UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENTS' MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR A STAY

Respondents[1] move for clarification of the Order entered December 21, 2004 or in the alternative a stay pursuant to 15 U.S.C. § 45(g)(2).

I. INTRODUCTION

Section 5(g)(4) of the FTC Act automatically stays the divestiture provisions of the Order pending resolution of Respondents' appeal. The Commission's Order includes a provision requiring CB&I to create a "divestiture package" of assets by dividing its Industrial Division into two separate entities, one of which would then be sold.[2] Because Respondents intend to petition a court of appeals for review of the Order and the Opinion on which the Order is based, Respondents respectfully request that the Commission confirm that those provisions of the Order requiring CB&I to create two separate entities, New PDM and New CB&I, are divestiture

[1] Respondents Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company are referred to herein collectively as "Respondents" or "CB&I."

[2] *See, e.g.*, Op. at 94.

provisions, and thus are stayed pending exhaustion of all appeals. In the alternative, Respondents request that the Commission exercise its discretion to stay the provisions of the Order requiring the separation of assets into New PDM and New CB&I pending resolution of all appeals. In addition, Respondents ask that the finality of the Order be tolled until such time as the Commission has ruled on this Motion.

II.
THE DIVESTITURE PACKAGE AND DIVESTITURE DIVISION TERMS

The Order directs CB&I to divest the assets acquired from Pitt-Des Moines, Inc. ("PDM"), along with certain additional assets, by dividing CB&I's "Relevant Business" into two "equal," "independent" and "stand-alone" entities (defined in the order as "New PDM" and "New CB&I") and then selling New PDM to an Acquirer approved by the Commission.[3] The Commission described this division of assets as the creation of a "divestiture package." Op. at 94.

The Order includes three provisions, described below, that dictate the manner in which the Relevant Business is to be divided and the assets to be included in New PDM and New CB&I (collectively, the "Divestiture Division Terms").

- CB&I is to "reorganize its Relevant Business into two independent, stand-alone operating divisions or subsidiaries, respectively New PDM and New CB&I, each fully, equally, and independently engaged in all aspects of the Relevant Business."

Order at ¶ III.A.

- CB&I is to "accomplish all actions necessary to ensure that New PDM and New CB&I are each assigned Customer Contracts, equitably apportioned among the types of products relating to the Relevant Business, to the extent necessary to effect the purpose of Paragraph III.A."

Order at ¶ III.B.

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[3] Respondents have moved simultaneously for reconsideration and modification of the current definition of "Relevant Business" on grounds of overbreadth.

- CB&I must "transfer to New PDM and New CB&I all necessary Relevant Business Employees so that each such entity shall posses the technical experience and expertise (i) to complete all Customer Contracts assigned or transferred to it, (ii) to bid on and obtain new Customer Contracts relating to the Relevant Business, and (iii) to complete any new Customer Contracts relating to the Relevant Business in substantially the same manner and quality employed or achieved by CB&I in the conduct of the Relevant Business prior to the date on which this Order becomes final."

Order at ¶ III.C.

The Divestiture Division Terms are expressly designed to create an entity ready for immediate divestiture. Under the Order, Respondents must complete the formation of New PDM and New CB&I no more than 90 days after the Order becomes final and sell New PDM within 180 days after the Order becomes final. Order at ¶ III, IV. In other words, the Order contemplates that New CB&I and New PDM will be in existence for approximately 90 days before the divestiture is consummated.[4]

III.
THE DIVESTITURE DIVISION TERMS ARE AUTOMATICALLY STAYED

Under Section 5(g)(4) of the FTC Act, an "order provision requiring a . . . corporation to divest itself of stock, other share capital, or assets" does not become final until either (1) no petition for review of the order has been filed within the time allowed, or (2) if a petition for review has been timely filed, until the party seeking review has exhausted its right to appeal. 15 U.S.C. § 45(g)(4).

