attempting unsuccessfully for a year to negotiate appropriate relief, the parties returned to the district court and, for the first time, briefed, presented testimony, and held oral argument on the issue of relief. On June 7, 1970, the district court ordered divestiture and instructed the parties to submit an appropriate form of judgment. *U. S. v. Ford Motor Co.*, 315 F. Supp. 372, 380 (E.D. Mich. 1970). The district court issued its final judgment on December 18, 1970. *U. S. v. Ford Motor Co.*, 1971 Trade Cas. (CCH) ¶ 73,445 (E.D. Mich. 1970).

> deny to the defendant the fruits of its statutory violation, and ensure that there remains no practices likely to result in monopolization in the future."

Microsoft, 253 F.3d at 103 (citations omitted). The appellate court in *Microsoft* instructed that "[i]n devising an appropriate remedy, the District Court also should consider whether plaintiffs have established a sufficient causal connection between Microsoft's anticompetitive conduct and its dominant position in the . . . market." *Id.* at 106.

Here, the causal connection is clear: The anticompetitive activity is CBI's acquisition of the assets and personnel of PDM's EC and Water Divisions. *See, e.g.,* Newmeister Tr. 2165-67 (LNG and LPG tank customers will pay higher prices as a result of that acquisition); Outtrim Tr. 726-27 (foreign entrants won't constrain CBI; after PDM acquisition, CBI will have the potential to increase price while they catch up); [**(*In Camera*)**] (after acquisition, CBI dominates the US LNG market)]; CX 629 at CBI-PL03084 (PDM acquisition "[c]ould create competition void for 1-3 years"). In short, *Microsoft* does not support Respondents' position but rather explains why divestiture is appropriate in the merger case before this Tribunal.

Respondents also erroneously cite *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 883 F. Supp. 1247, 1263 (W.D. Wis. 1995), *aff'd in part, rev'd in part and remanded*, 65 F.3d 1406 (7th Cir. 1995), as "finding in a section 7 case that 'it is the plaintiff's burden to prove they are entitled to injunctive relief.'" Motion for Directed Verdict at 2. It would have been difficult for Respondents to have chosen a case that more strongly contradicts the very point for which Respondents cite the case. *See* Motion for Directed Verdict at 2, 4. *Blue Cross v. Marshfield* is not a Section 7 case, but a private action for damages, under Section 4 of the Clayton Act, 15 U.S.C. § 15, and for injunctive relief under Section

16 of the Clayton Act, 15 U.S.C. § 26, for an alleged violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, 2. *Blue Cross v. Marshfield*, 65 F.3d at 1408. The district court in *Blue Cross v. Marshfield* questioned "whether divestiture of a long completed transaction is an appropriate remedy in a private action under the Sherman Act." *Blue Cross v. Marshfield,* 883 F. Supp. at 1264. The court noted that the plaintiffs "did not cite to a single case in which retroactive divestiture was awarded in a private section 1 or 2 case," and distinguished the case before it from actions brought by the government under Section 7: "Divestiture has been awarded in Section 7 cases in the context of proposed mergers and in cases brought by the government." *Id*.

Finally, Respondents cite *Ocean State v. Blue Cross & Blue Shield of R.I.*, also a case brought by a private plaintiff alleging a violation of Sections 1 and 2 of the Sherman Act -- not under Sections 7 or 11(b) of the Clayton Act. *Ocean State Physician Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 692 F. Supp. 52, 74 (D. R.I. 1988). In short, these cases have no bearing on this proceeding, and do nothing to limit the aforementioned authority of the Commission under Clayton Act Section 11 and FTC Act Section 5.

IV. There Is Substantial Evidence in the Record to Guide the Tribunal in Ordering Divestiture to Remedy the Effects of the Acquisition if a Violation Is Found

Respondents erroneously assert that "Complaint Counsel has not presented any evidence from any witness which shows that its proposed remedy of splitting up the combined CB&I and PDM 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." Motion for Directed

Verdict at 1-2. As explained above, and as expressed by Section 11(b) of the Clayton Act, Complaint Counsel has no such burden. Nevertheless, Respondents are wrong on the factual record as well. There is ample evidence in the record establishing the need for complete divestiture to remedy the effects of the acquisition and how that divestiture must be implemented in order to reestablish two independent, viable and competitive entities and to assure that relief is effective in restoring competition.

