

## VII. Standard of Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment is "in the public interest." In making that determination, the Court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e).

As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458–62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."<sup>1</sup> Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those

explanations are reasonable under the circumstances.<sup>2</sup>

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also *Microsoft*; 56 F.3d at 1458. Precedent requires that:

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.<sup>3</sup>

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"<sup>4</sup>

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own

hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing the case in the first place," it follows that court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. Id.

## VIII. Determinative Materials And Documents

There are no determinative documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 25, 2002.

Respectfully submitted,  
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## DEPARTMENT OF JUSTICE

### Antitrust Division

#### **United States v. The Manitowoc Co. Inc., Grove Investors Inc., and National Crane Corp.; Proposed Final Judgment and Competitive Impact Statement**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States v. The Manitowoc Co. Inc., Grove Investors Inc., and National Crane Corp.*, Civil No. 02 CV 01509 (RCL).

On July 31, 2002, the United States filed a Complaint alleging that the proposed acquisition by Manitowoc of Grove would violate section 7 of the Clayton Act, 15 U.S.C. 18, by substantially lessening competition in development, production, and sale of medium- and heavy-lift boom trucks in North America. The proposed Final Judgment, filed the same time as the Complaint, requires that the defendants divest either Manitowoc's or Grove's boom truck business to a person acceptable to the United States within 150 days after July 31st. Copies of the Complaint, the proposed Final Judgment, the proposed Final Judgment, Hold Separate Stipulation and Order, and Competitive Impacts

<sup>1</sup> 119 Cong. Rec. 24,598 (1973). See *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

<sup>2</sup> *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D.Mo. 1977); see also *United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

<sup>3</sup> *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); see *United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. See also *United States v. Amerian Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984).

<sup>4</sup> *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), (quoting *United States v. Gillette*, 406 F. Supp. at 716), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983); see *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrolls Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

Statement are available for inspection at the U.S. Department of Justice, Antitrust Division, Suite 215 North, 325 7th Street, NW, Washington, DC 20004 (telephone: 202/514-2692), and at the Clerk's Office of the U.S. Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001 .

Public comment is invited within 60-days of the date of this notice. Such comments and responses thereto will be published in the **Federal Register** and filed with the Court. Comments should be directed to J. Robert Kramer, II, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530 (telephone: (202) 307-0924).

**Dorothy B. Fountain,**

*Deputy Director of Operations.*

### **Hold Separate Stipulation and Order**

It is hereby stipulated and agreed to and between the undersigned parties, subject to approval and entry by the Court, that:

#### **I. Definitions**

As used in this Hold Separate Stipulation and Order:

A. "Acquire" means the entity or entities to whom defendants divest the National Crane or Manitowoc Boom Truck Business.

B. "Manitowoc" means defendant The Manitowoc Company, Inc., a Wisconsin corporation with its headquarters in Manitowoc, WI, its successors and assigns, and its subsidiaries (including Manitowoc Boom Trucks, Inc.), divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

C. "Grove" means Investors, Inc., a Delaware corporation with its headquarters in Shady Grove, PA, and its successors and assigns, its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

D. "National Crane" means National Crane Corporation, a Delaware corporation with its headquarters in Waverly, NE, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

E. "Boom truck" means any stiff boom telescopic crane designed for mounting on a commercial truck chassis fitted with outriggers for load lift stability.

F. "Manitowoc Boom Truck Business" means Manitowoc Boom Trucks, Inc. and its line of boom trucks, including:

1. Any and all tangible assets used in Manitowoc's boom truck manufacturing business, including Manitowoc's boom truck production facility in Georgetown, Texas; manufacturing, assembling and testing equipment, tooling, and other fixed assets; personal property, inventory, office furniture, materials, supplies, and other tangible property and all other assets used exclusively in connection with the Manitowoc Boom Truck Business; all license, permits, and authorizations issued by any governmental entity or organization in connection with making or selling boom trucks; all contracts, supply or teaming arrangements, leases, commitments, and understandings relating to the Manitowoc Boom Truck Business; all customer lists, accounts, and credit records of boom truck distributors, dealers, or end users; and sales, performance, service and repair, warranty, or other records relating to the Manitowoc Boom Truck Business; and

2. Any and all intangible assets used in developing, producing, selling, repairing or servicing Manitowoc, Manitex, USTC, JLG or Pioneer boom trucks, including but not limited to: (a) The Manitex, USTC, JLG and Pioneer brand names and all other intellectual property rights used exclusively in connection with the Manitowoc Boom Truck Business; (b) with respect to all other intellectual property rights (except the use of the Manitowoc brand name) used in connection with both the Manitowoc assets, a transferable, paid-up license, exclusive in the boom truck field use; (c) with respect to use of the Manitowoc brand name, at Acquirer's option, subject to approval of the United States, at its sole discretion, a transferable, paid-up license, not to exceed three years in length, exclusive in the boom truck field of use; (d) all existing licenses and sublicenses relating exclusively to the Manitowoc Boom Truck Business; and (e) a transferable, paid-up sublicense, exclusive in the boom truck field of use, to all other existing licenses and sublicenses relating to the Manitowoc Boom Truck Business. Intellectual property rights, as used herein, include, but are not limited to, patents, licenses and sublicenses, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, quality assurance and control procedures, design tools and stimulation capability, manuals, and all data concerning historic and current research and development relating to the Manitowoc Boom Truck Business.

