PUBLIC RECORD

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

PRETRIAL BRIEF OF RESPONDENT CHICAGO BRIDGE & IRON AS CORRECTED ON OCTOBER 29, 2002

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

OTHER AUTHORITIES

This case involves radically different views of post-acquisition market conditions for four products sold by Respondent Chicago Bridge & Iron Company ("CB&I"). Respondents intend to show that there has been timely, substantial and sufficient entry in these markets the nearly two years since CB&I's acquisition of Pitt-Des Moines, Inc.'s ("PDM") EC and Water Divisions ("Acquisition") closed, thus proving that these markets are vibrantly competitive today, and that the Acquisition has not substantially lessened competition. In contrast, Complaint Counsel looks back ten years to show how the market had performed prior to the Acquisition, and relies on alleged post-Acquisition conduct selectively chosen from the discovery record. Complaint Counsel's perspective necessarily ignores the impact of the recent substantial and sufficient entry. CB&I's competitors have successfully entered three of the four relevant markets since February 2001, and the fourth market, thermal vacuum chambers, has been dormant for many years because it is overbuilt. The law is clear that this evidence of sufficient entry rebuts Complaint Counsel's attempt to prove their *prima facie* case. United States v. Baker Hughes, 908 F.2d 981 (D.C. Cir. 1990); United States v. General Dynamics Corp., 415 U.S. 486 (1974). Respondents also intend to show that PDM-EC's assets were going to be liquidated absent the Acquisition, and that there were merger-specific and cognizable efficiencies gained from the transaction. Further, Respondents will demonstrate that Complaint Counsel relies on expert testimony that is based on misapplied economic theories and false and misleading testimony.

I. SUMMARY OF THE ARGUMENT

Complaint Counsel's Trial Brief (referred to herein as "FTC Br.") is more remarkable for what it does not say. Complaint Counsel dismisses new LNG entry with the shorthand term "fringe" without mentioning that, since the Acquisition, six large multi-billion-dollar, multinational competitors have entered the U.S. market for LNG tanks, import terminals and

peak-shaving facilities. Nor does Complaint Counsel mention that this market, which was dormant until recently, is a small portion of a competitive global market. The new entrants are far from "fringe" players and include foreign construction companies who have a wide range of experience working for U.S.-based petrochemical companies on LNG projects abroad. These LNG tank and facility competitors represent some of the world's largest construction companies who regularly compete against (and beat) CB&I on international projects. These competitors have successfully entered the U.S. and North American markets because the LNG tank market is no longer divided solely between two U.S. competitors, as it was before the Acquisition. Recent post-Acquisition LNG competition proves the vibrant nature of competition in this market. For example, Dynegy Midstream Services ("Dynegy") recently accepted for the largest LNG terminal in the U.S. Similarly, just last week,

[1]

Sufficient entry has also occurred in the U.S. market for LIN/LOX tanks. Complaint Counsel fails to mention that, despite the low demand for this product given an overbuilt industry, three out of four competitively bid post-Acquisition projects have been awarded to a recent entrant, American Tank & Vessel ("AT&V"), the third-largest tank company in the U.S. Given AT&V's current 75% post-Acquisition market share, coupled with customer satisfaction with AT&V's pricing and quality, Complaint Counsel's characterization of AT&V as a "fringe" competitor is false.

Similarly, sufficient entry has occurred in the LPG tank market. The market demand for LPG tanks is so low that since 1999 there have been only four LPG projects sold in the U.S.

[1] Further, Complaint Counsel fails to note that these five multinational construction giants are viewed as qualified, capable and cost-competitive by the vast majority of the customer base.

Complaint Counsel fails to mention that, of those four projects, AT&V has been awarded three. CB&I has been awarded but a single LPG contract in the last eight years. In fact, sales in this market are so rare that competition in the LPG tank market is legally insignificant.

Complaint Counsel's argument regarding the anticompetitive effects of the Acquisition is most suspect in the Thermal Vacuum Chamber ("TVC") market. There has been virtually no demand for TVCs in the past five years and CB&I has not even built a TVC in nearly 20 years. CB&I is prepared to address any competitive concerns in this dormant market with a competitively meaningful consent decree.

Respondents also intend to show that Complaint Counsel cannot meet its *prima facie* case because it has artificially inflated the HHI concentration statistics by including sales going back 12 years to 1990. Selecting the start date for the HHI calculation at 1996 through the Acquisition results in a change of zero in three of the four identified markets.[2] Five years is a more than amply sufficient period in which to measure concentration.

Finally, Respondents intend to show that, absent the Acquisition, PDM's EC Division would have been liquidated. Complaint Counsel's insistence that there theoretically might have been another purchaser ignores the professional percipient judgments of PDM's management and its investment banker, as well as the unique facts under which PDM-EC was being sold: the largest shareholder -- PDM's founding family -- had ordered all five divisions of the company sold posthaste in order to unlock the value of PDM's illiquid, thinly traded stock. The sale of PDM was ordered in a year when it was losing $30 million, which was more than its liquidation value. Respondents' evidence will demonstrate that liquidation was a real-world business reality, as compared to Complaint Counsel's theoretical academic argument.

[2] Even in Complaint Counsel's 12-year HHI measurement, the change in HHIs in the TVC market is still zero since CB&I has not built a TVC in the U.S. since 1984.

Notwithstanding the fact that sufficient competition exists in each of the four markets and that three of the four markets have little or no demand for its products, Complaint Counsel seeks the most draconian remedy available: the breakup of the Acquisition. This remedy makes no sense for a number of reasons, such as the fact that CB&I has lost almost every competitive bid in the relevant markets since the Acquisition in early 2001. In addition, many customers have testified that a breakup of CB&I into two competitors would lessen and not increase competition by creating two smaller and weaker competitors in largely dormant markets. Further, a breakup would reverse the many and substantial efficiencies created by the Acquisition.

II. BACKGROUND

A. Transaction Background

In June 2000, PDM's Board of Directors retained an investment banker to sell the company's five divisions. The Board's mandate was to obtain cash and not stock in these transactions. In September 2000, CB&I signed a letter of intent to buy the assets of the Water and Engineered Construction ("EC") divisions of PDM for over $90 million.[3] On September 12, 2000, CB&I made its HSR filing. On October 12, 2000, the HSR waiting period expired. Nevertheless, one week later, the FTC began an inquiry.

At the request of the FTC, Respondents voluntarily delayed the closing of the transaction for more than three months. Facing possible liquidation of the PDM-EC Division by the seller if CB&I delayed any further, CB&I closed the transaction on February 7, 2001, four months after the waiting period expired. The FTC could have initiated judicial action at that time, but did not do so. On October 25, 2001, eight months after the Acquisition closed, and a year after the investigation began, the FTC filed its Complaint.

[3] CB&I initially agreed to pay $93 million for the assets of PDM's EC and Water Divisions. Due to PDM-EC's poor performance in 2000, CB&I renegotiated the price to approximately $80 million.

The assets that are the subject of this Complaint are a fraction of the total value of the Acquisition, representing about $17 million of the total $83 million deal. In addition, the commerce from the relevant markets at issue is a small percentage of the revenue of the challenged assets. CB&I had generated no revenues from the LNG and TVC markets over the previous five years.

B. Factual Background

At issue in this case are: 1) liquefied natural gas ("LNG") storage tanks which store natural gas at a very low temperature which allows it to be stored in liquid form; 2) cryogenic liquefied nitrogen, oxygen and argon ("LIN/LOX") tanks which store these gases in liquid form; 3) liquefied petroleum gas ("LPG") tanks, which store gases such as butane, propane and butadiene at a refrigerated temperature in liquid form; and 4) thermal vacuum chambers ("TVCs"), which are used to test satellites.

The design for all of the relevant products has changed little in the last 50 years and is similar to the design of flat-bottom industrial storage tanks that are used to store chemicals and petroleum. All of these tanks (including flat-bottom) are fabricated and constructed using the same or similar methods. Every company that constructs basic flat-bottom storage tanks has a fabrication shop and personnel as well as migratory field crews who are paid hourly and who assemble the fabricated pieces at the customer's location using cranes and other equipment.

LNG tanks are incorporated into facilities known as "import terminals" or "peak-shaving plants." LNG import terminals cost hundreds of millions of dollars to construct, with the LNG tanks constituting approximately one-third of the total cost. An LNG peak-shaving facility is a smaller facility using smaller LNG tanks.

Since 1990, there has been little demand for LNG facilities in the U.S. No LNG tanks have been constructed since 1996. Between 1990 and 1996, only two other peak-shaving facilities were constructed and no import terminals were built. Since the Acquisition, customers have shown a renewed interest in constructing such facilities based on industry demand issues such as the energy market in California. Customers for these tanks are sophisticated multinational companies involved in the oil, gas and chemical industry, such as Dynegy, Shell, El Paso Corporation ("El Paso"), and others. These customers have significant experience purchasing these tanks in the world market from a wide variety of international competitors, including CB&I. A photo of a typical LNG tank is attached.

LIN/LOX tanks are used by air separation companies to separate air into its various components of oxygen, nitrogen and argon and then to sell the component gases to end users. The typical LIN/LOX tank costs between $750,000 and $1.5 million. The demand for these tanks is low, with an average since 1999 of four contracts per year. Customers do not foresee an increase in demand for these tanks and believe that the industry is overbuilt. A photo of a typical LIN/LOX tank is attached.

LPG tanks are large flat-bottom tanks with a double wall that permits the refrigeration of gases such as propane. LPG tanks are not complex structures, and companies who make basic flat-bottom tanks can construct them. There is little demand for field-erected LPG tanks in the U.S. Since 1998, only four LPG tanks have been awarded in the U.S. A photo of a typical LPG tank is attached.

TVCs are large cylindrical facilities used to test satellites prior to launch to ensure that they survive the extreme temperatures of space. CB&I has not constructed a TVC since 1984,

and PDM constructed both TVCs constructed in the U.S. between 1990 and 2001. Since 1998, no TVCs have been constructed. A photo of a typical TVC is attached.

III. THE GOVERNING LEGAL STANDARDS FOR PERMANENT INJUNCTIONS UNDER SECTION 7 OF THE CLAYTON ACT PLACE A HEAVY BURDEN ON COMPLAINT COUNSEL.

To succeed on a Section 7 claim (15 U.S.C. Section 18), Complaint Counsel has the burden of proving by a preponderance of the evidence: (1) the relevant product market or line of commerce; and (2) that the effect of the challenged acquisition may be to substantially diminish competition within the relevant market.[4] See, e.g., New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995).

At all times, Complaint Counsel has the ultimate burden of persuasion in this case. United States v. Baker Hughes, Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); United States v. M.P.M., Inc., 397 F. Supp. 78, 91 (D. Colo. 1975) (noting that the "burden to demonstrate a substantial lessening of competition or a tendency to create a monopoly lies . . . with the plaintiff"). Should Complaint Counsel establish a *prima facie* case through market share statistics, a burden shifting can occur with the burden of persuasion always ultimately residing with Complaint Counsel. The D.C. Circuit, in Baker Hughes, 908 F.2d at 982-83, has succinctly summarized the relevant standard:

> By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. . . . The burden of producing evidence to rebut this presumption then shifts to the defendant. . . .

[4] Although the Complaint challenges the Acquisition under both Section 7 of the Clayton Act and Section 5 of the FTC Act, the legal standards under both statutes are the same. See, e.g., F.T.C. v. PPG Indus., Inc., 798 F.2d 1500, 1501 n.2 (D.C. Cir. 1986) (Section 5 is "for present purposes, . . . assumed to be merely repetitive of [Section 7] of the Clayton Act"); R.R. Donnelley & Sons Co., 120 F.T.C. 36, 150 n.32 (1995) (noting that the "analytical standards for assessing legality in this context are read coextensively").

> If the defendant rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government and merges with the ultimate burden of persuasion, which remains with the government at all times.

(citations omitted). See also United States v. Syufy Enters., 903 F.2d 659, 654 n.6 (9th Cir. 1990) ("[E]vidence of high market share establishes a *prima facie* antitrust violation, shifting to the defendant the burden of rebutting the *prima facie* violation. The converse is not true, however; evidence of a high market share does not require a district court to conclude that there is an antitrust violation.") (citations omitted).

Complaint Counsel must show more than some impact on competition -- it, instead, "has the burden of showing that the acquisition is reasonably likely to have 'demonstrable and substantial anticompetitive effects.'" Kraft, 926 F. Supp. at 358 (quoting United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1066 (S.D.N.Y. 1969), aff'd, 401 U.S. 986 (1971)). There must be a showing that the alleged "demonstrable and substantial anticompetitive effects" are probable and not mere "ephemeral possibilities." Id.; see also M.P.M., Inc., 397 F. Supp. at 90 ("Probability of the proscribed evil is required.").

Historical concentration statistics do not by themselves satisfy Complaint Counsel's burden of proving "demonstrable and substantial" anticompetitive effects. As Justice Thomas stated in Baker Hughes, "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness. . . ." 908 F.2d at 984. That broader inquiry includes an analysis of barriers to entry, which, if low, are one type of evidence which rebuts a *prima facie* case. See id. ("[W]here entry barriers are low, market share does not accurately reflect the party's market power."). See also Syufy, 903 F.2d at 664-65; United States v. Waste Mgmt., Inc., 743 F.2d 976, 982 (2d Cir. 1984) (holding that under General Dynamics, "a substantial existing market share is insufficient to void a merger where that share is

misleading as to actual future competitive effect," because ease of entry is relevant to appraising the impact upon competition of a merger and may override other factors); F.T.C. v. Cardinal Health, 12 F. Supp. 2d 34, 54-55 (D.D.C. 1998) ("Even in highly concentrated markets, if there is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any of the likely anticompetitive effects of the proposed merger. . . . A court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's *prima facie* case of anticompetitiveness.").[5]

Ease of entry is established by evidence of timely, likely and sufficient entry.[6] See generally Cardinal Health, 12 F. Supp. 2d at 55. Entry is timely if it takes place within approximately two years. See Syufy, 903 F.2d at 666. Entry is likely and sufficient if "ease of entry in the market is such that the producers in the market could not long sustain an unjustified price increase." United States v. Calmar, Inc., 612 F. Supp. 1298, 1301 (D.N.J. 1985). See also Baker Hughes, 908 F.2d at 989 (entry is sufficient where it "would likely avert anticompetitive effects from . . . the acquisition. . . ."). Moreover, in Baker Hughes, the D.C. Circuit specifically rejected the Government's argument that a defendant must show "quick and effective" entry to rebut the Government's *prima facie* case. Id. at 987-88. The court also recognized that "potential competitors have a strong interest in downplaying the likelihood that they will enter a given market," and that "a firm that never enters a given market can nevertheless exert

[5] Further, Complaint Counsel, in attempting to justify selecting an HHI measuring 12 years of demand, grossly distorts Section 1.41 of the Merger Guidelines which states that "where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time." (FTC Br. at 14.) The operative terms in Section 1.41 are found in the phrase where "*annual data* may be unrepresentative." (emphasis added). CB&I does not dispute that for many individual years the use of annual data would be entirely unrepresentative of demand in these markets. It is, however, stretching the boundaries of the use of the HHI in entirely another direction to include 12 years of demand. CB&I, in including six years of demand in its suggested HHI measuring period of 1996 through 2001, respectfully suggests that six years of competition is more than ample to measure competition in any relevant market.