A. Complete Divestiture Is Necessary and Appropriate

Several witnesses testified as to the desirability of Complaint Counsel's proposed remedy. For example, Patrick Neary of TRW, a thermal vacuum chamber customer, gave the following testimony during his court appearance relating to the issue of remedy:

> Q. . . . If we went back to day one before the transaction occurred here in February of 2001 and we have a separate PDM and a separate Chicago Bridge, would that be give you the competition you're looking for?
>
> A. Yes.

(Neary, Tr. 1489, 1502). Likewise, Mr. Britton of Fairbanks Natural Gas testified, when asked whether he had an opinion as to the effects of the acquisition, "[m]y only opinion is that it's always nice when you have more than one company to get quotes from." CX 370 at 89 (Britton Dep.).

Witnesses also testified as to the inadequacy of Respondents' proposed remedy:

> Q. Do you think that if Chicago Bridge gave them a little mentoring, taught them some classes and stuff like that, do you think that would make Mr. Gill's company a real viable competitor in the thermal vacuum chamber -- large field-erected thermal vacuum chamber business?
>
> A. No, I would say not.

(Neary, Tr. 1458). Mr. Gill of Howard Fabrication also testified as to the inadequacy of Respondents' proposed remedy in the thermal vacuum chamber market:

> Q. Mr. Leon mentioned at the end of his opening about remedies, a proposal that they have made, and do you think that a little mentoring by Chicago Bridge would give you the ability to go out and compete in the large thermal vacuum chamber business?
>
> A. It would take more than mentoring.

(Gill, Tr. 202).

Dr. Simpson testified that complete divestiture is necessary and appropriate relief:

> Q. . . . [D]o you know what the complaint in this proceeding proposes as relief in the notice of contemplated relief?
>
> A. To reconstitute the assets that had been . . . acquired.
>
> Q. Do you think that this is required in order to restore the competition lost through CB&I's acquisition of PDM EC?
>
> A. Yes, I do. PDM EC was as strong a competitor as it was because it possessed certain tangible and intangible assets. For a reconstituted firm to be as strong a competitor, it, too, would have to possess these tangible and intangible assets.
>
> Q. Why?
>
> A. Things such as the fabrication plants that PDM EC had, its work force, its engineering staff and its intangible assets, such as its learning by doing, enabled it to compete as a very strong competitor in this marketplace.

Simpson, Tr. 3606-07.

Respondents' Motion overstates alleged concerns of some witnesses relating to a breakup of CB&I. Motion for Directed Verdict at 10-11. John C. Kelly of CMS Energy testified only that he would be concerned if personnel were pulled off his current project. Kelly, Tr. 4170. Mr. Bryngelson of El Paso, which is currently sole sourcing with CB&I the Elba Island LNG project in Georgia, an LNG project in the Bahamas and an LNG project at Altamira, Mexico, testified that if CB&I were split into two smaller companies, he would be less inclined to do more than one or two jobs with them at a time. (Bryngelson, Tr. 6123, 6214, 6155-56; *see* Glenn, Tr. 4234). Therefore, following divestiture, El Paso would be less likely to rely solely on CB&I for such a large portion of its LNG tank needs. El Paso's willingness to consider alternatives to CB&I following divestiture is a procompetitive result of the divestiture and provides an opportunity for the divested entity to gain sales.

When asked what impact a divestiture would have on his company, Mr. Glenn, the CB&I CEO said very little: He stated ***only*** that he would like the Court to take into consideration the fact that many of the company's contracts have non-assignability clauses and key employee provisions, that CB&I is too small today to qualify for some unspecified projects, and that CB&I employees work on a number of projects simultaneously. (Glenn, Tr. 4168-69). None of the items noted by Mr. Glenn is an obstacle to restoring competition through a complete divestiture.