Section 5(g)(4) no doubt was intended to achieve the eminently logical purpose of preventing divestiture provisions from becoming final while an appeal is pending, thereby rendering any appeal moot. *See, e.g.*, S. Rep. No. 103 - 130, at 11, *reprinted in*, 1994

[4] To the extent that the New PDM cannot be divested in the 90 day time frame, a Divestiture Trustee may be appointed to effectuate the divestiture. Order at ¶ V.

U.S.C.C.A.N. 1776 (1993) (noting that the mandatory stay of divestiture provisions was retained due to "the substantial impact on business operations of a divestiture order.").

The terms of the Order and the language of the Opinion upon which it is based demonstrate that the Divestiture Division Terms and the divestiture itself are inextricably intertwined:

> We order CB&I to reorganize its Industrial Division (and, to the extent necessary, its water tank unit) into two, separate, stand-alone divisions (New PDM and New CB&I) and to divest New PDM within six months after our Order becomes final.

Op. at 94. Observing that CB&I was "best positioned to know how to create two viable entities from its current business," while a divestiture trustee would "have to learn the business before recommending a divestiture package," the Commission reasoned that CB&I itself should select the assets to be divested in order to effect the divestiture more quickly than "immediately appointing a divestiture trustee." *Id.* The Commission noted that it intended to "ensure that CB&I creates a viable business and divests it . . . *within a reasonable time frame.*" *Id.* (emphasis added). It is clear from this language that the Commission saw CB&I's obligation to create New PDM and New CB&I as part and parcel of the divestiture obligation. Indeed, the Monitor Trustee, the person responsible for "oversee[ing] the divestiture requirements," has an integral role in the asset maintenance provisions of the New PDM and New CB&I. *See* Op. at 94 n.567.

The limitation on the time between division and divestiture is clearly consistent with the Commission's goal of ensuring that New PDM and New CB&I "hav[e] approximately equal shares of the markets for the Relevant Products, [are] each fully capable of being divested, and [are] each fully (and to the extent practicable, equally) engaged in all aspects of the Relevant Business." Order at III.A. It would surely be more consistent with the goal of divesting an

"equal" business to divide the Relevant Business shortly before the divestiture, rather than hoping that after a year or more two entities that began as equals would remain so.

Respondents therefore respectfully request that the Commission confirm that the Divestiture Division Terms are divestiture provisions within the meaning of Section 5(g)(4) and are automatically stayed pending appeal.

IV.
IN THE ALTERNATIVE, THE COMMISSION SHOULD EXERCISE ITS DISCRETION TO STAY THE DIVESTITURE DIVISION TERMS

If the Commission finds that the Divestiture Division Terms are not divestiture provisions stayed under Section 5(g)(4) of the FTC Act, Respondents respectfully request that the Commission exercise its discretion to stay the Divestiture Division Terms pending resolution of Respondents' appeals.[5]

The Commission has authority to stay all or part of the Order pursuant to the FTC Act, the Administrative Procedure Act ("APA") and the FTC's Rules of Practice. Section 5(g)(2) of the FTC Act provides that any order of the Commission to cease and desist "may be stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission." 15 U.S.C. § 45(g)(2). The FTC's Rules of Practice similarly provide that any party subject to a cease and desist order may apply for a stay of all or part of an order pending judicial review. 16 C.F.R. § 3.5 (2004). The APA generally allows an agency to stay the effective date of any action taken by it if "justice so requires." 5 U.S.C. § 705.

In practice, agencies governed by the APA, including the Commission, consider the same four factors that courts traditionally evaluate in considering a request for a stay: (1) the applicant's likelihood of success on the merits of his appeal; (2) whether failure to grant a stay

[5] Provisions of an order not stayed by Section 5(g) become effective upon the sixtieth day after service of the order. 15 U.S.C. § 45(g)(2).

will result in irreparable harm to the applicant; (3) whether a stay will harm other parties interested in the proceeding; and (4) the interests of the public. *See., e.g., In re Cal. Dental Assoc.*, No. 9259, 1996 FTC LEXIS 277 at *2-3 (F.T.C. May 22, 1996). The FTC Rules of Practice require applicants to address these same four factors in any request for a stay. 16 C.F.R. §3.56 (2004). Analysis of the last two factors is generally collapsed when the other party is the government and therefore represents the public interest. *See, e.g., Cal. Dental*, at *7-8.