[6] The Merger Guidelines, cited by Complaint Counsel, are not binding upon the court. F.T.C. v. PPG Indus., 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); Olin Corp. v. F.T.C., 986 F.2d 1295 (9th Cir. 1993)).

competitive pressure on that market." Id. at 987-988 (emphasis added). In other words, "if barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market regardless whether entry ever occurs." Id. at 988. See also F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 581 (1967). The court also noted that "failed entry in the past does not imply failed entry in the future: if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive." Baker Hughes, 908 F.2d at 989 n.9; see generally R.R. Donnelley & Sons Co., 120 F.T.C. 36 (1995). The evidence at trial will show timely, substantial, and sufficient entry has occurred since the merger closed.

Nearly two years of post-acquisition data conclusively establishes the sufficiency of entry, which Complaint Counsel essentially ignores. Post-acquisition evidence is dispositive. See, e.g., Baker Hughes, 908 F.2d at 989 (rejecting Government's merger challenge because two new companies had recently entered the U.S. drilling rig market, winning one contract apiece "and were poised for future expansion"); Syufy, 903 F.2d at 662-66 (rejecting Government's merger challenge because movie theater owner opened up three new cinema multiplexes within a 13-month period, and within two years of the challenged acquisition was operating more screens than previously). The Supreme Court and many other courts have recognized the utility of post-acquisition evidence. See, e.g., United States v. General Dynamics Corp., 415 U.S. 486, 505, 506 (1974) (noting that post acquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a Section 7 case); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1421-22 (S.D. Iowa 1991); United States v. International Harvester Co., 564 F.2d 769, 778-81 (7th Cir. 1977). Probability of anticompetitive effect is judged at the time of trial, which makes the consideration of post-Acquisition evidence critical. Complaint Counsel, however, suggests that post-Acquisition

evidence should be disregarded here, because it is the result of CB&I's manipulation in light of its knowledge of the FTC investigation. (FTC Br. at 29.) Complaint Counsel might be right if CB&I were pointing exclusively to the low prices at which it acquired a dominant post-Acquisition market share. Complaint Counsel's position makes no sense, however, where the post-Acquisition evidence concerns jobs lost despite the offering of very low prices. In these circumstances, "[p]ost-acquisition evidence favorable to a defendant can be an important indicator . . . where the evidence is such that it could not reflect deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition." Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981). There will be no evidence, and there can be no argument, that entry by competitors was manipulated by Respondents.[7]

IV. TIMELY, SUBSTANTIAL AND SUFFICIENT ENTRY DEMONSTRATES THAT THE ACQUISITION DID NOT SUBSTANTIALLY LESSEN COMPETITION IN THE RELEVANT MARKETS.

Respondents intend to show that entry has occurred in each of the relevant markets, the result of which prevents CB&I from successfully imposing a price increase. Despite defining four relevant markets, Complaint Counsel greatly confuses the entry issue by lumping all of the markets together. As some of the entrants are different in each market, each entrant must be considered in the context of the market in which it competes.

[7] Hospital Corp of Am. v. F.T.C., 807 F.2d 1381 (7th Cir. 1986), is not contrary. There, the Seventh Circuit states that "[p]ost acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." Id. at 1384 (emphasis added.)

A. Timely, Substantial And Sufficient Entry Has Occurred In The LNG Market.

Complaint Counsel relies on ancient history by focusing its analysis on the undisputed fact that CB&I and PDM were the dominant suppliers of LNG tanks over the 10 years prior to the Acquisition.[8] In order to make this ancient data relevant to post-Acquisition conditions, Complaint Counsel attempts to dismiss the competition generated by new entrants.

Recent events directly contradict this contention. The evidence will show that five large international LNG tank constructors have entered the U.S. LNG tank market within the past year. These constructors are all large, wealthy, multinational companies that have significant experience building LNG facilities worldwide, including experience working overseas with U.S.-based customers. Further, many of these companies have established joint ventures with domestic tank manufacturers to more quickly gain a foothold into the U.S. market.

While Complaint Counsel has chosen to characterize these entities as "fringe firms" and "consistently . . . inferior competitive alternatives" the reality is that each company is experienced and formidable. Each foreign entrant is actively pursuing work in the U.S. LNG market for two reasons. First, they have identified an increased demand for LNG tanks and facilities in the U.S. Second, they believe that the Acquisition created an opportunity for them to win LNG projects in the U.S.

In pursuing these opportunities, each of these competitors has invested hundreds of thousands (and in some cases millions) of dollars. Moreover, these competitors plan to invest significant additional capital in pursuing U.S. LNG projects.

[8] Specifically, Complaint Counsel stresses that Respondents supplied all of the LNG tanks in the U.S. during this time. However, Complaint Counsel neglects to mention, during this time, demand for LNG tanks was very low.

More importantly, those customers who are currently planning LNG projects in the United States -- many of whom have significant experience with these competitors from LNG projects abroad -- consider these competitors to be experienced, qualified and capable of offering competitive prices. In light of this compelling evidence, Complaint Counsel's focus on historical sales data predating the merger is wholly irrelevant because that historical data cannot accurately account for the competitive impact of these new firms.

1. Six Foreign Competitors Have Sufficiently Entered The U.S. Market To Construct LNG Tanks And Facilities Since The Consummation Of The Acquisition.

Complaint Counsel repeatedly argues that the LNG geographic market is limited to the United States. Regardless of the geographic market advanced by Complaint Counsel, the fact remains that the U.S. is a small portion of a global marketplace, a fact confirmed by LNG customers.

This perspective is critical to understanding competition for LNG tanks and facilities in the U.S.

Due to recent changes in domestic energy markets, U.S. customers have, for the first time in more than a decade, dramatically increased their demand for LNG storage facilities.

For example, Dynegy is currently planning to build the largest LNG import terminal in the U.S. in Hackberry, Louisiana. A variety of other customers are currently in the process of planning LNG storage and peak-shaving facilities.

This increased demand, combined with the Acquisition, is drawing foreign LNG tank builders into the U.S. market.

Specifically, six different companies and joint ventures have entered the U.S. market since the Acquisition. Complaint Counsel fails to recognized that these entities are massive international construction conglomerates capable of, and currently providing, strong competition in the U.S. market.

(a) Technigaz/Zachry

French-based SN Technigaz ("Technigaz"), a subsidiary of Bouygues Offshore, and now Saipan, is one of the world's leading suppliers of liquefied gas facilities. Technigaz has vast experience designing and constructing LNG tanks and LNG import terminals around the world. In early 2002, Technigaz entered the U.S. market. Specifically to aid in this effort, Technigaz formed a joint venture with H.B. Zachry ("Zachry"). Based in San Antonio, Zachry is one of the largest, most respected construction companies in the U.S.

The Technigaz/Zachry joint venture has been hotly pursuing several LNG opportunities in the U.S. and Mexico. For instance, Technigaz/Zachry

in submitting a bid proposal to

In addition, Technigaz has submitted budgetary pricing to

a and to

In addition, the joint venture has made sales presentations to a

number of North American LNG customers, including

LNG customers and consultants in the U.S. agree with the assessment that Technigaz/Zachry is likely to successfully build LNG tanks on a competitive basis in the U.S.

(b) TKK/AT&V

Toyo Kanetsu K.K ("TKK"), based in Japan, is a world leader in the construction of LNG tanks and facilities. TKK possesses unparalleled experience in the construction of double- and full-containment LNG tanks, and has built LNG tanks in many areas of the world, including, for example, Greece, Iran, and the Caribbean. TKK entered the U.S. LNG market in late 2001. To aid in this effort, it forged a joint venture with AT&V, a leading U.S. tank builder with experience in building cryogenic tanks.

The TKK/AT&V joint venture has been energetically pursuing LNG opportunities in the U.S. and elsewhere in North America.

The joint venture also for the LNG tanks associated with the and the evidence will show that it is one of the

two The joint venture has also submitted formal bids and/or budgetary pricing on several other U.S. LNG projects.

In addition, representatives of the joint venture have made numerous sales calls to other U.S. customers and have prepared formal marketing materials.

Customers have concluded that this joint venture is a formidable new competitor to CB&I in the U.S. market for LNG tanks and facilities.

Specifically, believes that TKK/AT&V's bid on the -- met all technical expectations and was within expected price range. Further, is confident that the joint venture has the reputation necessary to construct the is capable of doing the necessary fabrication and field erection work on the and will be able to manage the actual construction of the LNG tanks for the

Likewise, another LNG tank customer -- -- has recognized that the joint venture is "very interested in getting into the domestic market" and has solicited and received a satisfactory budgetary quote from TKK/AT&V

(c) Skanska/Whessoe

Skanska AB ("Skanska") is the largest construction group in the world. Its U.S. subsidiary is the fourth largest contractor in the U.S.

Based in Sweden, Skanska boasts annual revenues of $17.8 billion and employs 90,000 people worldwide. Skanska recently acquired Whessoe International ("Whessoe"), a 200-year-old engineering and construction firm with a well-established reputation in the

international LNG tank construction business. Whessoe has constructed LNG tanks across the globe, even in remote locations such as India, Trinidad and Algeria. In addition to the technology it possesses to build steel-walled LNG tanks, Skanska/Whessoe is the exclusive licensee of technology to construct LNG tanks with an inner concrete containment as well, a technology that is favored by at least one LNG customer in the U.S. --

There is no doubt that Skanska/Whessoe has successfully entered the U.S. LNG market. Dynegy has selected Skanska/Whessoe as the EPC contractor for the

It has also submitted budget pricing to for its proposed peak-shaving facility and to for its planned expansion of its

LNG customers in the U.S. agree that Skanska/Whessoe is likely to build quality LNG facilities at a competitive price. Many customers have commented on their favorable view of Skanska/Whessoe's reputation in this regard.

Those who have evaluated Skanska/Whessoe's prices have found them to be competitive. Dynegy chose Skanska/Whessoe as the winner of the bid contest for the EPC of the

evaluating a provided by Skanska/Whessoe, found that it has within

(d) Daewoo/S&B

Daewoo Engineering and Construction Co., Ltd. ("Daewoo"), a Korean multinational corporation, has built 12 LNG storage tanks in Korea since 1993.

Daewoo has become the "dominant contractor" in the design and construction of LNG terminals in Korea, the world's largest importer of LNG. Daewoo entered the U.S. LNG market this year. To assist it in this regard, Daewoo forged an alliance with S&B Engineers & Constructors ("S&B"), based in Houston, Texas.

This joint venture has begun to aggressively compete for LNG work in the U.S. Earlier this year, the joint venture made efforts to bid to

It is currently pursuing an LNG import terminal for in

Further, Daewoo/S&B was recently retained by

to prepare preliminary tank designs and engineering in connection with its FERC application, and is currently being considered as a candidate to build the tanks for that facility.

Customers believe that Daewoo/S&B is a competitive force in the U.S. market for LNG facilities. and others believe that the joint venture has the requisite experience and capability to build these tanks, and will consider it for future LNG work.

9

[9] approached after prequalified its bidders for the LNG tanks. Although did not accept a bid from it did not do so because it already had enough bidders, not because it questioned the abilities

(e) Tractebel

Tractebel SA ("Tractebel"), a large Belgian company, has entered the U.S. LNG market since the Acquisition. Specifically, Tractebel and have had negotiations about based on confidence in ability to In addition, Tractebel recently bid on an LNG import terminal In light of is selling the land and development plans for this project. is attempting to buy and with an eye on establishing itself in the U.S. market.

(f) MHI

Mitsubishi Heavy Industries ("MHI"), a Japanese conglomerate, is poised to enter the U.S. LNG tank and facility market, having built 36 large LNG storage tanks in diverse international locales. MHI has a permanent presence in many locations around the world, including the United States. MHI is beginning to enter the North American market for LNG facilities. It is currently competing against CB&I for a project in and is discussing work in the U.S. with Moreover, customers believe that MHI has the capability to construct similar projects in the U.S. at a competitive price.

2. The Presence Of Foreign Competition Has Been Timely, Substantial And Sufficient.

It is beyond dispute that the Acquisition of PDM by CB&I did not lessen competition in the U.S. market for LNG facilities. The evidence will show that CB&I's competitors in this market have been able to win a large share of current LNG work. The evidence will also show

that these customers uniformly believe that the entry of foreign competition in this market is of a high quality and provides a sufficient level of competition. This evidence of successful entry is the most important evidence in a Section 7 case. See, e.g., New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 351 (S.D.N.Y. 1995) ("Plaintiff offered no evidence that retailers [primary customers of ready-to-eat cereal] object to, or have been harmed by, the Acquisition," and the two largest customers testified in support of merger.).[10] The evidence will show that U.S. customers continue to prequalify foreign LNG tank manufacturers for bidding and accept their bids. Evidence of specific examples of current, successful post-merger competition essentially obliterate Complaint Counsel's LNG case. This evidence is dispositive:[11]

(a) Dynegy

This year, Dynegy awarded an EPC contract to Skanska/Whessoe for the -- an import terminal worth between million.