Complaint Counsel has introduced substantial evidence, both in the form of documents and witness testimony, as to the intense competition that existed in the relevant markets when there was an independent PDM.[9] Many witnesses testified that the elimination of PDM as an independent competitor raises concerns about competition. (Neary Tr., 1444, 1451; Hall, Tr. 1830-31; Kistenmacher, Tr. 878; **[(*In***

[9] For witness testimony, see for example [ ] (In Camera) (describing how [ ] saved [ ] million on the anticipated cost of its thermal vacuum chamber by playing CB&I off against PDM in a competitive bidding process); (Blaumueller, Tr. 289-90) (describing how PDM approached Peoples Gas without being solicited to bid on the company's LNG project). For documentary evidence, see for example CX 259 at 3002 ("Additionally, if we do not convince the customer to go union [on a project for an LNG facility in Joliet, Illinois, which was later cancelled], then we will proceed into a classic head-to-head price war with PDM and CBI NaCon [National Constructors, CB&I's non-union division]"); CX 863 at 8410 ("We [PDM] will be asked in the near future to re-bid the Cove Point LNG tank to Williams Gas Company . . . . We are in a very competitive situation and need to save every dollar we can"); CX 293 at 8141 ("PDM is bidding against CBI . . ." on the Cove Point LNG tank and ". . . will need a very competitive price to be successful."); CX 191 at 8948 (Air Products had awarded a LOX tank to PDM, which "was the very low bidder and met all of the technical requirements."

***Camera*)]**). Several customers have already suffered anticompetitive price increases as a result of the acquisition, or have received pricing for prospective projects suggestive of future anticompetitive pricing.[10] The evidence clearly supports the need for Complaint Counsel's proposed remedy to restore competition in the relevant markets.

B. Complete Divestiture Will Restore Competition

Dr. Simpson testified that divestiture to an appropriate acquirer of the reconstituted assets of PDM EC and PDM Water would be effective in restoring competition:

> "I believe that if Chicago Bridge & Iron is required to reconstitute the assets of PDM EC and PDM Water and then sell this to another buyer that that would restore the competition that existed prior to the acquisition." (Simpson, Tr. 3608-09)

The record in this proceeding gives substantial support for an effective divestiture remedy in this matter. There is substantial evidence in the record as to the structure, composition, and competitive viability of PDM and CB&I premerger, the precise PDM assets and personnel acquired by CB&I, and the disposition of those assets and personnel. *See* CX 385 at 25 (listing PDM EC's salaried and hourly employee headcount); CX 385 at 21-23 (listing PDM EC's facilities and equipment); CX 134 (organization chart for PDM EC); CX 133 (organization chart for PDM Water); and CX 328-339 (Asset purchase agreement, listing all assets of the PDM EC and Water Divisions purchased by CB&I, including all owned real property, tangible personal property, inventories, contract rights, accounts receivables, and intellectual

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[10] (Fan, Tr. 1003-05)(describing his belief that CB&I's pricing on a recent LIN/LOX project for Linde was 8% higher than it should have been); [**(**)] *(In Camera)*(describing how a budgetary estimate on a thermal vacuum chamber submitted in 2001 was 30% higher than the pricing submitted in 1999 for the same project); (Scorsone, Tr. 5048, 5119-20)(describing how he increased the price for Spectrum Astro's thermal vacuum chamber after CB&I's acquisition of PDM); (CX 370 at 42-45, 70-71 (Britton, Dep.))(describing how CB&I submitted an $18 million bid for a turnkey LNG peak shaving plant that Fairbanks Natural Gas estimated would cost $5 million).

property). This Tribunal, the Commission, and ultimately the Compliance Division can use this evidence as a guide for recreating by divestiture as closely as possible the pre-merger competitive environment.

In Order for Divestiture to Be Effective, CB&I Must Assign Contracts to the Divested Entity.

The record is clear that CB&I must be ordered to secure customer consent to assign customer contracts to the divested entity. As Respondents' counsel told the court during the closing, "the evidence is, there's nonassignment clauses in these contracts." (Leon, Tr. 8317). Likewise, Mr. Izzo testified that:

> "Other factors that could be considered with a potential split in the company from a customer perspective would be many of our contracts, we have, you know, assignment clause, which requires the agreement of the owner before a contractor would assign the work to another contractor." (Izzo, Tr. 6508)

However, Mr. Byers conceded that PDM was fully prepared to go out and gain consents from its customers to allow the sale of its contract backlog to third parties for completion, should PDM have decided to liquidate the EC division. (Byers, Tr. 6804-05). CB&I was obviously successful in convincing customers to assign PDM contracts to itself, as Respondents placed no evidence in the record of any customers going elsewhere to have their contracts completed by third parties. Consequently, non-assignability of contracts can not be the barrier to divestiture that Respondents allege.[11]

In Order to Be Successful, a Divestiture Must Provide the New Company with Sufficient Personnel.