Manitowoc Boom Truck Business, as used herein, does not include the right to develop, produce or sell Model S282, a mobile self-erecting tower crane licensed by Manitowoc from a foreign subsidiary, Potain.

G. "National Crane Boom Truck Business" means National Crane and its line of boom trucks, including:

1. Any and all tangible assets used in National Crane's boom truck manufacturing business, including its boom truck production facility in Waverly, Nebraska; manufacturing, assembling and testing equipment, tooling and other fixed assets; personal property, inventory, office furniture, materials, supplies, and other tangible property and all other assets used exclusively in connection with the National Crane Boom Truck Business; all licenses, permits, and authorizations issued by any governmental entity or organization in connection with making or selling boom trucks; all contracts, supply or teaming arrangements, leases, commitments, and understandings relating to the National Crane Boom Truck Business; all customer lists, accounts, and credit records of boom truck distributors, dealers, or end users; and sales, performance, service and repair, warranty, or other records relating to the National Crane Boom Truck Business; and

2. Any and all intangible assets used in developing, producing, selling, repairing, or servicing National or National Crane brand boom trucks, including but not limited to: (a) The National Crane and National brand names and all other intellectual property rights used exclusively in connection with the National Crane Boom Truck Business; (b) with respect to all other intellectual property rights used in connection with both the National Crane Boom Truck Business and other nondivested Grove assets, a transferable, paid-up license, exclusive in the boom truck field of use; (c) all existing licenses and sublicenses relating exclusively to the National Crane Boom Truck Business; and (d) a transferable, paid-up sublicense, exclusive in the boom truck field of use, to all other existing licenses and sublicenses relating to the National Crane Boom Truck Business. Intellectual property rights, as used herein, include, but are not limited to, patents, licenses and sublicenses, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, quality assurance and control procedures, design tools and simulation capability,

manuals, and all data concerning historic and current research and development relating to the National Crane Boom Truck Business.

## II. Objectives

The Final Judgment filed in this case is meant to ensure defendants' prompt divestiture of either the National Crane or Manitowoc Boom Truck Business for the purpose of ensuring the establishment of a viable competitor in the boom truck industry capable of competing effectively to supply boom trucks in North America and to remedy the anticompetitive effects that the United States alleges would otherwise result from Manitowoc's acquisition of Grove. This Hold Separate Stipulation and Order ensures, prior to such divestiture, that the National Crane and Manitowoc Boom Truck Businesses are operated as competitively independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by the consummation of Manitowoc's acquisition of Grove, and that competition is maintained during the pendency of the ordered divestiture.

## III. Jurisdiction and Venue

This Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

## IV. Compliance With and Entry of Final Judgment

A. The Parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

B. Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending entry of the Final Judgment by the Court, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though the

same were in full force and effect as an order of the Court.

C. Defendants shall not consummate the transaction sought to be enjoined by the Complaint herein before (1) the Court has signed this Hold Separate Stipulation and Order and (2) defendants have obtained from their lenders a written unconditional commitment to release any security interest(s) in the assets of the National Crane or Manitowoc Boom Truck Business pursuant to a divestiture under the terms of the Final Judgment.

D. This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

E. In the event (1) the United States has withdrawn its consent, as provided in Section IV(A) above, or (2) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

F. Defendants represent that the divestiture ordered in the proposed Final Judgment can and will be made, and that defendants will later raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

## V. Hold Separate Provisions

Until the divestiture required by the Final Judgment has been accomplished:

A. Defendants shall preserve, maintain, and continue to operate, respectively, the National Crane and Manitowoc Boom Truck Businesses as competitively independent, economically viable parts of ongoing competitive businesses, with management, research, design, development, promotions, marketing, sales, and operations of such assets held entirely separate, distinct, and apart from each other's operations and from those of defendants' other operations. Within twenty (20) days after the entry of this Hold Separate Stipulation and Order, defendants will inform the United States of the steps defendants have taken to comply with this Hold Separate Stipulation and Order.

B. Defendants shall take all steps necessary to ensure that (1) the National

Crane and Manitowoc Boom Truck Businesses will be maintained and operated as independent, ongoing, economically viable and active competitors in the boom truck industry; (2) management of the National Crane and Manitowoc Boom Truck Businesses (designated in Section V(J)) will not be influenced by defendants, except to the extent necessary to carry out defendants' obligations under this Hold Separate Stipulation and Order and the proposed Final Judgment; and (3) the books, records, competitively sensitive sales, marketing and pricing information, and decision-making concerning research, development, marketing, production, distribution, or sales of products by or under any of the National Crane and Manitowoc Boom Truck Businesses will be kept separate and apart from each other's operations.