The facility will contain three full-containment LNG tanks. When completed, the will be the largest in the U.S.

[12] As part of its search for an EPC contractor, Dynegy engaged in including analysis of each and

[10] See also F.T.C. v. Great Lakes Chem. Corp., 528 F. Supp. 84, 94-95 (N.D. Ill. 1981) ("A key factor to consider in analyzing whether the proposed acquisition will violate Section 7 is the impact of the transaction on . . . customers"); D. Scheffman, Director of Bureau of Economics, F.T.C., Sources of Information and Evidence in Merger Investigation, June 14, 2002 (found at www.ftc.gov/speeches/other/scheffmanabanyebar.pdf (visited October 28, 2002)) (stating that "[c]ustomers are . . . frequently well positioned to assess the potential impact of the merger on prices and other competitive factors" while the "motives of competitors must be carefully considered in assessing the information provided" because "competitors generally have an incentive [to] express negative views about a proposed transaction that would result in a stronger competitor and competition.")

[11] Complaint Counsel asserts that all of the LNG tanks in the U.S. are single-containment. By contrast, most of the projects currently being planned are double or full-containment, as discussed below.

[12] Construction of the facility is expected to and will be completed

Dynegy interviewed

including

After this process, Dynegy felt that

Dynegy eventually selected Skanska/Whessoe[13] -- identified as a "fringe firm" by Complaint Counsel -- over to serve as its EPC contractor for the Hackberry Project.[14]

After selecting Skanska/Whessoe as its EPC contractor, Dynegy began the process of bidding out the LNG tank portion of this project, which Skanska would supervise. To this end, Dynegy investigated and pre-qualified different bidders --

Dynegy asked all bidders to submit lump-sum turnkey bids for the construction of the LNG tanks for this project.[15]

Dynegy received bids from

sometime after February 1, 2002. bids met Dynegy's technical expectations, and were within Dynegy's expected price range.

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[13] Complaint Counsel asserts that "[s]ince 1990, and until the merged CB&I and PDM failed to bid on the Dynegy LNG project, not one overseas firm has been successful in competing for new projects in any of the relevant markets." This statement is false, as Skanska was awarded the EPC job for Dynegy.

[14] Complaint Counsel dismisses Dynegy's award of the EPC contract to Skanska as somehow constituting evidence of anticompetitive conduct because

Just the opposite is the case. The fact that Dynegy did not have to accede to terms proves its lack of market power. See, e.g., Syufy, 903 F.2d at 670 (rejecting a merger challenge in part because of post-acquisition evidence that the one time Syufy tried to put the squeeze on distributors "there was an immediate backlash."). Cf. In re Coca-Cola Bottling Co., 118 F.T.C. 452, 909 (1994) (pointing to evidence that "prior to the acquisition, third-party vendors had been able to resist any attempt . . . to force a vendor to take unwanted allied brands along with the desired brands," a fact which changed after the acquisition); The fact that Dynegy is not complaining about Skanska's performance or its pricing is proof that CB&I's position did not cause it to accept inferior terms from Skanska. Further, business strategy pre-dated the acquisition and thus does not represent a change in post-acquisition competition.

[15]

Although had not submitted a bid for the LNG tanks during this process, it later Dynegy and Dynegy a bid from because it was satisfied with the bids already submitted by Dynegy's willingness to entrust the Hackberry Project (the largest ever built in the U.S.) to these dispositive of the quality of existing competition for LNG tanks in the U.S.[16]

(b)

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[16] Complaint Counsel argues that Dynegy did not let This argument assumes Dynegy is irrational, since Dynegy could have saved if Complaint Counsel's view that would have been able to offer . The facts are contrary: Dynegy testified it was and bids while the FERC application was pending.

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(c)

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(d) Cheniere

Cheniere, along with other partners, is developing a state-of-the-art, LNG import terminal which will contain Cheniere is currently in the process of obtaining FERC approval for this project, and plans to solicit final firm price bids in .

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In the planning stages, Cheniere has engaged some of the so-called "fringe firms" identified by Complaint Counsel. In December of 2001, Cheniere hired to conduct preliminary engineering and design work on its LNG project.

In the summer of 2002, Cheniere hired assist it in preparing its permitting application to FERC by providing detailed LNG tank drawings and other logistical support. When Cheniere solicits formal bids for the EPC contract on this job, Cheniere plans to consider

Importantly, with respect to the U.S LNG market, Cheniere is confident that

(e) Yankee Gas

Yankee Gas is planning to construct an LNG peak-shaving facility in Waterbury, Connecticut. The Waterbury facility will include a two billion cubic foot LNG tank. The cost of the Waterbury facility is

Yankee Gas has retained the services of CHI Engineering to perform front-end engineering and design work for this project. Representatives of Yankee Gas had face-to-face negotiations with In addition, Yankee Gas has received

While Yankee Gas has not yet reached the point of securing final firm price bids, it is considering inviting

to bid on the EPC contract for this project.[19]

In addition, it appears that some of these foreign companies may have a specific competitive advantage to CB&I on this project. Local safety requirements may require to build an double-containment LNG tank. has experience constructing tanks, but has never built such tanks If such a tank is required, may not qualify to submit a bid.

(f)

[20]

[19] may well become a potential bidder against as an EPC contractor for the facility. will likely use along with its concrete tank technology, to design and build the LNG tank for the facility. also believes that local union labor will physically erect the tank, managed by

[20]

(g) El Paso

El Paso, a leading provider of natural gas services in North America, is currently developing three land-based LNG terminals in North America: (1) the Rosarito terminal in Baja California, Mexico; (2) the Altamira terminal in Altamira, Mexico; and (3) the Bahamas terminal on Grand Bahamas Island. El Paso corporate website at http://www.epenergy.com/about/ (visited Aug. 23, 2002)). In addition, El Paso's utility business is currently expanding

For the Altamira project, El Paso has pre-qualified

including

With respect to the Rosarito project in Baja California, El Paso pre-qualified

Each of these companies submitted bids for the LNG tanks, and are "still in the running for the Rosarito job . . . ."

In short, El Paso is investing over in the above facilities. It is permitting these companies to bid on these jobs and expects that they can perform the job if successful, whether or not they are located inside or outside the U.S

El Paso does not believe that the Acquisition of PDM by CB&I will

21

[21] This type of evidence is in stark contrast to evidence cited by Complaint Counsel. In claiming that "customers are willing to pay a higher price to obtain a more reputable supplier," Complaint Counsel fails to cite a single current or former customer. Instead, they cite an industry consultant who often acts as a competitor to and who has -- for a variety of reasons -- a bias against

(h)

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(i) CMS

Finally, CMS has entered into an EPC agreement with

Prior to hiring CMS solicited a budgetary price from which fell within a "very reasonable range" compared to

Such an effort served to constrain a high price. As a result,

B. Timely, Substantial and Sufficient Entry Has Occurred In The LIN/LOX Market.

Despite the low post-Acquisition demand in the U.S. for LIN/LOX tanks,[23] AT&V -- a market entrant -- has been awarded three out of the four competitively bid

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[23] LIN/LOX storage tanks are constructed in conjunction with plants known as air separation facilities. An air separation facility liquefies air by cooling it to several hundred degrees below Fahrenheit, and then distilling the air into its component parts. The end-result is the production or distillation of industrial gases such as oxygen, nitrogen and argon, which may either be used on-site or stored in tanks so that the gases can be available to the marketplace for sale. Not all air separation plants require LIN/LOX tanks. If the purpose of the facility is to liquefy the air and store large quantities of its component parts, then it may require a field-erected LIN/LOX storage tank. Construction

LIN/LOX jobs since the Acquisition.[24]

Given AT&V's 75% post-Acquisition market share, Complaint Counsel's reliance on historical pre-merger evidence is inapposite and misleading. In addition to AT&V, two other companies have recently entered the LIN/LOX tank market. Matrix Services, an Oklahoma-based comprehensive tank builder, has built since 1998 and continues to bid on these projects. Chattanooga Boiler and Tank ("CBT") has also begun to bid on LIN/LOX tanks in the U.S. Customers believe that these companies are qualified and sufficient in number to provide competitive bidding.

1. The LIN/LOX Tank Market Is Insignificant Because Demand For LIN/LOX Tanks Is Extremely Low.

Demand for field-erected LIN/LOX tanks is very low due to excess capacity of oxygen and nitrogen production in the U.S. In fact, this market is suffering the "most extended and lowest drop in business" in recent memory.

Due to excess capacity, traditional purchasers of LIN/LOX tanks are rarely in the market for new tanks or plants.[25]

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of an air separation facility can range in cost from 20 to 70 million dollars, while the cost of a LIN/LOX/LAR tank can range between $500,000 and 1.5 million dollars.

[24] Complaint Counsel includes, as part of this product, products known as liquid helium spheres and liquid hydrogen spheres. Complaint Counsel cannot succeed in its burden of proof with respect to these product lines. First, these products are in no way similar to the LIN/LOX tanks discussed herein. Second, Complaint Counsel has not presented a shred of evidence regarding these products, or the pricing associated with them. Third, Respondents will present customer testimony demonstrating that the acquisition has not caused any harm. Fourth, and finally, these products are legally insignificant, as none have been built in the U.S. since 1996.

[25] For example, Graver Manufacturing went out of business due to an overall lack of demand in this tank market.

2. There Has Been Substantial And Sufficient Entry In The LIN/LOX/LAR Market.

Complaint Counsel dismisses CB&I's LIN/LOX competitors as "fringe firms." In fact, these companies are strong competitors in the U.S. market for LIN/LOX tanks, so strong that CB&I has lost most of the post-Acquisition business in this market. This fact demonstrates that the Acquisition did not lessen competition.[26]

(a) AT&V

AT&V is the third-largest tank builder in the U.S. A recent customer, has described AT&V's performance as "exceptional." Within months of the Acquisition, AT&V won its first LIN/LOX tank bid, a two-tank project was pleased with the price AT&V offered, because it was lower than the amount budgeted for the project.

AT&V has completed the project, and was very pleased with AT&V's performance on this job. In fact, subsequently awarded AT&V another LIN/LOX tank in just this month.

Other purchasers of LIN/LOX tanks believe that AT&V can effectively compete in this market. Based in part on a positive reference from pre-qualified AT&V for a LIN/LOX tank AT&V was the eventual winner of that competitively bid job, beating out [27]

[26] In this market, Complaint Counsel's argument that foreign firms cannot effectively compete with CB&I is entirely irrelevant, as CB&I faces fierce domestic competition.

[27] In 2002, contracted with for the construction of a LIN tank in In entered into a In exchange for The agreement was extended prior to acquisition through When assumed the role of in the agreement. As a result of

has also requested LIN/LOX for a proposed in AT&V provided the received by for this project.[28]

(b) Matrix

Matrix Service Company ("Matrix") is the second-largest tank builder in the U.S. Matrix entered the LIN/LOX market in 1998. Between 1998 and 2000, Matrix won (and successfully completed) LIN/LOX tank jobs for In 2000, Matrix won (and successfully completed) a competitively bid LIN/LOX job for . Matrix won these contracts even though it bid against more experienced competitors, such as

Matrix can engineer, fabricate, and construct any type of LIN/LOX tank that a customer may request. Matrix continues to actively pursue this type of work, and has for various LIN/LOX projects for believes that the LIN/LOX tank market remains extremely competitive.

(c) CBT

Chattanooga Boiler and Tank ("CBT") is a 100-year-old tank company that specializes in the construction of steel plate storage tanks. Over the past century, CBT has designed, fabricated, and constructed stainless steel tanks and vacuum chambers far more complex than LIN/LOX tanks. Recently, CBT has taken steps

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[28] Since the continuing the prevented the project from being

to enter the LIN/LOX tank market. It has hired several employees with LIN/LOX experience (including a former Graver LIN/LOX tank builder) and has obtained substantial amounts of equipment from Graver. CBT plans to use this material and personnel to expand its presence in this market.

CBT has been actively submitting formal bids and budget pricing for LIN/LOX tanks. CBT has submitted for Further, CBT has been pre-qualified by as a supplier of LIN/LOX tanks.

3. Recent LIN/LOX Projects Demonstrate Timely, Substantial and Sufficient Competition that Rebuts Complaint Counsel's Case

The evidence will show that entry of the so-called "fringe firms" has created intense competition sufficient to constrain prices. The preponderance of customers, sophisticated players in the industrial gas field, believe that the Acquisition has not affected prices for LIN/LOX tanks. For example, does not believe that prices for these tanks have increased, and is satisfied with the current level of competition. Other customers, such as and are satisfied with the prices that they received for products in this market and have not seen any evidence of a post-Acquisition price increase. Competitors believe that the Acquisition has created opportunities for them in this market, and that the market is extremely competitive.

Five specific examples of post-Acquisition activity in this market demonstrate that the Acquisition has not lessened competition in any way:

[28] In light of this evidence, it is remarkable that Complaint Counsel could assert that CB&I's competitors are unable to compete on cost and quality.

First, competitively bid LIN/LOX tanks during evaluated bids from and selected because it was the was so satisfied with AT&V's performance that it has given AT&V additional LIN/LOX work and positive references to other customers. was satisfied with the price it paid for this project.

Second, in 2002, competitively bid a LIN/LOX tank in received bids from Due to the fierce competition for this job, lowered its final bid to .[29] Despite this steep price cut, was unsuccessful -- awarded this project to AT&V.[30]

[31]

Third, also in 2002, signed a letter of intent with to construct a LIN tank in approached because it was pleased with prior performance, and because believed that the from that job would save costs on the

[29] Complaint Counsel argues that it will take years to restore intense competition in this market. It is difficult to understand how a market in which suppliers cannot bid at can be considered to be anticompetitive.

[30] Complaint Counsel again suggests that decision to go with reflects a decline in competition. However, could have avoided by awarding this job to at a very favorable price. This example demonstrates lack of competitive advantages.

[31] This case is wholly unlike Complaint Counsel's citation of In re Coca-Cola, 118 F.T.C. at 609, which involved not the elimination of a competitor in that a homogenous market but instead the elimination of a single differentiated soft-drink brand -- Mr. Pibb. The fact consumers who liked the taste of the no longer available Mr. Pibb had to switch to "less desirable alternatives" has no application to a bid-model heavy construction industry.