Respondents cite to Mr. Sawchuck's concern that if CB&I's "engineering design department were instantly cut in half" it might cause a problem. Motion for Directed Verdict at 10 n.6. Of course,

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[11] Moreover, Mr. Glenn testified that his company is gaining over $ 1.5 billion per year in new business, CX 1731 at 16, and it appears that CB&I has cornered six new LNG projects. (Glenn, Tr. 4148, 4234, 4396-99). Considering that there were only nine projects during the past decade, there appears to be enough to help PDM become competitive again.

Complaint Counsel has not even suggested cutting anything in half, as the former PDM is about 10-20% of CB&I's entire business. Nevertheless, prior to divestiture CB&I must restore sufficient personnel levels to staff two viable and competing businesses. In order to have the capacity to handle several projects at once, like CB&I and PDM prior to the acquisition, the divested entity must have sufficient personnel.[12] Obviously, all the management, engineers and other employees that were originally with PDM must return. Since Respondents have reduced the number of personnel in the combined company following the acquisition, CB&I must be ordered to hire sufficient personnel, including management, sales personnel, engineers, draftsmen, estimators, and field personnel to assure that both the retained business and the divested entity are viable and competitive.[13]

Divestiture Must Assure that Both CB&I and the Acquirer of the Divested Entity Have a Sufficient Revenue Base and Scale to Compete for Large Projects.

The Commission must approve both the manner of the divestiture and the acquirer of the divested entity to assure that it will have a sufficient revenue base and scale of operations to compete for large projects. The record shows that an adequate revenue base is a critical component to competing,

[12] Respondents noted that AT&V's experience reveals that a lack of sufficient field personnel constrains a company's capacity. "[T]he reason [AT&V] said they were capacity-constrained was because they didn't have enough experienced field people, and that's a remedy, for CBI to give up a few field people." (Leon, Tr. 8328). Mr. Cutts of AT&V testified that he would need additional personnel in order to effectively replace the competition lost by CB&I's acquisition of PDM. He testified that he would need a "[k]ey marketing person in cryogenics and a key technical person in cryogenics. And then I'd probably also want the foremen and pushers and all the gear for about four more crews." (Cutts, Tr. 2372-73).

[13] Respondents have repeatedly argued that personnel with experience in the relevant markets are readily available. Mr. Stetzler of Chattanooga Boiler & Tank testified that approximately 30-40% of his personnel formerly worked with CB&I (Stetzler, Tr. 6322).

particularly in the LNG tank and LNG terminal markets.[14] (Izzo Tr., 6511-12). LNG facility contracts often impose large liquidated damage provisions on the constructor if the project is completed late, because LNG facility owners may be liable to LNG exporters if the terminal is not ready to receive LNG when it had been projected to be completed. (CX 891 at 46-47 (Glenn, Dep.); Izzo, Tr. 6485-86; Bryngelson, Tr. 6154-55). A large revenue base enhances an LNG facility constructor's ability to offer the financial guarantees necessary to win LNG contracts. (CX 891 at 43, 47 (Glenn, Dep.); Izzo Tr., 6511-12). LNG customers prefer to contract with a company that has a large asset base because there is a larger target to go after if the contractor is late in completing the project and the customer sues for liquidated damages. (Bryngelson, Tr. 6154-55).

There is substantial evidence in the record as to the size an entity must have to be an effective competitor in the LNG market. Prior to the acquisition by CB&I, PDM EC and Water were part of the larger PDM organization, which contained five divisions in total. (Byers, Tr. 6731). PDM's revenues increased from $474 million to $629 million from 1997 to 1999. (CX 520 at TAN 1003317). Prior to the acquisition, PDM's size was not an impediment to providing sufficient financial guarantees for LNG projects, and in fact PDM provided sufficient financial guarantees to Enron to be employed for the Penuelas LNG import terminal.[15] (Carling, Tr. 4529). Prior to the PDM acquisition, CB&I had annual revenue of

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[14] Having sufficient size to provide bonding is also a factor affecting viability in the thermal vacuum chamber market. Mr. Gill testified that his company, Howard Fabrication, could not effectively compete in the thermal vacuum chamber market because it was not large enough to purchase bonds for thermal vacuum chamber projects. (Gill, Tr. 200-01, 234).