C. Defendants shall use all reasonable efforts to maintain and increase the research, development, sales, and revenues of the products produced by or sold under the National Crane and Manitowoc Boom Truck Businesses, and shall maintain at 2001 levels or previously approved levels for 2002, whichever are higher, all research, development, product improvement, promotional, advertising, sales, technical assistance, marketing and merchandising support for the National Crane and Manitowoc Boom Truck Businesses.

D. Defendants shall provide sufficient working capital and lines and sources of credit to continue to maintain the National Crane and Manitowoc Boom Truck Businesses as economically viable and competitive, ongoing businesses, consistent with the requirements of Sections V(A) and V(B).

E. Defendants shall take all steps necessary to ensure that all the assets of the National Crane and Manitowoc Boom Truck Businesses are fully maintained in operable condition at no less than current capacity and sales, and shall maintain and adhere to normal product improvement and upgrade and repair and maintenance schedules for those assets.

F. Defendants shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, remove, sell, lease, assign, transfer, pledge or otherwise dispose of any assets of the National Crane or Manitowoc Boom Truck Businesses; provided, however, that nothing in this provision prohibits defendants from selling inventory in the ordinary course of business or, subject to the terms of Section IV(C)(2), offering a lender a security interest in assets

pursuant to Manitowoc's preexisting revolving lines of credit.

G. Defendants shall maintain, in accordance with sound accounting principles, separate, accurate and complete financial ledgers, books and records that report on a periodic basis, such as the last business day of every month, consistent with past practices, the assets, liabilities, expenses, revenues and income of the National Crane and Manitowoc Boom Truck Businesses.

H. Defendants shall take no action that would jeopardize, delay, or impede the sale of the National Crane and Manitowoc Boom Truck Businesses.

I. Defendants' employees with primary responsibility for the research, design, development, promotion, distribution, sale, and operation of the National Crane and Manitowoc Boom Truck Businesses shall not be transferred or reassigned to other areas within the company except for transfer bids initiated by employees pursuant to defendants' regular, established job posting policy. Defendants shall provide the United States with ten (10) calendar days notice of such transfer.

J. Prior to consummation of their transaction, defendants Grove and National Crane shall appoint Dan Wolf to oversee the National Crane Boom Truck Business and defendant Manitowoc shall appoint Brad Rogers to oversee the Manitowoc Boom Truck Business, and to be responsible for defendants' compliance with this section. Dan Wolf shall have complete managerial responsibility for the National Crane Boom Truck Business, and Brad Rogers shall have complete managerial responsibility for the Manitowoc Boom Truck Business, subject to the provisions of this Final Judgment. In the event either person is unable to perform his duties, defendants shall appoint, subject to the approval of the United States, a replacement within ten (10) working days. Should defendants fail to appoint a replacement acceptable to the United States within this time period, the United States shall appoint a replacement.

K. Defendants shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestiture pursuant to the Final Judgment to an Acquirer acceptable to the United States.

L. This Hold Separate Stipulation and order shall remain in effect until consummation of the divestiture required by the proposed Final Judgment or until further order of the Court.

Dated: July 30, 2002.

Respectfully submitted,

for Plaintiff, United States of America:  
Anthony E. Harris, Esquire, Illinois Bar No.: 1133713, United States Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW, Suite 3000, Washington, DC 20530, Telephone No.: (202) 307-6583.

For Defendant, the Manitowoc Company, Inc.: Darryl S. Bell, Esquire, Quarles & Brady LLP, 411 East Wisconsin Avenue, Suite 2040, Milwaukee, WI 53202-4497, Telephone No.: (414) 277-5123.

For Defendants, Grove Investors, Inc. and National Crane Corporation: Michael L. Weiner, Esquire, Skadden Arps Slate Meagher & Flom LLP, Four Times Square, New York, NY 10036, Telephone No.: (212) 735-3000.

#### Order

*It is so ordered* by the Court, this  
\_\_\_\_\_ day of July 2002.

United States District Judge

#### Final Judgment

*Whereas*, plaintiff, United States of America, filed its Complaint on July 29, 2002, plaintiff and defendants, The Manitowoc Company, Inc. ("Manitowoc"), Grove Investors, Inc. ("Grove"), and National Crane, Inc. ("National Crane"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

*And Whereas*, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

*And Whereas*, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by the defendants to assure that competition is not substantially lessened;

*And Whereas*, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

*And Whereas*, defendants have represented to the United States that the divestiture required below can and will be made and that defendants will later raise no claim of hardship of difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

*Now Therefore*, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is *Ordered, Adjudged and Decreed*:

#### I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

#### II. Definitions

As used in this Final Judgment:

A. "Acquirer" means the entity or entities to whom defendants divest the National Crane or Manitowoc Boom Truck Business.