Fourth, solicited pricing for a LIN/LOX tank project in in mid- . solicited budget pricing from initially internally priced the utilizing a profit margin but ultimately provided a firm fixed price bid for the project at a in response to competitive pressures. awarded that project to in March Based on its analysis of pricing from recent projects, was satisfied with the price it paid for this tank.

Finally, is currently contemplating the purchase of a field-erected LIN tank for a facility in will competitively bid the contract and anticipates soliciting bids from The low bidder will win the

C. Timely, Substantial and Sufficient Entry Has Occurred In The LPG Market.

1. Although Demand For LPG Tanks Is Low, Significant Competition Exists.

Since 1999, there have been four LPG projects sold in the U.S.

Of those four, AT&V has won three of the projects, including two in 2001. Since 1994, CB&I has won only one project. The last PDM LPG tank project was in 1998. There is no evidence that the merger substantially lessened competition.[32]

[32] Dr. Simpson, Complaint Counsel's expert economist, has presented data on the results of bids for ammonia tanks, which he asserts are similar to LPG tanks. Ammonia tanks are not included in the markets outlined in the Complaint in this matter or in his report. Dr. Simpson generally refuses to consider the possibility that experience and reputation gained in supplying one type of tank may help a firm compete for projects to supply a different tank in any of the markets he defines. It is curious that he considers contracts for ammonia tanks in this instance. Furthermore, he apparently never considered whether other types of tanks were also similar to LPG tanks and thus whether there was a good reason for including them in the analysis as there supposedly is for ammonia tanks. Thus, Dr. Simpson's analysis of the rates of success in bids for LPG and ammonia tanks is based on data that are not outdated but arbitrarily selected.

2. There Has Been Substantial and Sufficient Entry in the LPG Market.

Three companies in the U.S. are already in the market for LPG tanks, and several others are capable of entry. First, AT&V has successfully bid on and completed three different LPG tank projects for

These customers have been pleased with AT&V's work, and AT&V plans to pursue this type of work in the future.

The fact that AT&V has taken such a large share of the post-Acquisition market is dispositive. See Syufy, 903 F.2d at 667-68.

Second, Matrix is a viable competitor in this market. Matrix has bid on LPG tanks in the past, and is respected by customers such as

Two former PDM employees, both project managers, now work for Matrix. Their experience and knowledge solidifies Matrix's position as an LPG tank competitor.

Third, CBT has built a variety of API 650 storage tanks, API 620 storage tanks, and ASME pressure vessels. CBT has also built ambient petroleum gas storage tanks for clients such as

LPG tanks are, in many ways, similar to these structures, and CBT is confident that it can construct them. CBT plans to pursue future LPG tank projects.

In addition to these three competitors, numerous other tank manufacturers in the U.S. can make LPG tanks. Any builder capable of constructing an API 620 or API 650 storage tank has the capability to build LPG tanks. Such builders include Advance Tank and Puget Sound Fabricators, among many others.

Further, foreign

companies can construct these tanks in the U.S. and are actively seeking this work.

U.S. customers, many of whom are foreign-owned, would consider a foreign contractor for an LPG project.

3. Current LPG Customers Recognize The Presence Of Sufficient Post-Merger Competition.

Customers and competitors uniformly agree that the Acquisition will not lead to price increases. For example, believes that competition among CB&I, AT&V, and Matrix alone is sufficient to prevent a price increase, and foreign competitors would enter the market if competition slackened.

In fact, it appears that the Acquisition may increase the level of competition from smaller tank manufacturers.

Two examples illustrate fierce competition in this market. In 2000, purchased an LPG tank for its facility in and submitted bids on the project. awarded the contract to AT&V because it had the and could competently handle the job. AT&V's price was so competitive that it "beat the socks off of " was very pleased with AT&V's performance on this job.

Second, most tank construction companies can compete with CB&I on LPG projects, regardless of their prior LPG experience. Morse Construction Group ("Morse"), a small tank manufacturer in Washington State, built a large LPG tank for Texaco in 1994 despite never having built a low temperature or cryogenic tank before. Morse

had ample general experience constructing a variety of atmospheric storage tanks.

Texaco permitted Morse to bid on its LPG tank project even though it was not on Texaco's approved bid list. In addition to Morse and bid on the project. Texaco ultimately selected Morse as the lowest bid and because Morse met all the other requirements.

Morse timely completed the LPG tank without any major problems, and Texaco was satisfied with the performance, the price and the quality

33

D. The Thermal Vacuum Chamber Market Is *De Minimis*/Sufficient Competition Exists.

Although Complaint Counsel alleges that the Acquisition has left only one manufacturer of large thermal vacuum chambers ("TVCs") in the U.S., there is currently no demand for TVCs because the market is overbuilt and advances in technology are making them obsolete. Remarkably, Complaint Counsel fails to note that CB&I has not built a TVC since 1984, and that there has only been one constructed since 1992 (in 1997 by PDM). Under the facts of this case, no relevant antitrust market should exist here.[34] Notwithstanding the *de minimis* market,

[33] The weakness of Complaint Counsel's case regarding LPG tanks is evident from the argument set forth in its Trial Brief. Unlike Respondents, who have cited evidence that will actually be presented at trial, Complaint Counsel relies primarily on the affidavit of was originally on Complaint Counsel's witness list, but was eventually pulled from the list once it became evident that has no relevant knowledge in this area. Further, Complaint Counsel ignores the testimony of customers or competitors actually in this market, preferring to rely on its HHI calculations and unsupported assertions of price increases.

[34] Indeed, the size of the relevant product market must be substantial. United States v. Baker Hughes, Inc., 731 F. Supp. 3, 9 (D.D.C. 1990) ("The minuscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'") (citing United States v. Dupont & Co., 353 U.S. 586, 595 (1957)). The evidence provided by the FTC has not demonstrated, and thus, the FTC cannot argue that, the market for field-erected TVCs is "substantial."

sufficient competition exists. Alternatively, Respondents have offered to cure any competitive concerns.

1. Demand Is Nearly Non-Existent.

Complaint Counsel's historical sales data show that CB&I has not constructed a single TVC since 1984, when it exited the market.

CB&I's exit left PDM as the only competitor for field-erected TVCs in the U.S. from 1984 until 1997. CB&I attempted to reenter the TVC market in 1997 by acquiring XL systems ("XL"), but has not built a field-erected TVC since its reentry.

CB&I has subsequently sold XL, returning it to its pre-Acquisition capability level. Given the dormant market, the change in the HHI for field-erected TVCs as a result of the CB&I merger is zero, which means Complaint Counsel cannot establish a statistical *prima facie* case. [35]

The satellite industry has excess capacity in its existing TVCs.

Most satellite manufacturers already have one or more of these chambers, which have long lifespans.

Only two field-erected TVCs have been built in the U.S. since 1990. Demand for TVCs is in further decline for two reasons. First, demand for commercial and government satellites is nearly non-existent.

Second, satellite sizes are shrinking, rendering the large, field-erected TVCs obsolete.

[35] CB&I acquired XL because the hydrocarbon market was fairly soft and CB&I was looking to venture into new areas of technical expertise. XL had some capability in the medical industry. As a unit of CB&I, XL Systems never made a profit. Customers have stated that competition in the market for TVC construction improved when XL was sold by CB&I back to its original owners. Further, CB&I sold XL earlier this year, and in doing so CB&I lost the ability to manufacture thermal shrouds, TVCs or cryogenic pumps for TVCs.

Smaller shop-erected TVCs -- which CB&I does not make -- should be adequate to test satellites in the future.[36] Industry participants expect that the low level of demand, driven even lower by consolidation of the aerospace industry and the miniaturization of satellites, will ultimately cause the number of TVC suppliers to shrink to one. CB&I's Acquisition has thus had no competitive significance in the TVC market.

2. Competition Exists If Customers Choose To Utilize It.

Moreover, the evidence will show that Howard Fabrication has entered the TVC market. Although Howard's prior experience is primarily with smaller shop-erected projects, it entered the field-erected TVC market in 2001 by forming a consortium of industry participants called IMCO/Howard.[37] IMCO/Howard entered the market after Howard had received a bid request

This consortium is as qualified to build field-erected TVCs as CB&I because its personnel include many industry veterans. Based on its experience, potential customers would consider using IMCO/Howard if demand returns.

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[36] The line between field-erected and shop-erected chambers is blurred. Many companies delineate this distinction by chamber size. For example, one prominent competitor in the industry believes that shop-erected TVCs are those that are less than 15 feet in diameter, and the field-erected chambers are larger than that in weight, diameter, or length. The main difference between the two categories is the need to have a field crew with the equipment to align the pieces of steels together in the field. Thus, some small TVCs must be field-erected because they can only fit into the customer's building by being shipped in pieces instead of whole. Many companies are able to field-erect a large TVC, including Matrix. The steps taken in the design, procurement, fabrication and field-erection processes are identical for both cryogenic storage tanks (including TVCs) and conventional flat-bottom storage tanks.

[37] is not really a new entrant to the market.

Likewise, also testified that XL Systems and are currently fabricating Thus, entry has occurred in the TVC market.

Furthermore, the main customers for field-erected TVCs are large companies such as Boeing, Northrup Grumman (which just acquired TRW), Raytheon and Lockheed Martin.

These companies have the financial resources to sponsor a new entrant. For example, in 2001, Boeing chose Puget Sound Fabricators ("PSF") over CB&I to build an expensive and sophisticated 80-foot-diameter vacuum sphere even though PSF had never built such a structure before.

V. OTHER FACTORS SHOW THAT THE ACQUISITION HAS NOT SUBSTANTIALLY LESSENED COMPETITION IN ANY RELEVANT MARKET.

Two additional factors demonstrate that the Acquisition has not substantially lessened competition. First, the evidence will show that the PDM-EC Division would have been liquidated absent the Acquisition due to its poor financial performance and that the fact that no other alternative buyers were available. Respondents respectfully submit that these facts satisfy the "exiting assets" defense articulated in Olin Corp. v. F.T.C., 986 F.2d 1295, 1307 (9th Cir. 1993), which is a variation of the failing firm defense. Second, the Acquisition generated substantial efficiencies which offset any anticompetitive effects of the Acquisition. The evidence will show that these efficiencies are merger-specific and cognizable, entitling CB&I to judgment as a matter of law.

A. Absent The Acquisition, The Assets of PDM's EC Division Would Have Been Liquidated And No Other Alternative Purchasers For The EC Division Assets Were Available.

The evidence will show that, absent the Acquisition, PDM's EC Division assets would have been liquidated. The evidence will also show that Complaint Counsel's argument is largely an academic one that fails to account for actual market conditions and realities. Accordingly, CB&I's Acquisition did not substantially lessen competition.

In 2000, PDM's major (30%) shareholder decided to explore various ways of converting its PDM stock to cash. PDM entertained ideas from investment bankers Tanner & Co. ("Tanner") and Goldman Sachs. After considering various options, PDM hired Tanner to sell all five of PDM's divisions for cash as quickly as possible. In July 2000, PDM issued a widely-disseminated industry-wide press release announcing this fact.

Tanner and PDM management concluded that selling the EC and Water Divisions separately would be an expensive and difficult endeavor because of the nature of the divisions and their shared resources, and therefore recommended selling them together as one unit.

Further, at the time PDM's board committed to sell the assets, the PDM-EC Division's profitability had dropped more than 18.3% from 1999 to 2000, resulting in a loss that was initially estimated to be $8.9 million. In March 2001, the EC Division was forced to take additional write-downs on certain projects, and its actual EBIT loss for fiscal year 2000 was approximately $30 million. There were no signs that the EC Division's business was improving after 2000.

Tanner and PDM's management determined that, because of these losses, it was unlikely that another purchaser would emerge. They decided that if the CB&I deal did not close, they would simply liquidate the EC Division.

In December 2000, at a time when it looked like the CB&I deal might fall apart because of a disagreement over commercial terms, Tanner and PDM management went so far as to draw up a plan of liquidation for the EC Division. Similarly, a February 2001 analysis prepared by Tanner analyzed liquidation of the EC Division if the deal did not close and opined

that if the Water and EC divisions could not be sold together, " a reasonable buyer may not be found and a liquidation of the business may be the most effective resolution." According to Tanner, PDM's estimated liquidation value was between $14 and $31 million; CB&I paid an estimated $17 million for the EC Division assets.

The evidence will also show that no other purchasers were interested and/or able to purchase PDM's EC assets. See U.S. v. M.P.M. Inc., 397 F. Supp. 78, 102 (D. Colo. 1975) (finding "failing company" defense established where, *inter alia*, there was no other prospective purchaser for the entity at issue). As such, Respondents urge this Court to recognize that the purchase of these assets did not substantially lessen competition.

First, the evidence will show foreign companies were not interested in purchasing the EC Division's assets and made no inquiry to suggest such an interest.
Second, no financial investor was interested because "it would have been a very difficult and probably impossible sale" for a financial based buyer to buy a company that is losing $9 million (and later $30 million.)

The only passing interest in the EC Division came from was not a viable purchaser because it was only interested in purchasing PDM's EC Division, a plan that was contrary to the wishes of PDM and the advice of its consultants.[38] It is also clear that could not have financed the purchase of both PDM-EC and Water's assets.

Based on its financial statements, PDM's professional investment banker determined that could have at best offered sufficient consideration in the form of

[38] only interest in PDM focused on the two fabrication facilities associated with PDM's Water Division. In order to accommodate as a purchaser, PDM would have had to liquidate its Water Division. This would have been nonsensical, given that PDM's Water Division was the only asset that had value as a going concern.

stock, which was insufficient to meet the liquidity goals of PDM's major shareholder.

While the sale of PDM's EC Division does not technically meet the standard of the "failing company" defense, Respondents respectfully submit that they do meet the standard for the "exiting assets" defense, a variation of the failing firm defense identified by the Ninth Circuit in Olin, which noted that "the key element of such a defense is proof that, without the merger, the assets owned by the acquired firm would *shortly* be leaving the market." 986 F.2d at 1307 (emphasis added) (quoting John E. Kwoka, Jr. & Frederick R. Warren-Boulton, Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis, 31 Antitrust Bull. 431, 445-46 (1986)).