[15] CB&I did win a contract over PDM in Dabhol, India because CB&I was willing to provide greater financial guarantees than PDM. However, this likely had nothing to do with CB&I's size relative to PDM's size. (Carling, Tr. 4529).

between $600 to $800 million in the years between 1997 and 2000. (CX 891 at 41 (Glenn, Dep.); CX 892). CB&I was large enough to win large LNG projects between the time it was spun off from Praxair and the time it acquired the two PDM divisions. (CX 891 at 47-48 (Glenn, Dep.).

A Successful Divestiture Must Include the Assets of both the PDM EC and PDM Water Divisions.

The divestiture order must include all of the former PDM EC and Water assets and personnel. The same personnel, equipment, and fabrication facilities are used in the construction of the products of both groups. (Rano, Tr. 5894, 5898). Respondents concede that an effective divestiture would need to include assets necessary to other types of industrial storage tanks outside of the relevant market:

> "[I]f you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business. So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff. You would have to give it enough personnel so that everybody would have the expertise to do every kind of tank." (Leon,
>
> Tr. 8311-12)

There is substantial evidence in the record as to the close interrelationship between PDM EC and PDM Water, and the necessity of divesting enough assets to re-create the combined divisions for the resulting entity to be competitively viable. PDM EC and PDM Water routinely shared field erection personnel, fabrication facilities, and field erection equipment. (Scorsone, Tr. 4779-80; CX 552 at 45-48 (Braden Dep.)). The sharing of resources between PDM EC and PDM Water was beneficial to the company because, among other things, it allowed for a more consistent flow of work through the company's fabrication facilities. (CX 552 at 52-53 (Braden Dep.)). Mr. Byers, PDM's vice president of finance and administration, testified that because the two divisions shared human resources, services, and physical plant, he believed that "[i]t was not practical to split them and sell them separately." (Byers, Tr. 6780). A Tanner & Company analysis, based on conversations with PDM executives, concluded that "due to the historical connection between the Divisions and their sharing of facilities, the cost of separating the two businesses may be as high as $5 to $10 million." (Scheman, Tr. 6922-23; CX 525 at 1000406).

Dr. Simpson testified that in order to replace the competition that was eliminated by the acquisition, the divested entity would need the economies of scope that PDM obtained from the shared operations of its EC and Water divisions:

> Q. And what would the divested entity need to provide to buyers in order to replace the competition that was eliminated?
>
> A. PDM EC and PDM Water shared fabrication plants and shared construction crews, so an entity that would be divested would have to include assets that would enable the divested firm to compete not just in the markets in this case but also in markets such as flat bottom tanks, egg-shaped digesters and water tanks.

(Simpson, Tr. 3607).

In Order to Be Successful, a Divestiture Must Include PDM's Fabrication Facilities.

The divested entity must include PDM's fabrication facilities. In his expert testimony, Dr. Simpson testified that a divested entity would need a fabrication facility in order to replace PDM:

> Q. What tangible assets would an entrant need to acquire that allowed CB&I and PDM EC to compete so effectively?
>
> A. Both CBI and PDM EC had fabrication facilities in the U. S . . . .

(Simpson, Tr. 3155-56). Mr. Fahel, of Zachry Construction and a company repeatedly cited by Respondents as a potential entrant into the U.S. LNG market, testified that Zachry's lack of a U.S. fabrication facility was a cost disadvantage versus CB&I. (Fahel, Tr. 1635-37). The former PDM EC and Water Divisions possessed three fabrication facilities located in Provo, Utah; Clive, Iowa; and Warren, Pennsylvania. Possessing multiple fabrication facilities is advantageous because it allows a competitor to rationalize its freight costs. (Vetal, Tr. 428, 432-33). All three of PDM's former fabrication facilities must be divested.

An Effective Divestiture Must Include the Merged Company's Intangible Assets Including Technology and Know-How.