B. "Manitowoc" means defendant The Manitowoc Company, Inc.; a Wisconsin corporation with its headquarters in Manitowoc, WI, its successors and assigns, and its subsidiaries (including Manitowoc Boom Truck, Inc.), divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

C. "Grove" means Grove Investors, Inc., a Delaware corporation with its headquarters in Shady Grove, PA, and its successors and assigns, its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

D. "National Crane" means National Crane Corp., a Delaware corporation with its headquarters in Waverly, NE, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, joint ventures, and their directors, officers, managers, agents, and employees.

E. "Boom truck" means any stiff boom telescopic crane designed for mounting on a commercial truck chassis fitted with outriggers for load lift stability.

F. "Manitowoc Boom Truck Business" means Manitowoc Boom Trucks, Inc. and its line of boom trucks, including:

1. Any and all tangible assets used in Manitowoc's boom truck manufacturing business, including Manitowoc's boom truck production facility in Georgetown, Texas; manufacturing, assembling and testing equipment, tooling, and other fixed assets; personal property, inventory, office furniture, materials, supplies, and other tangible property, and all other assets used exclusively in connection with the Manitowoc Boom Truck Business; all licenses, permits, and authorizations issued by any governmental entity or organization in connection with making or selling boom trucks; all contracts, supply or teaming arrangements, leases, commitments, and understandings relating to the Manitowoc Boom Truck Business; all

customers lists, accounts, and credit records of boom truck distributors, dealers or end users; and sales, performance, service and repair, warranty or other records relating to the Manitowoc Boom Truck Business; and

2. Any and all intangible assets used in developing, producing, selling, repairing or servicing Manitowoc, Manitex, USTC, JLG or Pioneer boom trucks, including but not limited to: (a) The Manitex, USTC, JLG and Pioneer brand names and all other intellectual property rights used exclusively in connection with the Manitowoc Boom Truck Business; (b) with respect to all other intellectual property rights (except the use of the Manitowoc brand name) used in connection with both the Manitowoc Boom Truck Business and other nondivested Manitowoc assets, a transferable, paid-up license, exclusive in the boom truck field of use; (c) with respect to use of the Manitowoc brand name, at Acquirer's option, subject to approval of the United States, at its sole discretion, a transferable, paid-up license, not to exceed three years in length, exclusive in the boom truck field of use; (d) all existing licenses and sublicenses relating exclusively to the Manitowoc Boom Truck Business; and (e) a transferable paid-up sublicense, exclusive in the boom truck field of use, to all other existing licenses and sublicenses relating to the Manitowoc Boom Truck Business. Intellectual property rights, as used herein, include, but are not limited to, patents, license and sublicenses, technical information, computer software and related documentation, known-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, quality assurance and control procedures, design tools and simulation capability, manuals, and all data concerning historic and current research and development relating to the Manitowoc Boom Truck Business.

Manitowoc Boom Truck Business, as used herein, does not include the right to develop, produce or sell Model S282, mobile self-erecting tower crane licensed by Manitowoc from a foreign subsidiary, Potain.

G. "National cranes Boom Truck Business" means National Crane and its line of boom trucks, including:

1. Any and all tangible assets used in national Crane's boom truck manufacturing business, including its boom truck production facility in Waverly, Nebraska; manufacturing, assembling and testing equipment, tooling and other fixed assets; personal property, inventory, office furniture, materials, supplies, and other tangible property and all other assets used

exclusively in connection with the National Crane Boom Truck Business; and licenses, permits and authorizations issue by any governmental entity or organization in connection with making or selling boom trucks; all contracts, supply or teaming arrangements, leases, commitments and understandings relating to the National Crane Boom Truck Businesses; all customer lists, accounts, and credit records of boom truck distributors, dealers or end users; and sales, performance, service and repair, warranty or other records relating to the National crane Boom Truck Business; and

2. Any and all intangible assets used in developing, producing, selling, repairing or servicing National or National Crane brand boom trucks, including but not limited to: (a) The National Crane and National brand names and all other intellectual property rights used exclusively in connection with the National Crane Boom Truck Business; (b) with respect to all other intellectual property rights used in connection with both the national crane Boom Truck Business and other nondivested Grove assets, a transferable, paid-up license, exclusive in the boom truck field of use; (c) all existing licenses and sublicenses relating exclusively to the National Crane Boom Truck Business; and (d) a transferable, paid-up sublicense, exclusive in the boom truck field of use, to all other existing licenses and sublicenses relating to the National Crane Boom Truck Business. Intellectual property rights, as used herein, include, but are not limited to, patents, licenses and sublicenses, technical information, computer software and related documentation, known-how, trade secrets, drawing, blueprints, designs, design protocols, specifications for materials, quality assurance and control procedures, design tools and simulation capability, manuals, and all data concerning historic and current research and development relating to the National Crane Boom Truck Business.

