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

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

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-

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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.
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- 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 (Calpi

- 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.
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> 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

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

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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
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(two copies)

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