In order for a divestiture order to be effective, Respondents must divest all of the intellectual property, technology and know-how and other intangible assets related to the relevant products, including the PDM name, rights to which are under the collective control of Respondents. Dr. Simpson testified that restoration of competition requires divestiture of intangible as well as tangible assets:

> "The two companies possessed various tangible and intangible assets that enabled them to offer customers the best deal relating to dimensions of competition such as price, quality, timeliness of completion, reputation and safety." (Simpson, Tr. 3608) Mr. Cutts, a vice president of ATV, a company repeatedly referenced by Respondents as a potential replacement for PDM in the markets at issue, testified that ATV would need the following assets to effectively compete in the relevant markets:
>
> Q. And can you tell me what those things would be that you would want to procure from CB&I?
>
> A. First, their customer base, a list of all their customers, all their bids, everyone they've bid to in the last ten years. Second, their technical specifications associated with cryogenic LNG applications. Their welding systems associated with certain cryogenic applications. Their name, so I don't have to spend ten years building our name and fighting everybody in the industry who says things that aren't true about us . . . .
>
> Q. . . . When you refer to technical specifications associated with cryogenic LNG applications, would AT&V be interested in the technology and know-how of CB&I for those types of tanks; is that what you're referring to?
>
> A. Yes. Yeah. That's purchasing standards, design standards, calculations, drafting standards, vendor list, those – and there's other incidentals. They all fit under that

category.

(Cutts, Tr. 2372-73). Mr. Cutts also testified as to the advantage that CB&I possesses in established goodwill and reputation competing in the relevant markets:

> A. . . . We don't have the marketing. We looked recently at CB&I's marketing as far as advertising and just manpower. And we would have to spend, in a three-year time frame, we would have to spend almost one and a half million dollars just to equal what they're doing. More than what we do now. And we can't –
>
> Q. And that's just for advertising and marketing?
>
> A. Right. And we can't do it. We know we can't do it.

(Cutts, Tr. 2382). The PDM name will allow the new competitor created by the divestiture order to more effectively compete in the relevant markets.

Following complete divestiture, CB&I will nevertheless continue to benefit from the trade secrets and other intellectual property it has absorbed from PDM. Dr. Simpson testified that in order to assure that the acquirer will be able to compete on an equal footing with CB&I, the combined intellectual property of CB&I and PDM must be shared with the divested entity:

> Q. Prior to Chicago Bridge & Iron's acquisition of PDM EC and PDM Water, both CB&I and PDM possessed proprietary information about bidding strategies and construction techniques. . . . How should that proprietary information be treated in formulating relief in this proceeding?
>
> A. In order to have two firms that would -- that could compete on an equal footing, both firms should have access to that proprietary information.

(Simpson, Tr. 3609).

The Divested Entity Will Need a Track Record in Order to Be Successful.

The divested entity will require a backlog of work, both in the relevant markets and in general industrial and water tanks, to sustain it while it regains customer recognition. Respondents conceded this point during their closing argument: "In order for this company, new company, to work, is has to have work in the system. You can't just create it and then say, go out and find work, because it takes sometimes six months to a year for a job once you find an opportunity for it to come in." (Leon, Tr. 8316-17). For this reason, it is also imperative that the experienced management, engineers and field workers return to the new PDM. Mr. Scully of XL Systems testified that a track record is vital to a company's success. According to Mr. Scully, a divested entity would benefit from the wisdom of experienced people from CB&I and PDM by obtaining:

> "the history, the successful history, knowing the technology and all of the issues that have caused problems in the past that people know and won't make mistakes – make the same mistakes again. Conversely, if people were starting from scratch, they would have to make the mistakes that we've experienced over the years and correct them and thus know not to make them again." (Scully, Tr. 1240).

Further, competitors have testified that they would need experienced people with a track record to replace PDM. (Cutts, Tr. 2385) (Track record and reputation are important); (Blaumueller, Tr. 301-02)(experience is important). For example, Mr. Vetal of Matrix gave the following testimony as to the reasons for his interest in acquiring PDM EC:

> Q. Why would acquiring PDM have helped you to enter the cryogenic storage market?
>
> A. Because they had a lot of experienced personnel and fabrication capability in that area, both on the engineering design and shop side as well as the field side.
>
> Q. Why is having experience in engineering design on the field side important for entering the cryogenic storage market?
>
> A. You have to convince the customers that you're qualified, and you need to have the resumes and the experienced people to do so.
>
> Q. It was your understanding that PDM had the experience -- the expertise within their employees to convince customers that they were qualified?
>
> A. Yes.