An analysis of these factors supports the conclusion that the Divestiture Division Terms should be stayed pending resolution of Respondents' appeal.

A. Respondents Would Suffer Irreparable Harm if the Divestiture Division Terms are Enforced During the Pendency of an Appeal.

Absent a stay, Respondents would be required to divide CB&I's Industrial Division and water tank unit into two separate entities no later than June 7, 2005. Following the division, the two entities would then be required to operate separately until all appeals from the Order are exhausted, undoubtedly several years after the division – an untenable situation especially since the entities are somehow supposed to remain in rough parity over what would be a sustained period of time. Sustained operations as two separate, stand-alone divisions for an extended period of time would result in irreparable harm to Respondents, to the two new divisions, and, indeed, to competition in the marketplace. At a minimum, enforcement of the Divestiture Division Terms while an appeal is pending would (1) cause CB&I to incur substantial nonrecoverable costs that would decrease the ultimate value and marketability of both New PDM and New CB&I, (2) substantially impair the ability of CB&I to service its existing contracts, (3) negatively affect the competitiveness of New PDM and New CB&I in the interim by creating uncertainty among existing and potential customers, and (4) compromise Respondents' borrowing base and the terms of existing financing agreements to the detriment of both

Respondents and New PDM and New CB&I. Examples of the potential harm arising from extended operations as separate divisions are outlined below.

1. **Nonrecoverable Costs.**

The division itself will require CB&I to expend substantial management time and resources and will entail substantial nonrecoverable costs. For example, CB&I's work force was reduced by approximately 222 employees as a result of redundancies created by the original merger. Gerald Glenn Deposition ("Glenn Dep.") at 75-76; Tr. at 2663-64. The savings created by this personnel reduction was estimated at $16,800,490 in 2001, with a recurring savings of $21,195,671. Glenn Dep. at 76-77, Tr. at 2664. Compliance with the Divestiture Division Terms will necessarily require hiring personnel for either New CB&I or New PDM, essentially recreating many of those redundancies, so that each entity has equivalent technical expertise and personnel, including management personnel, required to compete independently in the relevant markets. Order at ¶ III.C.

Under the Order as it was intended to be implemented, CB&I would have incurred the costs of such additional personnel for a maximum of three months (assuming the divestiture is accomplished in a timely fashion). If the Divestiture Division Terms are not stayed, Respondents could, through New PDM and New CB&I, conceivably, bear the costs of these additional employees for two or more years, even though those additional personnel are not necessary to perform Respondents' current obligations under existing contracts. The employment of additional personnel to service contracts that could be performed by Respondents' Industrial Division would result in a substantial nonrecoverable cost to Respondents. Indeed, to the extent a contract will be completed before the appeals are exhausted, these costs are completely superfluous and, ironically, will only serve to harm either New PDM

or New CB&I. In addition, in the event the Order is found by the court of appeals to be overly broad in its definition of the assets to be divided or is reversed in its entirety, Respondents will incur substantial nonrecoverable costs, including administrative costs and severance pay, through "undividing," in whole or in part, assets and personnel distributed prematurely to New PDM and New CB&I.

2. Impairment of Existing Contracts.

CB&I's existing contracts do not include a contingency for the additional costs associated with hiring and maintaining for an extended period the number of employees that would be required to comply with the Divestiture Division Terms. If New CB&I and New PDM were formed now, the value of the contracts that would be divided between the two companies pursuant to the Order would be significantly reduced as a result of these additional costs.

In addition, a number of the existing contracts that would have to be assigned to New PDM and New CB&I include nonassignability clauses that preclude such assignments. Tr. at 4169. A number of the existing contracts that would have to be assigned are also subject to "key personnel" clauses that require specific CB&I personnel to work on the contracted project. *Id.* If New PDM and New CB&I were created now, CB&I would incur prematurely the costs of negotiating new contracts with such customers to avoid breach of these contract provisions. In addition, customers may have to negotiate a second assignment of the contracts if the divestiture ultimately does not take place.