### III. Applicability

A. This Final Judgment applies to Manitowoc, Grove and National Crane, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets or of lesser business units that include the National Crane or Manitowoc Boom Truck Business, that

the purchaser agrees to be bound by the provisions of this Final Judgment, provided, however, that defendants need not obtain such an agreement from the Acquirer.

### IV. Divestiture

A. Defendants are ordered and directed, within one hundred and fifty (150) calendar days after the filing of the Complaint in this matter, or five (5) days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the National Crane or Manitowoc Boom Truck Business in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States in its sole discretion. The United States, in its sole discretion, may agree to an extension of this time period of up to thirty (30) calendar days, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the National Crane or Manitowoc Boom Truck Business as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the National Crane or Manitowoc Boom Truck Business, whichever is then available for sale. Defendants shall inform any person making inquiry regarding a possible purchase of the National Crane or Manitowoc Boom Truck Business that either will be divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the National Crane or Manitowoc Boom Truck Business, whichever is then available for sale, customarily provided in a due diligence process except such information or documents subject to the attorney-client or work-product privilege. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide prospective Acquirers of the National Crane or Manitowoc Boom Truck Business and the United States information relating to the personnel involved in the production, operation, development and sale of the National Crane or Manitowoc Boom Truck Business (whichever is then available for sale) to enable the Acquirer to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer to employ any defendants employee whose primary responsibility

is the production, operation, development and sale of the boom truck products of the National Crane or Manitowoc Boom Truck Business.

D. Defendants shall permit prospective Acquirers of the National Crane or Manitowoc Boom Truck Business to have reasonable access to personnel and to make inspections of the physical facilities of the National or Manitowoc Boom Truck Business (whichever is then available for sale); access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer of the National Crane or Manitowoc Boom Truck Business that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the National Crane and Manitowoc Boom Truck Businesses.

G. Defendants shall not take any action, direct or indirect, that would prevent or discourage in any way any dealer from distributing the boom truck products of the National Crane or Manitowoc Boom Truck Business, whichever is actually divested, for a period of two years after such divestiture. Nothing in this provision, however, shall prevent defendants from promoting and selling in the ordinary course of business products that compete with the National Crane or Manitowoc Boom Truck Business.

H. Defendants shall warrant to the Acquirer of the National Crane or Manitowoc Boom Truck Business that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and the following the sale of the National Crane or Manitowoc Boom Truck Business, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the National Crane or Manitowoc Boom Truck Business.

I. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire National Crane or Manitowoc Boom Truck Business, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the National Crane or Manitowoc Boom Truck Business can and will be used by the Acquirer as part of a viable,

ongoing business, engaged in developing, manufacturing and selling boom trucks in North America.

Divestiture of the National Crane or Manitowoc Boom Truck Business may be made to an Acquirer, provided that it is demonstrated to the sole satisfaction of the United States that the National Crane or Manitowoc Boom Truck Business will remain viable and the divestiture of such assets will remedy the competitive harm alleged in the Complaint. The divestitures, which pursuant to Section IV or Section V of this Final Judgment,

1. Shall be made to an Acquirer that, in the United State's sole judgment, has the managerial, operational, and financial capability to compete effectively in the manufacturer and sale of boom trucks in North America; and

2. Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

#### **V. Appointment of Trustee**

A. If defendants have not divested the National Crane or Manitowoc Boom Truck Business within the time period specified in Section IV(A), defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of either the National Crane or Manitowoc Boom Truck Business.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the National Crane or Manitowoc Boom Truck Business. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by defendants must be conveyed in writing to the United States

and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as plaintiff approves, and shall account for all monies derived from the sale of the National Crane or Manitowoc Boom Truck Business and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the National Crane or Manitowoc Boom Truck Business and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to customary confidentiality protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the National Crane and Manitowoc Boom Truck Businesses and shall describe in detail each contact with any such person. The trustee shall maintain full records of all

efforts made to divest the National Crane and Manitowoc Boom Truck Business.

G. If the trustee has not accomplished such divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the plaintiff who shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

#### **VI. Notice of Proposed Divestiture**

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the National or Manitowoc Boom Truck Business, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee if applicable additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any

third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(D) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by defendants under Section V(D), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

#### **VII. Financing**

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

#### **VIII. Hold Separate**

Until the divestiture required by this Final Judgment has been accomplished defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture order by this Court.

#### **IX. Affidavits**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the National Crane or Manitowoc Boom Truck Business, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the National Crane and Manitowoc Boom Truck Businesses, and to provide required information to any prospective Acquirer, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any

objection by the United States to information provided by defendants, including limitations on the information, shall be made within fourteen (14) days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve the National Crane and Manitowoc Boom Truck Businesses and to divest the National Crane or Manitowoc Boom Truck Business until one year after such divestiture has been completed.

