

foot fabrication plant in Provo, Utah. (Ex. A and B) On the one hand, CB&I does not want the Commission to divest the plant to another competitor, but it is willing to shut the plant down itself and lay off all of its employees without any notice to this Commission or staff.

Within the last 72 hours, Complaint Counsel has learned that CB&I has notified employees of the Provo plant that their employment would be terminated on December 26, 2003, and that operations at the Provo plant will cease thereafter.¹ After negotiations with the International Boilermakers Union, CB&I has agreed to delay the date of closure to February. (See Ex. B) Respondent's press release announcing the plant closure describes the action as a "temporary suspension" of operations that is expected to "exceed six months in duration."²

Absent emergency action, due to the time required for Commission Orders to become effective under 15 U.S.C. § 45(g) (60 days after a final order is served upon Respondents), CB&I will be able to close the Provo plant and send its employees in search of new employment before any Commission Order can prevent this. Moreover, as this entire facility will be closed by February and all employees laid off by that time, the process of closure will likely begin prior to that final date. Employees who have now been told that they will lose their jobs shortly after the Christmas holidays will have to seek other work and may move from the area. CB&I may also dispose of the machinery, equipment, and other assets at that facility, just as it did "[s]oon after the Acquisition,"

¹ This was the first time that Complaint Counsel learned of Respondents' plans for the Provo facility; Respondents never apprised Complaint Counsel or the Commission of their plans, including at any time before, during, or after the November 12, 2003, oral argument to the Commission.

² Notably, however, staff has been informed that Union representatives for the affected employees from Local No. 182 of the International Brotherhood of Boilermakers were told that the plant closure is likely to be permanent.

when “CB&I auctioned off a substantial amount of the equipment that it purchased from PDM.” IDF-591. Once this process of closure is well under way, PDM’s Provo facility, which has been in operation making water and industrial tanks since 1947, will cease being an ongoing business that can be divested as such. Having to reconstitute such a plant long after its equipment has been removed or mothballed and the employees scattered to the winds will prejudice the Commission’s ability to have the former PDM business divested as a going concern to restore competition. Immediate action is thus necessary to stop CB&I from closing the Provo, Utah, plant that CB&I acquired from PDM on February 7, 2001, as part of the Acquisition that is the subject of this proceeding.

In an effort to justify the projected closing, CB&I states that, “[f]ollowing several quarters of production at significantly reduced operating levels, the Company has determined that the facility cannot sustain operations given the current and forecasted level of business.” (*See* Ex. B) Whatever CB&I’s reason for the announced plant closure, it would not appear to be motivated by sudden financial difficulties: CB&I’s website and most recent 10-Q state that its net income in third quarter 2003 have increased by 37%, and that its revenues overall have increased by 56% in the same period, including in North America. (Ex. C; *see* <http://www.cbiepc.com/cgi-bin/pressframe.pl?rel=4>) Regardless of the validity of CB&I’s proffered justification, however, the law is clear that CB&I’s private financial needs do not outweigh the public interest in ensuring the adequacy of eventual relief. *See, e.g., FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1506-09 (D.C. Cir. 1986).

Authorization to seek a federal court order is necessary to assure that Respondent CB&I is enjoined from dissipating the assets in issue, which are the subject of proposed divestiture relief,

pending completion of this administrative litigation, including the pending appeal. Section 13(b) of the FTC Act authorizes the Commission to seek, and the court to grant, provisional injunctive relief (including ancillary equitable relief) in aid of an administrative proceeding. Although the Commission most commonly seeks such injunctive relief prior to the commencement of an administrative proceeding, the Commission has previously sought and obtained preliminary injunction orders in aid of pending administrative proceedings. *See, e.g., FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (Granting rescission of an acquisition to allow Commission to “determine the lawfulness of the transaction” and holding that the “statutory grant of the power to issue a preliminary injunction [under 13(b)] carries with it whatever ancillary equitable relief is necessary to the effective exercise of the granted power”); *FTC v. Pharmtech Research, Inc.*, 567 F. Supp. 294, 296 (D.D.C. 1983) (Granting preliminary injunction to enjoin the dissemination of certain advertisements pending the outcome of ongoing administrative proceedings); *FTC v. PepsiCo., Inc.*, 477 F.2d 24, 26 (2d Cir. 1973) (Court required PepsiCo to “continue the Rheingold beer operation and to maintain its assets until such time as the expedited administrative proceedings are terminated.” Case was initiated after administrative proceedings had commenced the previous year and after PepsiCo announced that it was terminating its agreement to hold itself and the target, Rheingold, separate); *see also FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C.Cir.1981) (Holding that “Section 13(b) confirms the equity power courts exercised prior to its enactment to grant interim relief in aid of the FTC’s law enforcement authority. Congress expressed a plain purpose to codify decisional law, not to straightjacket it”).