3. Employment Uncertainty.

It will likely be extremely difficult to induce current CB&I employees to accept positions with New PDM at this time. Because the divestiture order is under appeal and may not be final for two or more years, an employee transferring to New PDM would have to take a position

knowing that in two years or so, he may be unemployed if the divestiture does not take place and personnel are again reduced to pre-division levels.

4. Customer Uncertainty.

Customers evaluating bids for tank construction in the product markets affected are extremely conscious of price and timing of projects. *See, e.g.,* Op. at 39, n.244, citing Tr. at 566, 627. CB&I's customers generally bid a job months before construction ever begins, and the actual construction of a tank project may take anywhere from 12 to 36 months to complete after the contract is awarded. Tr. at 3897; 1574 (LIN/LOX); Tr. at 1074; 4210; 4634 (LIN/LOX); 4567-68. A customer evaluating a bid from New PDM or New CB&I now would know that in one to two years either the new company will be sold to an unknown purchaser or the two companies will be re-merged into one. In either case, the customer can anticipate that one to two years after contracting with the new company, when the contractor may be in critical stage of the construction process, New PDM, New CB&I, or both will be undergoing enormous changes that may ultimately increase costs and delay the completion of existing projects. As a result, customers may be unlikely to award construction contracts to either New PDM or New CB&I faced when with certainty that significant corporate changes are on the horizon.

If division of the Industrial Division were delayed until such time as the divestiture is certain, the divestiture would take place within three months of the division. It is unlikely that either New PDM or New CB&I would be bidding on more than a few projects in that short period of time. In addition, customers would know that the divestiture would be completed within a short period after such bids and would therefore be less likely to occur during the critical phases of construction.

B. Enforcement of the Divestiture Division Terms During the Pendency of the Appeal Would Result in Harm to Interested Parties and the Public.

Division of the Relevant Business now would be detrimental to the Commission's ultimate intent in seeing a fully competitive New PDM in the marketplace. It is unlikely that after operating independently for an extended time period New PDM and New CB&I will still be the entirely "equal" assets envisaged by the Commission. Order at ¶ III.A. As a result, the two companies will either have to be "rebalanced," or the Commission's intent to create two equal competitors will be frustrated.

Thus, a stay in this circumstance is merely "a reasonable measure to avoid the potential cost and confusion that may be created by the immediate implementation of the remedial provisions of the original order and any subsequent revision by the court of appeals." *Cal. Dental* at *8.

C. The Public's Interest in Preservation of the Assets to be Divested is Protected by Other Provisions of the Order.

Other provisions of the Order, either as written or with minor amendments, provide sufficient safeguards to preserve the integrity of the assets to be divested. Respondents do not suggest that Paragraph II, governing the appointment and responsibilities of a Monitor Trustee, should be stayed (even though the Monitor Trustee is defined as a person who oversees divestiture). While the appeal is pending, the Monitor Trustee would still be empowered to ensure compliance with those terms of the Order designed to preserve the assets of CB&I in the event of a future divestiture.

Similarly, although the asset preservation requirements of Paragraphs VI and VII are drafted in reference to New PDM and New CB&I, Respondents informed Complaint Counsel in a letter dated January 31, 2005, that "[w]ithout waiving any rights to challenge the scope or

appropriateness of the Order before the FTC or any federal court, CB&I understands and agrees that the requirements of Paragraph VI.A and the first paragraph of Paragraph VI.B of the Order (on page 13), and the subparagraphs of Paragraph VI.B. as they relate to the Relevant Business generally, shall apply to the Relevant Business and shall become binding as of the date Paragraph VI becomes final, notwithstanding any stay of the obligations of Paragraph III." It is for that reason, Respondents believe that Complaint Counsel will not oppose Respondents' Motion to Stay these provisions.