#### **X. Compliance Inspection**

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. Access during defendants' office hours to inspect and copy, or at plaintiff's option, to require defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports, under oath if

requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then the United States shall give defendants ten (10) calendar days prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

#### **XI. No Reacquisition**

Defendants may not reacquire any part of the National Crane or Manitowoc Boom Truck Assets, whichever is divested, during the term of this Final Judgment.

#### **XII. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, an to punish violations of its provisions.

#### **XIII. Expiration of Final Judgment**

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

#### **XIV. Public Interest Determination**

Entry of this Final Judgment is in the public interest.

Date: \_\_\_\_\_

Court approval subject to procedures of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16.

United States District Judge

#### **Competitive Impact Statement**

The United States, pursuant to Section 2(b) of the Antitrust Procedures

and Penalties Act ("APPA"), 15 U.S.C. 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

#### **I. Nature and Purpose of the Proceeding**

On July 30, 2002, the United States filed a civil antitrust suit alleging that the proposed acquisition by The Manitowoc Company, Inc. ("Manitowoc") of Grove Investors, Inc. ("Grove") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The Complaint alleges that a combination of Manitowoc and Grove would substantially lessen competition in the development, production, and sale of medium- and heavy-lift boom trucks in North America. Combining Grove and Manitowoc, the largest and third largest producers of medium- and heavy-lift boom trucks, would result in a single firm—Manitowoc—with a market share of over 60 percent, and two firms with a combined share of over 90 percent, of North American sales of medium- and heavy-lift boom trucks. This reduction in competition would lead to higher prices and reduced product quality and innovation for medium- and heavy-lift boom trucks to the detriment of consumers. Accordingly, the prayer for relief in the Complaint seeks: (1) A judgment that the proposed acquisition would violate Section 7 of the Clayton Act, and (2) a permanent injunction that would prevent Manitowoc from acquiring control of or otherwise combining its assets with Grove and its boom truck subsidiary, National Crane Corp.

At the same time the Complaint was filed, the United States filed a proposed settlement that would permit Manitowoc to complete its acquisition of Grove, but require defendants to divest either Manitowoc's or Grove's boom truck business in such a way as to preserve competition in North America. The settlement consists of a Hold Separate Stipulation and Order and a proposed Final Judgment.

According to the terms of the settlement, defendants must divest either Manitowoc's or Grove's boom truck business to a person acceptable to the United States, in its sole discretion, within one hundred and fifty (150) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later. The United States, in its sole discretion, may extend the time period for divestiture by an additional period of time, not to exceed 30 days. If defendants do not complete the divestiture within the prescribed time period, then the United

States may nominate, and the Court will appoint, a trustee who will have sole authority to divest either the National Crane or the Manitowoc boom truck business.

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the APPA. Entry of the proposed Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

#### **II. Description of the Events Giving Rise to the Alleged Violations of the Antitrust Laws**

##### *A. The Defendants and the Proposed Transaction*

Manitowoc, based in Manitowoc, WI, is a publicly held conglomerate with three principal lines of business: Production and sale of commercial refrigeration equipment, construction and repair of lake-going freighters, and production and sale of various types of stationary and mobile cranes. In 2001, Manitowoc reported approximately \$1.2 billion in total revenues.

Grove makes and sells all types of mobile cranes, including hydraulic truck-mounted, all-terrain, and rough-terrain cranes. A Grove subsidiary, National Crane, makes boom trucks and knuckleboom cranes. In 2001, Grove reported revenues in excess of \$713 million.

On March 19, 2002, Manitowoc and Grove announced an agreement pursuant to which Manitowoc would acquire Grove and assume its liabilities in a transaction valued at approximately \$270 million. This transaction would combine the nation's largest and third largest producers of medium- and heavy-lift boom trucks, and in the process, substantially lessen competition in the already highly concentrated North American market for medium- and heavy-lift boom trucks.

##### *B. The Effects of the Transaction on Competition in the Sale of Medium- and Heavy-Lift Boom Trucks*

###### **1. Relevant Market: North American Production and Sale of Medium- and Heavy-Lift Boom Trucks**

The Complaint alleges that the development, production, and sale of medium- and heavy-lift boom trucks is a relevant product market within the meaning of Section 7 of the Clayton Act. A "boom truck" is a stiff boom telescopic crane mounted on a standard flat-bed commercial truck chassis. This general-purpose mobile crane has a

broad range of applications in the construction, petroleum, and utility industries. Although boom trucks are produced in many models and sizes, their nominal load lift ratings generally distinguish them as either light-, medium-, or heavy-lift cranes. A combination of highly desirable features sets medium- and heavy-lift boom trucks apart from all other types of cranes or lifting devices. These features include an ability safely to haul loads and travel at highway speeds from site to site, exceptional load lift (from 15 tons to 40 tons) and reach (40 feet to over 100 feet) capability, overall versatility, and general ease of use.