This Court should apply the "exiting assets" defense in this case. The evidence will show that PDM's EC Division lost $30 million in a short period of time and had no chance for a successful reorganization, both because business was not likely to improve and because PDM would not have continued to operate the EC Division or any of its other divisions. Having conducted a reasonable good faith search for potential buyers, PDM's management agreed that its EC assets would have been liquidated if the Acquisition had not been completed. That decision is far from self-serving as it was reached two months before closing at a time when management viewed the CB&I deal as shaky. PDM's management had a duty to maximize revenue from selling the EC assets (and the investment banker, paid on commission, had a similar incentive), and they determined that liquidation was the way to accomplish that goal. Thus, there is no factual dispute that the assets of PDM's EC Division would have been liquidated if not sold and that CB&I was the only purchaser. Under Olin, Respondents have met

their burden to establish that but for the merger, these assets would have exited and that CB&I was the only available buyer.

The failing firm defense similarly requires that:

> First, the proponent of the acquisition must show that the company to be acquired is in imminent danger of failure. Second, the failing company must have no realistic prospect for a successful reorganization. Third, the proponent must demonstrate that there is no viable alternative purchaser. In order to satisfy the third criterion, the proponent of the acquisition must demonstrate that it has made a reasonable, good faith attempt to locate an alternative buyer.

Dr. Pepper/Seven-Up Cos., Inc. v. FTC, 991 F.2d 859, 864-65 (D.C. Cir. 1993) (internal citations omitted). Given that PDM was committed to selling all five of its divisions, there was no prospect PDM would have continued to operate its EC Division. (Byers Tr. 131:19-24.) Courts have recognized that an acquired firm's weak financial condition is highly relevant. See also FTC v. Great Lakes Chem. Corp., 528 F. Supp. 84, 87 (N.D. Ill. 1981) ("The competitive weakness of one of the two merging parties goes to the heart of the Government's statistical *prima facie* case and warrants a finding that no substantial lessening of competition is likely to occur in any market without reaching the issues of geographic and product markets.").[39] In sum, PDM-EC's poor financial condition in the year prior to the Acquisition and its imminent liquidation absent the Acquisition demonstrate that CB&I's purchase of PDM's assets did not substantially lessen competition.

B. The Acquisition Generated Merger-Specific And Cognizable Efficiencies.

The evidence will show that the Acquisition has generated merger-specific and cognizable efficiencies, and that these efficiencies have resulted in lower costs to consumers and

[39] See also U.S. v. International Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977) (acquired firm's "weakness as a competitor" was "precisely the kind of information into which the Supreme Court in recent cases has mandated an inquiry").

improved CB&I's ability to compete in the world market for cryogenic tanks.

Merger-specific efficiencies are defined as those unlikely to be accomplished in the absence of either the proposed merger or another means during a comparable time frame. They must be verified, and not automatically accepted as a result of anticompetitive reductions in output or service. Merger Guidelines § 4.0. See also FTC v. H.J. Heinz Co., 246 F.3d 708, 721 n.20 (D.C. Cir. 2001).

Respondents will prove the existence of millions of dollars in recurring annual savings (compared to the $84 million purchase for the PDM-EC and Water Divisions' assets).

Because CB&I and PDM had redundant capabilities in several areas, the Acquisition permitted them to reduce fixed costs of production by consolidating and/or eliminating certain operations. The Acquisition has resulted in significant elimination of redundant personnel and administrative functions, as well as rationalization of fabrication and engineering services. The Acquisition has also improved CB&I's access to volume discounts, generated substantial savings through implementation of "best practices" in engineering, construction, and other areas, and allowed CB&I to lower its Technical Services Fee ("TSF") charged on each cryogenic tank – a savings that is passed on to CB&I's customers.

These efficiencies have been verified since the Acquisition took place. Complaint Counsel lacks any evidence to rebut evidence of efficiencies presented by Respondents. Such uncontradicted evidence, combined with the significant entry discussed above, rebuts Complaint Counsel's case and requires judgment for Respondents.

VI. COMPLAINT COUNSEL'S EVIDENCE FAILS TO PROVE THAT CB&I'S ACQUISITION WILL SUBSTANTIALLY LESSEN COMPETITION IN ANY RELEVANT MARKET.

The evidence will show that Complaint Counsel's case is deficient in numerous respects, such that they cannot meet their burden of proof. Each deficiency is discussed below.

A. Complaint Counsel's Use Of 12 Year Old HHI Data Is Misleading And Inaccurate.

As previously discussed, historical HHI data are relevant only if they are reflective of current market conditions. The use of historical data is irrelevant here because such data fails to account for the strong competitive pressures being exerted by recent entrants in the markets today. Specifically, since the Acquisition, CB&I has lost two LIN/LOX projects for BOC, one LIN/LOX project for Air Liquide,

By contrast, CB&I has won only one competitively bid LIN/LOX job since the Acquisition and

LNG tank Yet, Complaint Counsel insists that these numerous victories by CB&I's competitors should be dismissed. This argument simply has no merit.

The use of historical information is also irrelevant because the measuring period of historical HHIs is subject to manipulation by Complaint Counsel. Complaint Counsel chooses to measure HHIs using data since 1990. Complaint Counsel's expert economist relies on this analysis in expressing his opinions regarding the alleged anticompetitive effect of the Acquisition. The use of such old bids is contrary to the Merger Guidelines, which state "[m]arket shares will be calculated using the best indicator of firms' future competitive significance." § 1.41. If Complaint Counsel and its expert had chosen a reasonable measuring period of 1996 through the date of the Acquisition, there would be *no change* in the HHIs for three of the four relevant markets: PDM has not built an LNG tank in the U.S. since 1992; CB&I has not built a TVC in the U.S. since 1984; and prior to the Acquisition, CB&I had not built an LPG tank in the U.S. since prior to 1996. (See supra at 34-40.)

B. Complaint Counsel Fails To Address The Sufficiency Of Post-Acquisition Entry.

It is undisputed that substantial entry has occurred in all of the relevant markets since 1998 (except possibly for TVCs). As discussed extensively above (see supra at 12-40), the post-acquisition entry in this case is actual, substantial, and sufficient to constrain prices. CB&I has lost two of the last three jobs in the LNG market, and three of the last four competitively-bid jobs in the LIN/LOX market. The jobs that CB&I has won have been at (See supra at 12-40.)[40] Complaint Counsel essentially ignores these facts, as does their expert Dr. Simpson. Remarkably, Dr. Simpson fails to address, or distorts the enormous importance of, the story.[41]

C. Complaint Counsel's Supposed Entry Barriers Are "Red Herrings."

Complaint Counsel has identified several entry barriers faced by CB&I's competitors in the relevant markets that, according to Complaint Counsel, will prevent them from competing with CB&I on a level playing field. As discussed above, the actual entry of these competitors directly undercuts Complaint Counsel's arguments on this score. See In re Grand Union Co., 102 F.T.C. 812, 1983 F.T.C. LEXIS 61, at *529 (July 18, 1983). Complaint Counsel's reliance on these so-called entry barriers is misplaced, as set forth below.

1. LNG "Entry Barriers"

- Subcontracting -- Subcontracting is not an entry barrier. In fact, subcontracting portions of an LNG project can actually lower costs. For this

[40] Complaint Counsel repeatedly cites In re Coca-Cola, 118 F.T.C. 452 (1995) to support its case. However, the In re Coca-Cola court reviewed three years of post-acquisition evidence and concluded that "after the acquisition [prices] rose to above the national average for Dr. Pepper retail prices." Id. at 608-09. The reverse is true here.

[41] Dr. Simpson suggests that behavior in the bid might have been an instance of exercising its new market power by placing additional conditions on its bid. In fact, offer to build the entire project reflects only a desire for more business. This behavior does not reflect market power deriving from the Acquisition, because engaged in the same behavior long before as Dr. Simpson himself points out.

reason, CB&I often subcontracts portions of an LNG job, as do its competitors.

- Fabrication -- Fabrication is not an entry barrier. Fabrication is routine, and can be easily performed. Further, foreign LNG tank builders can do the necessary fabrication. In some cases, these builders can fabricate steel overseas more cheaply than in the U.S. If fabrication were an entry barrier, foreign entrants would not waste their money attempting to enter the U.S. market. Their very presence belies Complaint Counsel's argument.

- FERC -- FERC is not an entry barrier. Dynegy and Cheniere have used Skanska/Whessoe and Daewoo, respectively, to perform the tank portion of the FERC application.

- Reputation -- Reputation is not an entry barrier. Virtually all current customers believe that the foreign entrants have excellent reputations for building LNG facilities, and that they can build those facilities in the U.S.

- Lack of experience -- Lack of experience in building LNG tanks in the U.S. is not an entry barrier. Customers do not require that foreign tank companies have previous experience building LNG tanks in the United States.

Further, Complaint Counsel contends that alliances between foreign LNG tank builders and domestic companies will not have any effect on the competitiveness of foreign entrants.

This claim ignores the extensive size, experience, and reputation of each domestic partner. Customers have recognized this experience as relevant.

2. LIN/LOX "Entry Barriers"

- Subcontracting -- Subcontracting is not an entry barrier. In fact, subcontracting can often lower a contractor's costs.

  Each step in the construction of a LIN/LOX tank is easily subcontracted.

  Like all builders of LIN/LOX tanks, CB&I subcontracts portions of those jobs.

- Equipment -- Access to equipment is not an entry barrier. Equipment needed to construct LIN/LOX tanks is readily available. It is not substantially different from the equipment needed to construct a conventional storage tank.

- Fabrication -- Fabrication is not an entry barrier. Any company able to fabricate steel plate storage tanks can fabricate the components for a LIN/LOX tank. New entrants are capable of fabricating a LIN/LOX tank.

- Engineering -- Engineering is not an entry barrier, as it is a fairly standard process that a tank construction company can easily accomplish through subcontracting to an outside firm, hiring experienced personnel, or simply training current employees.

- Personnel -- Access to personnel is not a barrier to entry. Each new entrant has already hired personnel with LIN/LOX experience.

- Reputation -- Reputation is not a barrier to entry. AT&V, Matrix and CBT have all been accepted as qualified by the majority of the LIN/LOX customer base. .

  Customers have testified that their primary motive in awarding a project is low price, not reputation.[42]

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[42] testified that low price, not reputation or performance record, is the number one factor in selecting a tank manufacturer.

Q: So then, is it fair to say that even if a field erected LIN/LOX tank supplier is having some problems with a particular job, that wouldn't preclude you from considering them for the next job down the pike?

A: That is correct. *Low price will always get you there.*

- Experience -- Experience is not a barrier to entry, as the primary motive in awarding a project is low cost, not experience. For example, although was concerned about using to construct a LIN/LOX tank, it awarded the project after checking its references. made this award despite the fact that was not pre-qualified at the time it submitted its pricing package.

3. LPG "Entry Barriers"

There are no meaningful entry barriers in the LPG market. AT&V has successfully entered, winning three of the last four projects, and Morse successfully made a hit-and-run entry (given sporadic demand, that is all that is necessary) by subcontracting the engineering and without adding a single new employee.

D. Complaint Counsel Improperly Relies On Budget Pricing To Argue That Prices Have Increased As A Result Of The Acquisition.

In a vain effort to show that prices have been affected by the Acquisition, Complaint Counsel relies on budget pricing provided by CB&I to customers over the past two years.

The evidence will show that use of budget pricing to try to measure effects of the Acquisition is invalid. Budget pricing is merely an initial effort to give the customer a "ballpark" price for a particular job. Generally, budget prices are to assist customers in managing their budgets, and to manage the customer's expectations. For that reason, budget prices for the products at issue, such as LIN/LOX tanks,

Budget prices often vary and can be unreliable indicators of true price because they are necessarily based on incomplete information. When a customer solicits a budget price, they generally do not provide all of the information necessary for CB&I to provide a final firm price

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(emphasis added). This testimony directly contradicts Complaint Counsel's unsupported assertion that reputation is the most important consideration in selecting a LIN/LOX tank supplier.

bid. For that reason, a contractor will err on the "high side" when calculating a budget price. For example, when calculating a budget price, a contractor such as CB&I will often not know: 1) what schedule the customer plans to follow in building the structure; 2) the exact location of the job; 3) what engineering design will be used for the structure; 4) the identity of the ultimate end user of the structure; or 5) the approximate start date of the project. The evidence will show that this information is crucial to calculating a final fixed price bid, and that a lack of information on these and other issues can result in dramatically varying budget prices.

Customers do not purchase structures based on a budget price. When they wish to purchase a product, they solicit a final, firm price bid. At that time, they provide all of the necessary information set forth above.

The wide variance associated with budget prices is also due to the fact that contractors such as CB&I do not put extensive effort into calculating a budget price, primarily because the number is not binding on CB&I or the customer. For example, CB&I does not shop around for the best price on steel, insulation, or concrete at the budget pricing stage. This effort is reserved for the process of calculating final firm price bids; this effort generally involves contacting 50 to 70 vendors for current materials costs. For that reason, a budget price is generally higher than the final firm price bid on the same job.

Budget pricing is the only post-Acquisition evidence upon which Complaint Counsel relies in an attempt to establish an anticompetitive effect. [43] For the reasons discussed above, this evidence is meaningless.

[43] In addition, many of the budget prices used by Complaint Counsel to support its case are not even typical budget prices. For many budget prices, CB&I will have some information about the job, such as the decade or state in which the project will be built. In the case of Complaint Counsel's examples, virtually no information is provided. For example, the cited by Complaint Counsel was provided to as part of a Similarly, a cited

E. Complaint Counsel's Case Relies On Distorted Evidence.

Complaint Counsel relies on a variety of distorted and misinterpreted evidence to support its case. For example, Complaint Counsel claim that "Industry Participants Predict Higher Prices for the Relevant Products As a Result of the Acquisition." However, this claim is largely based on outdated affidavits, which fail to address the substantial post-acquisition entry which has occurred in the relevant markets. In fact, the sworn deposition testimony in this case favors Respondents. In order for Complaint Counsel to carry its burden, a clear preponderance of the evidence favoring Complaint Counsel's case is required. See United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 183, 190-91 (N.D. Ill. 2001) (finding that DOJ failed to carry its burden on product market where customer testimony was found to be at best "equivocal").[44]

F. Complaint Counsel's Arguments Regarding "Critical Loss Analysis" Are Factually Flawed

Dr. Simpson's opinion regarding LNG and LIN/LOX tanks is based largely on a factually flawed "critical loss" analysis. Critical loss theory measures the percentage loss in sales necessary to make a given price increase unprofitable for a producer. The higher the fixed costs as the percentage of a product's total cost (the "contribution margin"), the lower a firm's willingness to risk the loss of business a price increase might cause.