D. Respondents Are Likely to Succeed on Appeal.

In determining whether Respondents meet the likelihood of success element, the Commission need not believe that the decision it rendered is incorrect. *Cal. Dental*, at *9-10. Rather, as the Commission explained in *California Dental*:

> Prior recourse to the initial decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

Id. (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours,*, 559 F.2d 841, 844-45) (D.C. Cir. 1977). The Commission should view the element of likelihood of success in light of the harm presented by enforcement of the Order pending appeal. *See id.* at *10 (citing *Wash Metro.* 559 F.2d at 843 (noting that requisite "degree or level of possibility of success will generally vary according to an assessment of the other three factors"). In other words, where an applicant has established that failure to grant a stay will result in substantial irreparable harm to the applicant, other parties, and the public, as Respondents have here, the burden of establishing likelihood of success is correspondingly reduced. *See id.* ("[T]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury suffered

absent the stay."); *In re Novartis Corp.*, 128 F.T.C. 233, 235-36 (1999) (granting stay despite finding that applicant's "assertions of likelihood of success on the merits merely revisit arguments that we have already considered and rejected"); *see also In re Toys "R" Us, Inc.*, 126 FTC 695, 698-700 (1998).[6]

Accordingly, difficulties arising from the application of the law to a complex factual record will support a finding of a substantial showing on the merits. *Novartis Corp.*, 128 F.T.C. at 235; *see also Toys "R" Us,* 126 FTC at 697 (citing *In re KVG Coffee Shop*, No. 95-B-42791, M-47, 1995 U.S. Dist. LEXIS 15617 (S.D.N.Y. October 18, 1995)) ("The difficulty inherent in applying the applicable law to a complex set of facts is a relevant factor in determining whether a stay applicant has made a substantial showing on the merits."); *Supermkt. Servs., Inc. v. Hartz Mountain Corp.*, 382 F. Supp. 1248, 1254-55 (S.D.N.Y. 1974).

A comparison of the Commission's own Opinion and Order and the Initial Decision and Order issued by the Administrative Law Judge conclusively demonstrates that this case presents a host of difficult legal and factual issues on which courts may differ. On appeal, Respondents expect to argue, at a minimum,[7] that the Commission erred in: (1) failing to use a bidding model to evaluate the competitive markets and in looking back in time to conclude that the acquisition effected a "merger to monopoly;" (2) concluding that the HHI analysis alone established Complaint Counsel's prima facie case; (3) misapplying the standard set forth in *United States v. Baker Hughes, Inc*, 908 F.2d 981 (D.C. Cir. 1990), to determine that Respondents failed to rebut Complaint Counsel's prima facie case; (4) improperly shifting the burden of persuasion, rather

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[6] The Commission has expressly declined to require applicants to demonstrate a particular degree of likelihood success. *Cal. Dental* at *10.

[7] This list of questions is not intended to be an complete listing of the questions to be presented on appeal.

than merely the burden of production of evidence, to Respondents; (5) finding an antitrust violation without proof of probable anticompetitive effects; (6) crafting a remedy intended to "restore" competition without first finding the extent of the alleged anticompetitive effects; and (7) concluding that barriers to entry were high and that new entrants would not pose effective constraints on CB&I's ability to raise prices.[8]

The complex factual and legal questions to be presented on appeal, viewed in light of the potential harms, outlined above, from enforcement of the Order pending an appeal, compel a finding a likelihood of success on appeal.

V.
CONCLUSION

Respondents respectfully request that the Commission enter an order clarifying that the Divestiture Division Terms are automatically stayed upon timely filing of a petition for review pending resolution of Respondents' appeal. In the alternative, Respondents ask that the Commission exercise its discretionary authority to stay the Divestiture Division Terms pending resolution of Respondents' appeal.

[8] Respondents' Petition to Reconsider the Opinion and Order in Light of Entry After the Close of the Record and Overbreadth outlines reasons the Commission's Order and Opinion should be reconsidered, which reasons may also serve as a basis for reversal by an appropriate court of appeals, assuming that the Commission does not re-open and reconsider the new evidence in an appropriate manner prior to or in lieu of an appeal.

Dated: February 1, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ivy A. Johnson, hereby certify that on February 1, 2005, a true and correct copy of the foregoing *Petition to Reconsider the Opinion and Order in Light of Entry after the Close of the Record and Overbreadth* was served on the following persons by hand delivery:

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