Medium- and heavy-lift boom trucks offer an appealing package of versatility and performance at attractive prices—a combination unmatched by any other type of crane (e.g., knuckleboom, hydraulic truck, all-terrain, rough-terrain, tower, and lattice boom cranes; service vehicles; or boom trucks with lower nominal lift rating capability) or lifting device (e.g., fork-lift trucks, aerial manlift vehicles). For that reason, prospective customers would be willing to pay a significant premium over current prices before seriously considering any other type of crane or lifting device. Medium- and heavy-lift boom trucks are a relevant product market in which to assess the competitive effects of a combination of Manitowoc and Grove.<sup>1</sup>

The Complaint alleges that the sale of medium- and heavy-lift boom trucks in North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act. Over 99 percent of medium- and heavy-lift boom trucks sold in North America are produced by firms located in either the United States or Canada. Although a very few medium-lift boom trucks have been imported from a single firm in Japan, historically, foreign producers have not developed and produced a sufficiently wide range of different models of boom trucks, and have not established a reputation for quality, safety, and reliability or the extensive distribution networks that would enable them to attract significant sales of medium- and heavy-lift boom trucks away from North American firms. A small but significant and nontransitory increase in prices of North American medium- or heavy-lift

boom trucks would not precipitate a significant loss of sales to imported products. North America this is a relevant geographic market in which to assess the competitive effects of Manitowoc's proposed acquisition of Grove.

## 2. Anticompetitive Effects of the Acquisition

The Complaint alleges that in this highly concentrated market for medium- and heavy-lift boom trucks, a combination of Manitowoc and Grove likely would; (i) Substantially lessen competition in development, production, and sale of medium- and heavy-lift boom trucks in North America, (ii) eliminate actual and potential competition between Manitowoc's and Grove's medium- and heavy-lift boom truck businesses; and (iii) increase prices and reduce current levels of quality and innovation for medium- and heavy-lift boom trucks.

Specifically, the Complaint alleges that Grove (via National Crane) and Manitowoc are, respectively, the nation's largest and third largest producers of medium- and heavy-lift boom trucks. There is only one other major producer of medium- and heavy-lift boom trucks. Combined, the three largest competitors command over 90 percent of all sales of medium- and heavy-lift boom trucks in North America. Three small firms (two North American and one Asian) produce somewhat specialized products that account for less than ten percent of unit sales of medium- and heavy-lift boom trucks in North America. Individually and collectively, however, these small firms do not have the production capacity, strong reputation for safety and reliability, or extensive distribution networks necessary to attract sufficient sales away from the much larger market incumbents, and hence effectively constrain any post-merger exercise of market power.<sup>2</sup>

Manitowoc's acquisition of Grove is likely to diminish competition substantially by creating conditions conducive to: (a) The two remaining major competitors engaging in tacit or explicit coordinated pricing to the detriment of consumers since neither would have to worry about competition from Grove; and (b) Manitowoc unilaterally increasing its prices for medium- and heavy-lift boom trucks.

Significant new entry into development, production and sales of medium- and heavy-lift boom trucks would be difficult, time consuming, and hence unlikely to deter (or constrain) an exercise of market power after the acquisition by Manitowoc of Grove. To be successful in this industry, a new competitor<sup>3</sup> must not only construct a production facility and establish a large network of dealers to provide sales, service, and customer support for its products, it must also develop a strong reputation for producing high quality, safe, and reliable boom trucks. Successful new entry would require a substantial capital investment in the form of sunk costs,<sup>4</sup> which would be large relative to the size of the North American boom truck industry and the risk of any expected profits. Considering the time required, expense, investment risks, and expected returns, it is highly unlikely that following a combination of Manitowoc and Grove, new market entry would occur on such a magnitude and scale as to displace sufficient sales from the two remaining major incumbent producers of medium- and heavy-lift boom trucks to constrain a post-merger exercise of market power.

## III. Explanation of the Proposed Final Judgment

The proposed Final Judgment will preserve competition in the sale of medium- and heavy-lift boom trucks in North America. The Judgment requires that within one hundred and fifty (150) calendar days after the filing of the Complaint in this matter, or within five (5) days after notice of entry of the Final Judgment, whichever is later, Manitowoc must sell its own or Grove's boom truck business to an acquirer acceptable to the United States. The United States may extend this time period for divestiture for one additional period, not to exceed 30 days. Defendants must use their best efforts to divest either the Manitowoc or Grove boom truck business as expeditiously as possible, and until the ordered divestiture takes place, the defendants must cooperate with any prospective purchasers.

If Manitowoc does not accomplish the ordered divestiture within the

<sup>1</sup> The basic competitive analysis (i.e., three to two reduction in major competitors in an already highly concentrated market) would not change appreciably if one were to examine individual models by load lift capability (concluding perhaps that models within a certain range of load lift capability comprise a relevant product, e.g., 15–17 ton boom trucks), rather than, as in this case, considering larger boom trucks collectively as a single market for “medium and heavy lift boom trucks.”