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[44] Further, Dr. Simpson relies on the same type of unreliable evidence. While he suggests that the opinions of buyers "should only be given weight if the customers have a meaningful basis for forming these opinions" he relies on statements from customers who admittedly do not have current information about the market and from witnesses who later testified that they have changed their opinions. For example, he cites while admitting that the testimony of knowledge is limited to the market from the late 1990s, and testified that he has not assessed the LNG tank market in detail as his company has not bid an LNG tank project in that time.

Dr. Simpson ignores the large number of witnesses who have an active involvement in and responsibility for the sourcing of LNG tanks and who have testified that the merger will not have an anticompetitive effect.

For LNG tanks, Dr. Simpson based his variable costs estimate for purposes of computing the contribution margin almost entirely on a single document describing the projected costs of a single project. Based on this document, he incorrectly assumes that several important categories of costs, including the number of engineers and project managers CB&I employs, are entirely variable, when in fact the evidence will show they are not.

Dr. Simpson's critical loss analysis is also flawed in that it underestimates the competition that CB&I faces and thus the likelihood that its sales would decline if it attempted to increase price. Based on his erroneous estimate, Dr. Simpson concludes that a 5% price increase would be profitable if CB&I's sales decline by no more than 25%.

The evidence suggests that over the next three years, CB&I is unlikely to be able to be asked to bid on any more than .[45] A correct estimate of variable costs shows a price increase would be unprofitable if it caused CB&I to lose only one project.

In addition, Dr. Simpson in no way accounts for the fact that the number of cryogenic tank projects is sporadic. If CB&I loses one project in a given year, that project could represent 100% of its sales for that year. Thus, the cost of a loss of one large bid due to one price increase destroys Dr. Simpson's estimates.

Moreover, Dr. Simpson fails to recognize current competition where significant changes in LNG, LIN/LOX, and LPG markets have occurred. For example, Dr. Simpson refers

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[45] however, these include that It is unlikely that CB&I will be able to compete for all the remaining projects. For one of these projects, the preliminary engineering study for the project calls for the

Moreover, at least these projects are at a very early stage of planning. It is highly likely that most of these projects will not be built.

repeatedly to a 1994 bid solicitation by Memphis Gas, Light and Water.

This bid, like many cited by Dr. Simpson, took place before the merger that formed Skanska/Whessoe and before the forming of three joint ventures, TKK AT&V, Technigaz/Zachry, and Daewoo/S&B, which were formed for the express purpose of competing for LNG tank projects in the United States. Nonetheless, Whessoe and TKK did participate, in one form or another, in the Memphis bidding.[46] Dr. Simpson mistakenly asserts that CB&I and PDM-EC were "the two low cost bidders" at Memphis (MLGW).

In fact, PDM-EC's bid did not meet the customer's technical specifications and was rejected for that reason. Thus, PDM-EC's bid cannot be compared to those of the other bidders. Dr. Simpson's reliance on this evidence is misplaced. As the evidence will show, Dr. Simpson's mistaken understanding of fixed and variable costs and his selective review of the record renders his opinion suspect in every respect.

VII. REMEDY SOUGHT BY COMPLAINT COUNSEL IS INAPPROPRIATE AND PUNITIVE

As stated above, the value of all four products at issue is a small percentage of the revenue of PDM-EC. Yet Complaint Counsel seeks divestiture of the entire two-division purchase. This remedy is punitive and should not be allowed. It is well established that "[t]he key to the whole question of an antitrust remedy is . . . to find effective measures to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961). See also In re Grand Union Co., 102 F.T.C. 812 (1983) ("The Supreme Court . . . has ruled that punitive relief is inappropriate in a civil antitrust proceeding."). Divesture is a

[46] Complaint Counsel fails to mention that it bid reluctantly at the urging participation in this bid was limited to engineering tasks, and to MLGW. was the entity that actually submitted the bid

"drastic" remedy, and "cannot be had on assumptions." United States v. Crowell, Collier & MacMillian, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973). Rather, there must be "factual bases and economic theory as applied to such facts" to support such a remedy. Id. Furthermore, "even in a case of a judicial determination that an acquisition was in violation of Section 7, a claim of hardship attendant upon complete divestiture can be considered in determining the appropriate remedy for the redress of antitrust violations where something short of divestiture will effectively redress the violation." U.S. v. International Tel. & Tel. Corp., 349 F. Supp. 22, 31 (D. Conn. 1972).

If the Court finds that Complaint Counsel has met its burden of proof in this case, which CB&I respectfully submits it has not, then, in the alternative CB&I urges the Court to deny Complaint Counsel's request for rescission of the Acquisition and the reestablishment by CB&I of two distinct and separate businesses. Such a remedy is impossible, impractical, potentially harmful to customers, and/or unnecessary for several reasons.

First, PDM no longer exists except on paper. Therefore, rescission simply cannot be done.

Second, customers in this case have uniformly stated that divestiture of PDM assets would not restore competition. See F.T.C. v. Great Lakes Chemical Corp., 528 F. Supp. 84, 94-95 (N.D. Ill. 1981) (stating that "[a] key factor to consider in analyzing whether the proposed acquisition will violate Section 7 is the impact of the transaction on . . . customers"). For example, one CEO of a customer stated that a breakup of CB&I would "weaken a good supplier, while not reconstituting a viable alternative supplier."

testified that if as a result of a breakup "CBI was weakened enough so it couldn't

compete with the outside international players, then it would have some impact by weakening the major U.S. player at this time."

Third, Complaint Counsel's proposed remedy of complete divestiture presents innumerable practical and logistical problems, making it impossible to implement. The evidence will show that, at any given time, CB&I's Industrial Division has about 300 tank projects pending in various stages. Labor on each project must be split up, and CB&I and the divested entity must both have experienced workers to round out the requirements for each product line. This presents enormous logistical problems as recognized by customers. Both and LIN/LOX tank customers, would be concerned if a CB&I breakup occurred while CB&I was constructing a tank for them.

Fourth, any newly formed entity would have to be large enough to provide the corporate guarantees required for LNG and TVC tank projects today. a project manager for testified that he would scrutinize the financial status of any new owner of PDM to determine whether it would able to make the parent company guarantee. He further noted that, at this point, he would not want to work with a company any smaller than CB&I.

The evidence will show that a new competitor created from just the tank business of CB&I would not

have enough assets or revenue to satisfy the types of financial guarantees that LNG owners now demand. Customers have testified that the Acquisition has made them more comfortable in accepting a parent company guarantee from CB&I.

Based on the evidence, any breakup remedy would fail to establish a competitor for LNG jobs in the United States or, for that matter, internationally.

Fifth, a breakup makes no sense given the small size of the challenged markets. For example, in the year prior to the Acquisition, there were no sales whatsoever in three of the four markets, and only $5 million in sales in the LIN/LOX market. As a result, breakup is not appropriate when $66 million of the total $84 million in purchased assets relate to the construction of municipal water tanks, which Complaint Counsel does not challenge. Nor has Complaint Counsel collected any evidence as to the impact of divestiture on the customers in all the other markets that are served by CB&I but not subject to challenge in this lawsuit such as flat-bottom tanks.

Sixth, should the Court find that the Acquisition has caused any competitive problem, given the existing supply-side capacity of many tank constructors not currently involved in these four markets, less "drastic" and punitive remedies are available to create even more competition in the four product markets in this case.

As to the TVC market, although Respondents do not agree that the TVC market should constitute a relevant antitrust market under Section 7, it has proposed a package of behavioral constraints in the form of a proposed Consent Decree in an effort to alleviate any competitive concerns created by its acquisition of PDM assets on the TVC market
There are several components.

Customers testified that this agreement would benefit competition.

The last competitively bid thermal vacuum chamber was won at a price

Despite the dormant market for TVCs, Complaint Counsel proposes to breakup CB&I's $80 million Acquisition in its entirety because of potential loss of competition in the *de minimis* TVC market. TVC customers would be concerned if this litigation resulted in a splintering of CB&I into two companies, with neither company having the expertise to properly make field-erected TVCs. Customers have testified that they did not know whether a divested PDM would be allowed to bid on TVC projects because of its unknown financial circumstances.
Similarly, were a foreign competitor to acquire a divested PDM-EC, the customers do not know whether that divested company could bid because of the "made in the U.S.A." requirements in their government contracts which are imposed for reasons of national security.

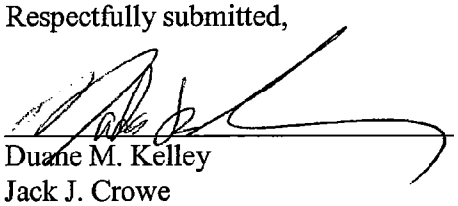
Further, if any remedy imposed by this Court resulted

in CB&I's exit from the TVC market, it is entirely possible that no TVC suppliers would exist in the United States, causing a true hardship for TVC customers.

In short, Complaint Counsel's proposed remedy should be rejected as inappropriate and punitive. To the extent this Court determines competitive issues exist, Respondents' proposed relief solves such concerns.

Dated: November 5, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Nada S. Sulaiman, hereby certify that on this 29th day of October, 2002, I served a true and correct copy of this Public Version of the Pretrial Brief of Respondent Chicago Bridge & Iron As Corrected On November 5, 2002 by hand delivery upon:

The Honorable D. Michael Chappell
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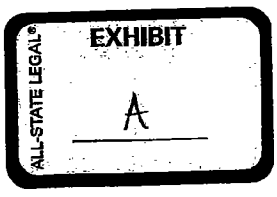

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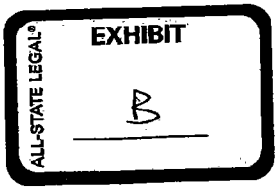

6. Since the Acquisition, CB&I has lost LIN/LOX projects for , one LIN/LOX project for , and lost LNG bid to . (See supra at 12-34.)

7. CB&I has won only one competitively bid LIN/LOX job since the Acquisition and LNG tank for .

8. PDM has not built an LNG tank in the U.S. since 1992; CB&I has not built a TVC in the U.S. since 1984; and prior to the Acquisition, CB&I had not built an LPG tank in the U.S. since prior to 1996.

IV. TIMELY, SUBSTANTIAL, AND SUFFICIENT ENTRY DEMONSTRATES THAT THE ACQUISITION DID NOT SUBSTANTIALLY LESSEN COMPETITION IN THE RELEVANT MARKETS

A. Legal Basis

1. Proof of low barriers to entry is one type of evidence which rebuts a *prima facie* case. It is settled that "where entry barriers are low, market share does not accurately reflect the party's market power." United States v. Syufy Enterprises, 903 F.2d 659, 665 (9th Cir. 1990). See also United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984) (stating that under General Dynamics "a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect," and the government's Merger Guidelines state that ease of entry is relevant to appraising the impact upon competition of a merger and may override other factors); F.T.C. v. Cardinal Health, 12 F. Supp. 2d 34, 54-55 (D.D.C. 1998) ("Even in highly concentrated markets, if there is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any likely anti-competitive effects of the proposed merger. . . . A court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's prima facie case of anticompetitiveness"); Grand Union Co., 102 F.T.C. 812 (1983) (High concentration levels "can occur with high, moderate or low entry barriers and do not necessarily indicate that high entry barriers exist.")

2. Ease of entry is established by evidence of timely, likely and sufficient entry. See generally FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998). Entry is timely if it takes place within approximately two years. See United States v. Syufy Enterprises, 903 F.2d 659, 666 (9th Cir. 1990). Entry is likely and sufficient if "ease of entry in the market is such that the procedures in the market could not long sustain an unjustified price increase." United States v. Calmar, Inc., 612 F. Supp. 1298, 1301 (D.N.J. 1985); see also Baker Hughes, 908 F.2d at 989 (entry is sufficient where it "would likely avert anticompetitive effects from . . . the acquisition . . . ."); Grand Union Co., 102 F.T.C. 812 (1983) ("Evidence of low entry barriers includes recent entry into the target market, or recent capacity expansion by existing competitors in the market and clearly tilts the balance against the legal presumption raised by concentration levels alone.").

3. Entry does not have to be "easy" to be likely and sufficient. Baker Hughes, 908 F.2d at 987-988. In addition, Respondent's evidence of entry does not have to be

"substantial." See Baker Hughes, 908 F.2d at 987-88 (rejecting the Government's argument that a defendant must show "quick and effective" entry to rebut the Government's prima facie case and noting that imposing a heavy burden of production on a defendant would be particularly anomalous in cases where the Government can establish its *prima facie* case simply by presenting market concentration statistics). Rather, to rebut the Government's prima facie case, a Respondent must make 'showing' that the prima facie case inaccurately predicts the relevant transaction's probable effect in future competition." Id. at 991. Moreover, "if barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market regardless whether entry ever occurs." Id. See also FTC v. Procter & Gamble Co., 386 U.S. 568. 581 (1967). Finally, "failed entry in the past does not imply failed entry in the future: if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive. Id. at 989 n. 9.

4. Post-acquisition data is dispositive since it proves absence of significant entry barriers in the relevant market. See Baker Hughes, 908 F.2d at 989 (relevant that two new companies had recently entered the U.S. drilling rig market, winning one contract a piece "and were poised for future expansion"). See also Syufy Enterprises, 903 F.2d at 662-666 (entry barriers low where a movie theater owner opened up three new cinema multiplexes within a thirteen month period, and within two years of the challenged acquisition was operating more screens than previously). "Post acquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a § 7 case." United States v. General Dynamics Corp., 415 U.S. 486, 505 (1974). See also United States v. Archer-Daniels-Midland Company, 781 F. Supp. 1400, 1421-22 (S.D. Iowa 1991).

