# EXHIBIT 2-B

**EXHIBIT 2-B**

**Defendants' Statement of Issues of Fact and Law Which Remain to be Litigated**

Whether Plaintiff has established that the proposed merger would likely result in undue concentration in one or more properly defined Relevant Markets under the Clayton Act is an issue which remains to be litigated.

a. "The objective of Section 7 of the Clayton Act is to prohibit only those acquisitions that may allow the combined entities to exercise market power by raising prices and restricting the availability of a product or service to customers." *FTC v. Occidental Petroleum Corp.*, No. 86-900, 1986 WL 952, at *13 (D.D.C. Apr. 29, 1986); *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

b. The Government is entitled to a presumption that anticompetitive effects from the proposed merger are likely only after it properly defines a relevant market and establishes the merger would result in undue concentration in that market. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990).

c. Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition. Substantiality can be determined only in terms of the market affected. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

d. The courts have consistently held that defining relevant markets and proving the likelihood of anticompetitive effects in Section 7 cases

require a rigorous, fact-intensive inquiry that must be grounded in commercial realities. *See, e.g.*, *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 511 (1974) ("The Government's statistical presentation simply did not establish that a substantial lessening of competition was likely to occur in any market."); *Brown Shoe Co.*, 370 U.S. at 322 n.38 ("Only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").

i. "The appropriate line of commerce for Clayton Act purposes must be chosen in terms of the realities of the business situation involved." *United States v. Baker Hughes*, 731 F. Supp. 3, 6 (D.D.C. 1990) (citing *Brown Shoe Co.*, 370 U.S. at 325), *aff'd*, 908 F.2d 981 (D.C.Cir. 1990). "The determination of the relevant market in the end is a matter of business reality—how the market is perceived by those who strive for profit in it." *United States v. Sungard Data Sys., Inc*., 172 F. Supp. 2d 172, 182 (D.D.C. 2001) (citation omitted).

ii. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, Inc. v. Domino's Pizza, Inc*., 124 F.3d 430, 436 (3d Cir. 1997); *see also*

*FTC v. Lab. Corp. of Am.*, No. SACV 10-1873 AG (MLGx), 2011 WL 3100372, at *23 (C.D. Cal. Mar. 11, 2011) (denying motion to enjoin a proposed merger based on rejection of the FTC's definition of the relevant market); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1134 (N.D. Cal. 2004) (rejecting Government's proposed product market for lack of economic analysis and inability to identify articulable product market boundaries).

e. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co.*, 370 U.S. at 325.

   i. "Whether two particular products belong in the same relevant product market can be demonstrated by the extent of cross-elasticity of demand between the two products; in other words, the readiness and ability of consumers of one product to turn to the other product." *Archer-Daniels-Midland Co.*, 866 F.2d at 248.

   ii. Factors for finding reasonable interchangeability "include price, use, and qualities." *Queen City Pizza*, 124 F.3d at 437 (citation omitted).

f. Any sensible measurement of market concentration must include all market participants. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 124 (D.D.C. 2004).

g. Defendants do not challenge that the Relevant States, as identified in the Complaint, constitute a relevant geographic market. The proper definition of one or more product markets for purposes of assessing potential

competitive effects, and the potential increase in concentration in the relevant markets, are issues that remain to be litigated.

Assuming Plaintiff establishes an undue increase in concentration in a properly defined relevant market, whether anticompetitive effects in the relevant market are unlikely is an issue that remains to be litigated.

a. If Plaintiff establishes its "'*prima facie* case, the burden shifts to defendants to show that traditional economic theories of the competitive effects of market concentration are not an accurate indicator of the merger's probable effect on competition in these markets or that the procompetitive effects of the merger are likely to outweigh any potential anticompetitive effects.'" *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011) (citation omitted).

b. The presumption granted Plaintiff can be rebutted by Defendants establishing that anticompetitive effects are unlikely. *Gen. Dynamics Corp.*, 415 U.S. at 498; *see also Arch Coal, Inc.*, 329 F. Supp. 2d at 130 ("[T]his Circuit has cautioned against relying too heavily on a statistical case of market concentration alone, and that instead a broad analysis of the market to determine any effects on competition is required.").

c. "The Supreme Court has adopted a totality-of-the-circumstances approach to the [Clayton Act], weighing a variety of factors to determine the effects of particular transactions on competition. . . . Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." *Baker Hughes*, 908 F.2d at 984.

d. A merger should not be blocked unless the Government proves that the alleged anticompetitive effects from the merger are "'sufficiently probable and imminent.'" *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 623 n.22 (1974) (citation omitted).

e. There are many ways Defendants can establish that anticompetitive effects are unlikely.

   i. Defendants can demonstrate that the government's statistical data does not provide an accurate picture of the market by showing "why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying" the government's case. *Baker Hughes*, 908 F.2d at 991.

   ii. Defendants can demonstrate that other parties offer products or services that are sufficiently similar to the merging parties' products. *H & R Block, Inc.*, 833 F. Supp. 2d at 81. Indeed, even if other non-merging parties do not currently sell alternatives, "non-merging parties may be able to reposition their products to offer close substitutes for the products offered by the merging firms." Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines (2010) § 6.1; *see also FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 57 (D.D.C. 2009) ("The ability and willingness of current competitors to expand their foothold in the market and/or reposition greatly reduces the anticompetitive effects of a merger, and is essentially equivalent to new entry.").

iii. Where large, sophisticated buyers are present, their sophistication is likely to promote competition even in a highly concentrated market. *Baker Hughes*, 908 F.2d at 986; *see also United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 675 (D. Minn. 1990) (noting "the power of the fluid milk buyers in the area" as one of the "[c]ommercial realities constituting clear evidence that [the merging] dairies are unlikely to exercise monopolistic market power following the proposed acquisition"); *Archer-Daniels-Midland Co.*, 781 F. Supp. at 1416 ("The existence of large, powerful buyers of a product mitigates against the ability of sellers to raise prices.").

iv. Evidence of the acquired company's weakness as a competitor "is precisely the kind of information into which the Supreme Court in recent cases has mandated an inquiry" into whether there was a substantial lessening of competition. *United States v. Int'l Harvester Co.*, 564 F.2d 769, 773–74 (7th Cir. 1977) (citing *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975); *Marine Bancorporation*, 418 U.S. at 631; *Gen. Dynamics Corp.*, 415 U.S. at 497-98; *Brown Shoe Co.*, 370 U.S. at 322 n. 38).

v. Evidence that the acquired company is a failing firm eliminates the danger that the merger would substantially lessen competition. *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302-03 (1930) (merger with a failing firm "is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton

Act"). The failing company defense does not require that a company deplete the assets of affiliated companies to meet the requirement that it faces "the grave possibility of business failure." Courts have applied the failing company defense to failing divisions or subsidiaries of companies that were otherwise profitable. *See FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 96 (N.D. Ill. 1981).

vi. "[A] showing of sufficient efficiencies may rebut the government's showing of likely anticompetitive effects." *H & R Block*, 833 F. Supp. 2d at 89. Even if efficiencies do not provide a complete defense to the merger, evidence of efficiencies is "relevant to the competitive effects analysis of the market required to determine whether the proposed transaction will substantially lessen competition." *Arch Coal, Inc.*, 329 F. Supp. 2d at 151.

f. When a customer can replace outside services with internally-created alternatives, these alternatives are reasonably interchangeable substitutes that should be included in the relevant market. *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 278 (5th Cir. 1978); *Sungard Data Sys.*, 172 F. Supp. at 186-87; *FTC v. Cardinal Health, Inc*., 12 F. Supp. 2d 34, 48 (D.D.C. 1998).