<sup>2</sup> These small rivals would be unable to quickly and easily expand their sales of medium- and heavy-lift boom trucks for many of the same reasons why significant new entry would be difficult, time-consuming and unlikely, post-merger. See p. 7, below.

<sup>3</sup> Entry into the production and sale of medium- and heavy-lift boom trucks may be de novo (i.e., by a new producer) or lateral (e.g., by an established maker of other types of cranes or lifting devices).

<sup>4</sup> The term “sunk costs” as used in this context includes the costs of acquiring tangible and intangible assets that cannot be recovered through the redeployment of these assets outside the relevant market, i.e., costs uniquely incurred to enter the production and sale of medium- and heavy-lift boom trucks in North America and that cannot be recovered upon exit from that industry.

prescribed time period, the United States will nominate, and the Court will appoint, a trustee to assume sole power and authority to complete the divestiture. Defendants must cooperate fully with the trustee's efforts to divest either boom truck business to an acquirer acceptable to the United States and periodically report to the United States on their divestiture efforts.

If the trustee is appointed, the defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is completed. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

#### IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act (15 U.S.C. 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of section 5(a) of the Clayton Act (15 U.S.C. 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendant.

#### V. Procedures Available for Modification of the Proposed Final Judgment

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of

the date of publication of this Competitive Impact Statement in the **Federal Register**. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to: J. Robert Kramer II, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H Street, NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

#### VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Manitowoc and Grove. The United States could have continued the litigation to seek preliminary and permanent injunctions against Manitowoc's acquisition of Grove. The United States is satisfied, however, that the divestiture of the assets as proposed in the Final Judgment will establish, preserve, and ensure competition in the relevant market. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Manitowoc's acquisition of Grove from having adverse competitive effects.

#### VII. Standard of Review Under the APPA for Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including

consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e) (emphasis added) As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."<sup>5</sup> Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977-1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches

<sup>5</sup> 119 Cong. Rec. 24598 (1973). See *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). As "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.<sup>6</sup>

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A]" proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of public interest.'"<sup>7</sup>

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States alleges in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the Government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the Court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

### VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 30, 2002.

Respectfully submitted,

Anthony E. Harris,  
*Illinois Bar No. 1133713, U.S. Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, (202) 307-6583.*

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<sup>6</sup> *United States v. Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); see *United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. See also *United States v. American Cyanamid Co.*, 719 F.2d at 565.

<sup>7</sup> *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982) (citations omitted), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) quoting *United States Gillette Co.*, *supra*. 406 F. Supp. at 716; *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky 1985).

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

#### Agency Information Collection Activities: Proposed Collection; Comments Requested

**AGENCY:** 60-day emergency notice information collection under review: new collection; financial status report (SF 269A).

The Department of Justice, Office of Justice Programs, Office of the Comptroller, has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with emergency review procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by August 30, 2002. The proposed information collection is published to obtain comments from the public and affected agencies. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information Regulations Affairs, Attention: Department of Justice Desk Officer, (202) 395-6466, Washington, DC 20503.

During the first 60 days of this same review period, a regular review of this information collection is also being undertaken. All comments and suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Cynthia J. Schwimer, Comptroller, (202) 307-0623, Office of the Comptroller, Office of Justice Programs, U.S. Department of Justice, 810 7th Street, NW., Washington, DC 20531, or facsimile at (202) 307-1463.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information:

1. *Type of information collection:* New collection.

2. *The title of the form/collection:* Financial Status Report (SF 269A).

3. *The agency for number, if any, and the applicable component of the department sponsoring the collection:* Non-applicable.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: The form is completed by grant recipients who were awarded grants by the Department of Justice, Office of Justice Programs. It is used as an aid for grant recipients to report the status of their expenditures.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* The estimated total number of respondents are 11,292, and the estimated time to complete the form is one and a half hours.

6. *An estimate of the total public burden (in hours) associated with the collection:* There are approximately 67,752 hours annual burden associated with this information collection.

If additional information is required contact: Brenda E. Dyer, Department Deputy Clearance Officer, Information Management and Security Staff, Justice Management Division, United States Department of Justice, 601 D Street NW., Patrick Henry Building, Suite 1600, NW., Washington, DC 20530.

Dated: August 16, 2002.

**Brenda E. Dyer,**

*Department Deputy Clearance Officer, United States Department of Justice.*

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## DEPARTMENT OF JUSTICE

### Office of Justice Programs

#### Agency Information Collection Activities: Proposed Collection; Comments Requested

**ACTION:** 30-Day notice of information collection under review: reinstatement, with change, of a previously approved collection for which approval has expired; Accounting System and Financial Capability Questionnaire.

The Department of Justice (DOJ), Office of Justice Programs has submitted