5. Since probability of anti-competitive effect is judged at the time of trial, and "post-acquisition evidence favorable to a defendant can be an important indicator ... where the evidence is such that it could not reflect a deliberate manipulation by the merged companies temporarily to avoid anticompetitive activity, and could not reasonably be construed as representing less active market competition than would otherwise have occurred without the questioned acquisition." Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981). See also United States v. International Harvester Co., 564 F.2d 769, 778-781 (7th Cir. 1977).

Further, customer evidence is one of the most important forms of evidence for assessing anticompetitive effect. FTC v. Great Lakes Chem. Co., 528 F. Supp. 84, 94-95 (N.D. Ill. 1981); New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 351 (S.D.N.Y. 1995).

B. Factual Basis -- LNG

1. Increased demand, combined with the Acquisition, is drawing foreign LNG tank builders into the U.S. market.

2. is a joint venture with vast experience designing and constructing LNG tanks and LNG import terminals around the world, and has entered the market. Specifically to aid in this effort, formed a joint venture with

, one of the largest, most respected construction companies in the U.S.

3. The joint venture has been hotly pursuing several LNG opportunities in the U.S. and Mexico.

4. LNG customers and consultants in the U.S. agree with the assessment that is likely to successfully build LNG tanks on a competitive basis in the U.S.

5.

6. also submitted a formal bid for the LNG tanks , and the evidence will show that it is finalists. The has also submitted formal bids and/or budgetary pricing on several other U.S. LNG projects.

7. Customers have concluded that TKK/AT&V is a formidable new competitor to CB&I in the U.S. market for LNG tanks and facilities.

8 believes that bid on the -- the -- met all technical expectations and was within expected price range.

9. -- has recognized that the is "very interested in getting into the domestic market" and has solicited and received a satisfactory budgetary quote from

10. Skanska/Whessoe is the largest construction group in the world. Its U.S. subsidiary is the fourth largest contractor in the U.S.
Whessoe has constructed LNG tanks across the globe, even in remote locations such as India, Trinidad and Algeria.

11. Skanska/Whessoe is the exclusive licensee of technology to construct LNG tanks with an inner concrete containment as well, a technology that is favored by

12. Dynegy has selected Skanska/Whessoe as the EPC contractor for the Hackberry Project.

13. has submitted budget pricing to for its proposed facility and to for its planned

14. LNG customers in the U.S. agree that Skanska/Whessoe is likely to build quality LNG facilities at a competitive price. Many customers have commented on their favorable view of Skanska/Whessoe's reputation in this regard.

15. Dynegy chose Skanska/Whessoe as the winner of the bid contest for the EPC of the Hackberry Project.

16. Daewoo/S&B, a Korean multinational corporation, has built 12 LNG storage tanks in Korea since 1993. Daewoo has become the "dominant contractor" in the design and construction of LNG terminals in Korea, the world's largest importer of LNG. Daewoo entered the U.S. LNG market this year. To assist it in this regard, Daewoo forged an alliance with S&B Engineers & Constructors ("S&B"), based in Houston, Texas.

17. Earlier this year, made efforts to bid to on the . It is currently pursuing an LNG import terminal for

18. was recently retained by to prepare preliminary tank designs and engineering in connection with its FERC application, and is currently being considered as a candidate to build the tanks for that facility.

19. Customers believe that is a competitive force in the U.S. market for LNG facilities. and others believe that the joint venture has the requisite experience and capability to build these tanks, and will consider it for future LNG work.

20. Tractebel, a large Belgian company, has entered the U.S. LNG market since the Acquisition.

21. and have had negotiations about , based on confidence in ability to build LNG tanks in the U.S.

22. recently bid on an LNG import terminal . In light of its is selling the land and development plans for this project. is attempting to buy the land and build the terminal with an eye on establishing itself in the U.S. market.

23. Mitsubishi Heavy Industries ("MHI"), a Japanese conglomerate, is poised to enter the U.S. LNG tank and facility market, having built 36 large LNG storage tanks in diverse international locales. It is currently competing against for a project in and is discussing work in the U.S. with .

24. Customers believe that MHI has the capability to construct similar projects in the U.S. at a competitive price.

25. U.S. customers continue to pre-qualify foreign LNG tank manufacturers for bidding and accept their bids.

26. Dynegy awarded an EPC contract to Skanska/Whessoe for the Hackberry Project -- an import terminal .
The facility will contain .
When completed, the Hackberry Project will be the largest in the U.S.

27. As part of its search for an EPC contractor, Dynegy engaged in a detailed assessment of qualified competitors, including analysis
Dynegy interviewed
including

28. Dynegy felt that all of these companies
Dynegy eventually selected Skanska/Whessoe over to serve as its EPC contractor for the Hackberry Project.

29. Dynegy investigated and pre-qualified different bidders -- Dynegy asked all bidders to submit lump-sum turnkey bids for the construction of the LNG tanks for this project. Dynegy received bids from , sometime after February 1, 2002. All bids met Dynegy's .

30. Although had not submitted a bid for the LNG tanks during this process, it later approached and asked to submit a bid. a bid from , because it was satisfied with the bids already submitted by .

31.

32.

33.

34. has also solicited budget pricing from was comfortable with the range of pricing received from these competitors, and believes that the budget quotes were all plans to invite to provide final firm price bids for this major LNG project.

35. along with other partners, is developing a state-of-the-art, , LNG import terminal which will contain LNG tanks.

36. In December of 2001, hired -based to conduct preliminary engineering and design work on its LNG project. In the summer of 2002, hired to assist it in preparing its permitting application to FERC by providing detailed LNG tank drawings and other logistical support.

37. When solicits formal bids for the EPC contract on this job, plans to consider as potential candidates.

38. is confident that "there is enough competition between the others, with and and all the rest of them that we have mentioned that we will get a good selection of bids when we go out for bids."

39. is planning to construct an LNG peak-shaving facility in The facility will include a LNG tank.

40. has retained the services of to perform front-end engineering and design work for this project. Representatives of had face-to-face negotiations with In addition, has received budget pricing from While has not yet reached the point of securing final firm price bids, it is considering inviting which is performing the preliminary engineering analysis, to bid on the EPC contract for this project.

41. Local safety requirements may require to build an all-concrete double-containment LNG tank.

42. Skanska/Whessoe has experience constructing double concrete tanks, but If such a double concrete tank design is required, qualify to submit a bid.

43. is currently considering a proposed LNG import terminal in which will contain LNG tank.

44. has had a number of discussions with several potential EPC candidates, including

45. believes that each of these companies is able to handle this project, including the necessary engineering, procurement and construction. expects to narrow this list to , and expects that it will be able to get a good price as a result of this competitive process.

46. has pre-qualified companies to build LNG tanks -- including With respect to the project in as potential LNG tank builders. Each of these companies submitted bids for the LNG tanks, and are "still in the running for the job . . . ."

47.

48.

49. has entered into an EPC agreement with to add a LNG tank to its import terminal.

50. Prior to hiring solicited a budgetary price from which fell within a "very reasonable range" compared to price. Such an effort served to constrain a high price. As a result, is "very comfortable with the price that we were getting on the tank."

C. Factual Basis -- LIN/LOX

1. It has been well established that AT&V, Matrix and CBT have all been accepted as qualified by the majority of the LIN/LOX customer base.

2. American Tank & Vessel has won three of the four competitively bid LIN/LOX jobs that have occurred since the acquisition for a 75% post-acquisition market share.

3. Within months of the Acquisition, AT&V won its first LIN/LOX tank bid, a two-tank project for

4. was pleased with the price AT&V offered, because it was lower than

5. subsequently awarded AT&V another LIN/LOX tank just

6. Based in part on a positive reference from awarded AT&V a LIN/LOX tank

7. has requested LIN/LOX budget pricing from for a proposed project provided the budget price received for this project.

8. Matrix Services, began to participate in the LIN/LOX market in 1998 and has successfully and satisfactorily competed a total of four LIN/LOX tanks.

9. Between 1998 and 2 000, Matrix won (and successfully completed) LIN/LOX tank jobs for

10. In 2000, Matrix was awarded (and successfully completed) a competitively bid LIN/LOX job

11. Matrix continues to actively pursue this type of work, and has LIN/LOX projects for customers.

12. CBT has been actively submitting formal bids and budget pricing for LIN/LOX tanks.

13. Chattanooga Boiler and Tank ("CBT") is a 100-year-old tank company that specializes in the construction of steel plate storage tanks.

14. CBT has submitted a formal bid for LIN/LOX tanks

15. has also been pre-qualified by as a supplier of LIN/LOX tanks.

16. Demand for field-erected LIN/LOX tanks is very low due to excess capacity of oxygen and nitrogen production in the U.S.

17. Due to excess capacity, traditional purchasers of LIN/LOX tanks are rarely in the market for new tanks or plants.

18. Graver Manufacturing went out of business due to an overall lack of demand in this tank market.

19. competitively bid and awarded LIN/LOX tanks during 2000-2001.

20. evaluated bids from and selected because it was the

21. was satisfied with the price it paid for this project.

22. In 2002, competitively bid a LIN/LOX tank and received bids from

23. Due to the fierce competition for this job, lowered its final bid to a

24. Despite this steep price cut, was unsuccessful -- awarded this project to

25. In 2002, signed a letter of intent with to construct a LIN tank

26. approached because it was pleased with , and because believed that the use of engineering documents from that job would save costs on the job.

27. solicited pricing from for a LIN/LOX tank project in

28. initially internally priced the utilizing a profit margin of but ultimately provided a firm fixed price bid for the project at a profit margin of in response to competitive pressures.

29. awarded that project to in March 2002.

30. was satisfied with the price it paid for this tank.

31. is currently contemplating the purchase of a field-erected LIN tank for a facility in

32. will competitively bid the contract and anticipates soliciting bids from

33. The low bidder will win the contract.

34. have each testified that they do not believe prices have increased, do not believe that prices will increase, and further testified that they are satisfied with the current level of competition.

35. In fact, testified that it believes it has more potential bidders for pre-qualification today than it has had in the past.

36. The in the industry shares the same opinion as the customers. does not believe that the prices of field erected LIN/LOX tanks will be affected by the CB&I/PDM merger but rather believes that it has created opportunity for enter into the business of field erected LIN/LOX tanks.

37. has stated that the merger of CB&I and PDM "has given us some potential opportunities." believes that the LIN/LOX tank remains extremely competitive today.

38. recently competitively bid a LIN/LOX tank which was ultimately awarded to despite the fact that lowered its price to

39. awarded a LIN/LOX project in , , to after competitive pressure forced to reduce its original bid with a

profit margin to a bid containing a margin of

D. Factual Basis -- LPG Market

1. Since 1999, there have been four LPG projects sold in the U.S. (Harris Rpt., ¶ 91 (citing Table 5.))

2. Of those four, AT&V has won three, including two in 2001. Id.

3. Since 1994, CB&I has only won one project. Id.

4. PDM's last LPG project was in 1998. Id.

5. AT&V has successfully bid on and completed three LPG tank projects.

6. These LPG customers are pleased with AT&V's work.

7. AT&V plans to pursue this type of work in the future.

8. Matrix has bid on LPG projects in the past and is respected by LPG customers, such as

9. Two former project managers from PDM now work for Matrix.

10. CBT has built a variety of API 650 storage tanks, API 620 storage tanks, ASME pressure vessels, and ambient petroleum gas storage tanks.

11. CBT plans to pursue future LPG tank projects.

12. Any builder capable of constructing an API 650 or API 620 storage tank has the capability to build LPG tanks.

13. Such builders include Advance Tank, Puget Sound Fabricators, among many other.

14. Foreign companies can construct these tanks in the U.S. and are actively seeking this work.

15. believes that competition among alone is sufficient to prevent a price increase, and foreign competitors would enter the market if

competition slackened.

16. The Acquisition appears to increase the level of competition from smaller tank manufacturers.

17 For example, was very pleased with an LPG tank it purchased from in 2001.

18. submitted bids on the project.

19. price was so competitive that is "beat the socks off of

20. like most tank construction companies, successfully competed against on an LPG project despite no prior LPG, low temperature or cryogenic tank experience.

21. permitted to bid even though it was not on approved bid list.

22. timely completed the project without any major problems, and was satisfied with the performance, the price, and the quality.

E. Factual Basis -- Thermal Vacuum Chambers

1. believes that shop-erected TVCs are those that are less than 15 feet in diameter, and the field-erected chambers are larger than that in weight, diameter, or length.

2. The main difference between the two categories is the need to have a field crew with the equipment to align the pieces of steel together in the field.

3. Some small TVCs must be field-erected because they can only fit into the customer's building by being shipped in pieces instead of whole.

4. The steps taken in the design, procurement, fabrication and field-erection processes are identical for both cryogenic storage tanks (including TVCs) and conventional flat-bottom storage tanks.

5. Complaint Counsel's historical sales data show that CB&I has not constructed a single TVC since 1984, when it exited the market.

6. CB&I's exit left PDM as the only competitor for field-erected TVCs in the U.S. from 1984 until 1997.

7. CB&I attempted to reenter the TVC market in 1997 by acquiring XL Systems ("XL"), but has not built a field-erected TVC since its reentry.

8. CB&I acquired XL because the was looking to

9. CB&I has subsequently sold XL,

10. When CB&I sold XL, CB&I lost the ability to manufacture thermal shrouds, TVCs or cryogenic pumps for TVCs.

11. Given the dormant market, the change in the HHI for field-erected TVCs as a result of the CB&I merger is zero, which means Complaint Counsel cannot establish a statistical prima facie case.

12. The satellite industry has excess capacity in its existing TVCs.

13. Most satellite manufacturers already have one or more of these chambers, which have long lifespans. uses a TVC built and uses one built .

14. Only two field-erected TVCs have been built in the U.S. since 1990. (Harris Rpt., 150.)

15. Demand for TVCs is in further decline for two reasons. First, demand for commercial and government satellites is nearly non-existent. Second, satellite sizes are shrinking, rendering the large, field-erected TVCs obsolete.

16. Smaller shop-erected TVCs -- which CB&I does not make -- should be adequate to test satellites in the future.

17. Industry participants expect that the low level of demand, driven even lower by consolidation of the aerospace industry and the miniaturization of satellites, will ultimately cause the number of TVC suppliers to shrink to one.