(Vetal, Tr. 427-28). Thus, to make sure that the new entity has the reputation, experience and sufficient business base to be a viable competitor, CB&I's existing backlog of work at the time of the divestiture must be apportioned between CB&I and the divested entity.

In Order to Be Effective, the Divestiture Will Need a Trustee and the Enforcement Efforts of the Compliance Division.

The divestiture will require the appointment of a monitor trustee to oversee its effective implementation, as recognized by Respondents. (Simpson, Tr. 5715). The appointment of a trustee is a normal part of the divestiture process. *See* Casey Triggs, FTC Divestiture Policy, 17 Antitrust 75, 76 (Fall 2002).

There are additional institutional safeguards that will insure an effective remedy.[16] The Commission maintains a specialized Compliance Division, whose purpose is to oversee and implement Commission divestiture orders. The Compliance Division will work with the trustee in implementing an effective order. The Compliance Division has substantial experience in structuring and implementing Commission divestiture orders to insure that the goal of restoring competition is achieved. The Commission ultimately must approve any purchaser of the divested entity, insuring that the parent will have sufficient financing to operate the

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[16] Reestablishing two viable and competitive entities cannot be left to Respondents to accomplish as they see fit. It requires the skill and expertise of the Commission's Compliance Division aided by a monitor trustee. Jeffrey Sawchuck (BP), cited in the Motion for Directed Verdict, testified that any concerns regarding implementation of relief depends on how the two restored competitors are set up:

> Q. Would you have any concerns as a customer if the FTC tried to split up CBI's Engineered Construction Division, their Tank Building Division, into two separate companies, one continued to be owned and operated by CBI and another that is owned and operated on its own?
>
> A. I think we would have to see the final outcome and how it was -- how it finally was set up.

Sawchuck, Tr. 6066. Mr. Sawchuck's concern can be dealt with by proper monitoring of the divestiture.

divested assets and maintain their competitive viability in the markets at issue.

Finally, divesting assets in a consummated transaction is not a novel exercise. The Commission has ordered, and the Compliance Division has successfully implemented and enforced, several divestitures of integrated assets in consummated merger cases. *See In re B.F. Goodrich Co.*, 110 F.T.C. 207 (1988); *In re Occidental Petroleum Corp.*, 115 F.T.C. 1010 (1992). Dr. Simpson testified that customers would benefit from reconstituting and divesting the acquired businesses:

> Q. Do you believe that customers would benefit by reconstituting a competitive company?
> A. Yes, I do.

Simpson, Tr. 3611.

V. Conclusion

The Clayton Act and established Supreme Court precedent unequivocally state that divestiture is warranted and appropriate upon showing that Respondents have violated Section 7. Respondents' motion fails to cite any of this authority, and indeed fails to even mention the governing provision of the Clayton Act in this case. Each one of the dozens of pieces of evidence presented by Complaint Counsel independently mandate that CB&I return what it has wrongfully acquired. There is substantial evidence in the record showing that a complete divestiture would be beneficial and necessary to restore the competition that was eliminated by the acquisition. Accordingly, Respondents' Motion for Directed Verdict on the Issue of Remedy should be denied.

Respectfully submitted,

____

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Dated: January 23, 2003

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, and PITT-DES MOINES, INC. a corporation.	Docket No. 9300

ORDER

On January 14, 2003, Respondents filed a Motion for Directed Verdict on the Issue of Remedy. On January 23, 2003 Complaint Counsel filed an Opposition to Respondents' Motion for Directed Verdict. Having fully considered Respondents' Motion and Complaint Counsel's Opposition thereto, the Court finds that there is substantial evidence in the record supporting granting of appropriate relief in this matter if a violation is found following post-trial briefing and submission of proposed findings and conclusions of law. The Court further finds that Respondents are not entitled to a directed verdict on this issue. Accordingly,

IT IS HEREBY ORDERED that Respondents' motion is denied in its entirety.

ORDERED

D. Michael Chappell
Administrative Law Judge

Date: January , 2003

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Complaint Counsel's Opposition to Respondents' Motion for Directed Verdict on the Issue of Remedy to be delivered by hand to

The Honorable D. Michael Chappell
Federal Trade Commission
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Administrative Law Judge

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Dated: January 23, 2003

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