Complaint Counsel therefore request authorization to file an action in federal district court in Utah seeking appropriate provisional injunctive relief pursuant to Section 13(b) of the Federal

Trade Commission Act, 15 U.S.C. § 53(b), in aid of the Commission's pending administrative proceeding in Docket No. 9300. Such relief would preserve the Commission's ability to order an effective divestiture remedy if the Commission ultimately determines to affirm the Initial Decision of Administrative Law Judge ("ALJ") D. Michael Chappell, filed on June 12, 2003. A preliminary injunction should issue if Complaint Counsel establishes "upon a proper showing that, weighing the equities and considering the FTC's likelihood of ultimate success, such action would be in the public interest." *FTC v. H. J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001).

Here, we believe a court should be persuaded that this showing is satisfied. Unlike most cases where an injunction is sought on the basis of a mere investigation, in this case a lengthy, adversarial evidentiary hearing has already established by "reliable and probative evidence...that the effect of the Acquisition of PDM's EC and Water Divisions by CB&I may be to substantially lessen competition" in the relevant field-erected tank and vacuum chamber markets in the United States (ID-3) and that the Acquisition violates Section 7 of the Clayton Act and constitutes an unfair method of competition in violation of Section 5 of the FTC Act. We will also point out to the court that the Order filed by the ALJ with the Initial Decision requires Respondents, *inter alia*, to divest all of assets that were acquired by CB&I from PDM in the Acquisition, and that Paragraph V. of the ALJ's Order specifically directs:

that from the date that this Order becomes final, until such time as the divestiture required by Paragraph II.A of this Order is completed, CB&I shall take all measures necessary to maintain all assets ordered to be divested in their accounted for condition and to prevent any further deterioration, except normal wear and tear, so as to not impair the assets' operating viability, marketability, or confidentiality, if applicable.

At this point in the administrative proceeding, Respondents have appealed from the Initial Decision and Order, Complaint Counsel have cross-appealed, oral argument on the appeal and cross-

appeal was held on November 12, 2003, and the matter is now pending on appeal before the Commission. If authorized to file a preliminary injunction action, Complaint Counsel would seek an order that would require also Respondents to preserve assets in a manner substantially similar to the requirements set forth in Paragraph III of Complaint Counsel's Proposed Final Order, filed with our cross-appeal, which provides:

that from the date this Order (without regard to the finality of the divestiture requirements herein) becomes final until the date New PDM is divested to an Acquirer pursuant to this Order:

- A. Respondents shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of CB&I's Tank Business and the CB&I Tank Assets, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of CB&I's Tank Business and of the CB&I Tank Assets, except for ordinary wear and tear.
- B. Respondents shall maintain the operations of CB&I's Tank Business and the CB&I Tank Assets in the ordinary course of business and in accordance with past practice (including regular repair and maintenance of the CB&I Tank Assets), and shall use best efforts to preserve the existing relationships with customers, suppliers, vendors, employees, landlords, creditors, agents, and others having business relations with CB&I's Tank Business and the CB&I Tank Assets. Respondents shall, among other things as may be necessary:
 - 1. use best efforts to maintain and increase sales of CB&I's Tank Business, and to maintain at budgeted levels for the year 2002 or the current year, whichever are higher, all administrative, technical, and marketing support for CB&I's Tank Business;
 - 2. use best efforts to maintain the current workforce and to retain the services of employees and agents relating to CB&I's Tank Business, including payment of bonuses as necessary;
 - 3. assure that Respondents' employees with primary responsibility for managing and operating CB&I's Tank Business are not transferred or reassigned to other areas within Respondents' organization except for transfer bids initiated by employees pursuant to Respondents' regular, established job posting policy;

4. provide sufficient working capital to maintain CB&I's Tank Business as an economically viable and competitive ongoing business; and
5. except as part of a divestiture approved by the Commission pursuant to this Order, not remove, sell, lease, assign, transfer, license, pledge for collateral or otherwise dispose of the CB&I Tank Assets.

We propose to ask that this order cover all of the former PDM assets and business at issue, including the Provo plant. At this point, given that CB&I has ambushed this staff, not once, but twice (by closing on the acquisition pending subpoenas from the Commission and initiating this closure without notice to the staff), CB&I cannot be trusted to maintain these assets as a going concern so that effective divestiture relief can be achieved at the conclusion of this matter.

In sum, Respondent CB&I has initiated steps to close the Provo, Utah plant and terminate the employees of that plant. This action will disperse the skilled workforce associated with the plant and will impose substantial new impediments to the Commission's ability ultimately to obtain full and effective relief in this matter should the Commission determine to affirm the Initial Decision.

For the reasons set forth herein, Complaint Counsel hereby respectfully request that the Commission authorize the filing of a federal court complaint, substantially in the form attached hereto as Exhibit D, seeking an order to enjoin Respondent CB&I from dissipating assets that are the subject of proposed divestiture relief and to require Respondent CB&I to preserve all such assets pending completion of administrative litigation in this proceeding.

DATE: December 5, 2003

Respectfully submitted,

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