18. is not really a new entrant to the market.

19. also testified that XL Systems and its subcontractor, Votaw, are currently fabricating two 15-foot field-erected TVCs.

20. IMCO/Howard entered the field-erected TVC market in 2001 by forming a consortium of industry participants.

21. IMCO/Howard entered the market after Howard had received a bid request from for a large TVC project.

22. This consortium is as qualified to build field-erected TVCs as CB&I because its personnel include many industry veterans, and based on its experience, potential customers would consider using IMCO/Howard if demand returns.

23. The main customers for field-erected thermal vacuum chambers are large companies such as

24. These companies have the financial resources to sponsor a new entrant. For example, in the chose over to build an expensive and sophisticated even though had never built such a structure before.

V. THE ACQUISITION GENERATED SIGNIFICANT EFFICIENCIES

A. Legal Basis:

Merger-specific efficiencies are defined as those unlikely to be accomplished in the absence of either the proposed merger or another means during a comparable time frame. Merger Guidelines § 4.0. See also FTC v. H.J. Heinz Co., 246 F.3d 708, 721 (D.C. Cir. 2001)

B. Factual Basis:

1. The Acquisition has generated merger-specific and cognizable efficiencies, and that these efficiencies have resulted in lower costs to consumers and improved CB&I's ability to compete in the world market for cryogenic tanks.

2. Merger-specific efficiencies are defined as those unlikely to be accomplished in the absence of either the proposed merger or another means during a comparable time frame. They must be verified, and not automatically accepted as a result of

anticompetitive reductions in output or service. Merger Guidelines § 4.0. See also FTC v. H.J. Heinz Co., 246 F.3d 708, 721 n.20 (D.C. Cir. 2001).

3. Respondents will prove the existence of millions of dollars in recurring annual savings (compared to the $84 million purchase for the PDM-EC and Water Divisions' assets). (See RX 66.)

4. Because CB&I and PDM had redundant capabilities in several areas, the Acquisition permitted them to reduce fixed costs of production by consolidating and/or eliminating certain operations.

5. The Acquisition has resulted in significant elimination of redundant personnel and administrative functions, as well as rationalization of fabrication and engineering services. The Acquisition has also improved CB&I's access to volume discounts, generated substantial savings through implementation of "best practices" in engineering, construction, and other areas, and allowed CB&I to lower its Technical Services Fee ("TSF") charged on each cryogenic tank – a savings that is passed on to CB&I's customers.

6. These efficiencies have been verified since the Acquisition took place.

VI. ABSENT THE ACQUISITION, THE ASSETS OF PDM'S EC DIVISION WOULD HAVE BEEN LIQUIDATED AND NO OTHER ALTERNATIVE PURCHASERS FOR THE EC DIVISION WERE AVAILABLE

A. Legal Basis:

Olin Corp. v. FTC, 986 F.2d 1295, 1304, 1307 (9th Cir. 1993); Dr. Pepper/Seven-Up Cos. v. FTC, 991 F.2d 859, 864-65 (D.C. Cir. 1993); FTC v. Great Lakes Chemical Corp., 528 F. Supp. 84, 87 (N.D. Ill. 1981); United States v. International Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977)

B. Factual Basis:

1 In 2000, PDM's major (30%) shareholder decided to explore various ways of converting its PDM stock to cash.

2. PDM entertained ideas from investment bankers
. After considering various options, PDM hired Tanner to sell all five of PDM's divisions for cash as quickly as possible.

3. In July 2000, PDM issued a widely-disseminated industry-wide press release announcing this fact.

4. PDM management concluded that selling the EC and Water Divisions separately would be an expensive and difficult endeavor because of the nature of the

divisions and their shared resources, and therefore recommended selling them together as one unit.

5. At the time PDM's board committed to sell the assets, the PDM-EC Division's profitability had dropped more than 18.3% from 1999 to 2000, resulting in a loss that was initially estimated to be $8.9 million.

6. In March 2001, the EC Division was forced to take additional write-downs on certain projects, and its actual EBIT loss for fiscal year 2000 was approximately $30 million. There were no signs that the EC Division's business was improving after 2000.

7. PDM's management determined that, because of these losses, it was unlikely that another purchaser would emerge. They decided that if the CB&I deal did not close, they would simply liquidate the EC Division.

8. In December 2000, at a time when it looked like the CB&I deal might fall apart because of a disagreement over commercial terms, PDM management went so far as to draw up a plan of liquidation for the EC Division. Similarly, a February 2001 analysis prepared by analyzed liquidation of the EC Division if the deal did not close and opined that if the Water and EC divisions could not be sold together, "a reasonable buyer may not be found and a liquidation of the business may be the most effective resolution."

9. According to PDM's estimated liquidation value was between $14 and $31 million; CB&I paid an estimated $17 million for the EC Division assets.

10. No other purchasers were interested and/or able to purchase PDM's EC assets. Foreign companies were not interested in purchasing the EC Division's assets and made no inquiry to suggest such an interest.

11. No financial investor was interested because "it would have been a very difficult and probably impossible sale" for a financial based buyer to buy a company that is losing $9 million (and later $30 million.)

12. The only passing interest in the EC Division came from Matrix was not a viable purchaser because it was only interested in purchasing PDM's EC Division, a plan that was contrary to the wishes of PDM and the advice of its consultants.

13.

14. could have at best offered sufficient consideration in the form of stock, which was insufficient to meet the liquidity goals of PDM's major shareholder.

VII. THERE ARE NO SIGNIFICANT ENTRY BARRIERS AT ISSUE

A. Legal Basis

Actual entry of competitors is dispositive of the question of whether entry barriers exist. See In re Grand Union Co., 102 F.T.C. 812, 1983 F.T.C. LEXIS 61, at *529 (July 18, 1983).

B. Factual Basis -- LNG

1. Subcontracting is not an entry barrier. In fact, subcontracting portions of an LNG project can actually lower costs. CB&I often subcontracts portions of an LNG job, as do its competitors.

2. Fabrication is not an entry barrier. Fabrication is routine, and can be easily performed. Further, foreign LNG tank builders can do the necessary fabrication. In some cases, these builders can fabricate steel overseas more cheaply than in the U.S. If fabrication were an entry barrier, foreign entrants would not waste their money attempting to enter the U.S. market.

3. FERC is not an entry barrier. Dynegy and Cheniere have used Skanska/Whessoe and , respectively, to perform the tank portion of the FERC application.

4. Reputation is not an entry barrier. Virtually all current customers believe that the foreign entrants have excellent reputations for building LNG facilities, and that they can build those facilities in the U.S.

5. Lack of experience in building LNG tanks in the U.S. is not an entry barrier. Customers do not require that foreign tank companies have previous experience building LNG tanks in the United States.

C. Factual Basis -- LIN/LOX

1. Subcontracting is not an entry barrier. Subcontracting can often lower a contractor's costs. Construction of a LIN/LOX tank is easily subcontracted. Like all builders of LIN/LOX tanks, CB&I subcontracts portions of those jobs.

2. Access to equipment is not an entry barrier. Equipment needed to construct LIN/LOX tanks is readily available. It is not substantially different from the equipment needed to construct a conventional storage tank.

3. Fabrication is not an entry barrier. Any company able to fabricate steel plate storage tanks can fabricate the components a LIN/LOX tank. New entrants are capable of fabricating a LIN/LOX tank.

4. Engineering is not an entry barrier, as it is a fairly standard process that a tank construction company can easily accomplish through subcontracting to an outside firm, hiring experienced personnel, or simply training current employees.

5. Access to personnel is not a barrier to entry. Each new entrant has already hired personnel with LIN/LOX experience.

6. Reputation is not a barrier to entry. AT&V, Matrix and CBT have all been accepted as qualified by the majority of the LIN/LOX customer base.

Customers' primary motive in awarding a project is low price, not reputation.

7. Experience is not a barrier to entry, as the primary motive in awarding a project is low cost, not experience.

D. Factual Basis -- LPG

1. AT&V has successfully entered the LPG market, winning three of the last four projects.

2. successfully entered the LPG market by subcontracting the engineering and without adding a single new employee.

3. Other competitors are capable of competing in the LPG market., such as Matrix and Chattanooga Boiler & Tank.

E. Factual Basis – TVC

1. believes that shop-erected TVCs are those that are less than 15 feet in diameter, and the field-erected chambers are larger than that in weight, diameter, or length.

2. The main difference between the two categories is the need to have a field crew with the equipment to align the pieces of steel together in the field.

3. Some small TVCs must be field-erected because they can only fit into the customer's building by being shipped in pieces instead of whole.

4. The steps taken in the design, procurement, fabrication and field-erection processes are identical for both cryogenic storage tanks (including TVCs) and conventional flat-bottom storage tanks.

5. Complaint Counsel's historical sales data show that CB&I has not constructed a single TVC since 1984, when it exited the market.

6. CB&I's exit left PDM as the only competitor for field-erected TVCs in the U.S. from 1984 until 1997.

7. CB&I attempted to reenter the TVC market in 1997 by acquiring XL Systems ("XL"), but has not built a field-erected TVC since its reentry.

8. CB&I acquired XL

9. CB&I has subsequently sold XL

10. When CB&I sold XL, CB&I lost the ability to manufacture thermal shrouds, TVCs or cryogenic pumps for TVCs.

11. Given the dormant market, the change in the HHI for field-erected TVCs as a result of the CB&I merger is zero, which means Complaint Counsel cannot establish a statistical prima facie case.

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Second, satellite sizes are shrinking, rendering the large, field-erected TVCs obsolete.

16. Smaller shop-erected TVCs -- which CB&I does not make -- should be adequate to test satellites in the future.

17. Industry participants expect that the low level of demand, driven even lower by consolidation of the aerospace industry and the miniaturization of satellites, will ultimately cause the number of TVC suppliers to shrink to one.

18. not really a new entrant to the market.

19. contract manager also testified that

20. IMCO/Howard entered the field-erected TVC market in 2001 by forming a consortium of industry participants.

21. IMCO/Howard entered the market after had received a bid request from for a large TVC project.

22. This consortium is as qualified to build field-erected TVC's as CB&I because its personnel include many industry veterans, and based on its experience, potential customers would consider using IMCO/Howard if demand returns.

23. The main customers for field-erected thermal vacuum chambers are large companies such as Boeing, Northrup Gumman (which just acquired TRW), Raytheon and Lockheed Martin.

24. These companies have the financial resources to sponsor a new entrant. For example, in the fall of 2001, Boeing chose Puget Sound Fabricators over CB&I to build an expensive and sophisticated 80 foot diameter vacuum sphere even though PSF had never built such a structure before.

25. Alternatively, customers are not necessarily concerned about the experience level of vendors for TVC's. For instance, for the bidding of its thermal vacuum chamber project even though had not constructed a thermal vacuum chamber

VII. BUDGET PRICING IS NOT AN ACCURATE INDICATOR OF ANTICOMPETITIVE EFFECTS

A. Factual Basis

1. Budget pricing is merely an initial effort to give the customer a "ballpark" price for a particular job. They are usually over-estimated to assist customers in managing their budgets, and to manage the customer's expectations.

2. Budget prices for the products at issue, such as LIN/LOX tanks, range from 25% above the final bid price to 5% below the final bid price.

3. Budget prices often vary and can be unreliable indicators of true price because they are necessarily based on incomplete information. When a customer solicits a budget price, they generally do not provide all necessary information, such as : 1) what schedule the customer plans to follow in building the structure; 2) the exact location; 3) what design details; 4) customer identity; or 5) start date of the project. This information is needed to calculate a final fixed price bid, and that a lack of information on these and other issues can result in varying budget prices.

4. Customers do not purchase structures based on a budget price. When they wish to purchase a product, they solicit a final, firm price bid. At that time, they provide all of the necessary information set forth above.

5. Contractors do not generally spend much time on budget pricing; accordingly, it is not as accurate or as low as possible.

VIII. COMPLAINT COUNSEL'S RELIANCE ON ITS CRITICAL LOSS ANALYSIS ARE FACTUALLY FLAWED

A. Factual Basis

1. With respect to LNG tanks, Dr. Simpson incorrectly estimated the costs associated with his contribution margin calculation.

2. Dr. Simpson underestimates the competition that CB&I faces and thus the likelihood that its sales would decline if it attempted to increase price. Based on his erroneous estimate, Dr. Simpson concludes that a 5% price increase would be profitable if CB&I's sales decline by no more than 25%. The evidence suggests that , CB&I is unlikely to be able to be asked to bid on any more than U.S. LNG tank projects. A correct estimate of variable costs shows a price increase would be unprofitable if it caused CB&I to lose only one project. In addition, Dr. Simpson in no way accounts for the fact that the number of cryogenic tank projects is sporadic. If loses one project in a given year, that project could represent 100% of its sales for that

year. Thus, the cost of a loss of one large bid due to one price increase destroys Dr. Simpson's estimates.

3. The bid process took place before the merger that formed Skanska Whessoe and before the forming of three joint ventures, TKK-AT&V, Technigaz-Zachry, and S&B-Daewoo, which were formed for the express purpose of competing for LNG tank projects in the United States.

4.

5.

IX THE REMEDY SOUGHT BY COMPLAINT COUNSEL IS INAPPROPRIATE AND PUNITIVE

A. Legal Basis:

"The key to the whole question of antitrust remedy is to bind effective measures to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 326 (1961). See also Grand Union, Docket No. 9121, 102 F.T.C. 812 (1983) Divesture is a "drastic" remedy, and "cannot be had on assumptions." United States v. Crowell, Collier & MacMillian, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973). Rather, there must be "factual basis and economic theory as applied to such facts" to support such a remedy. Id. Furthermore, the hardships that would be caused by such a remedy "can be considered in determining the appropriate remedy for the redress of antitrust violations where something short of divestiture will effectively redress the violation." U.S. v. International Tel. & Tel. Corp., 349 F.Supp. 22, 31 (D. Conn. 1972).

B. Factual Basis

1. The assets that are the subject of this Complaint are a fraction of the total value of the Acquisition, representing about $17 million of the total $83 million deal.

2. In addition, the commerce from the relevant markets at issue is a small percentage of the revenue of the challenged assets.

3. CB&I had generated no revenues from the LNG and TVC markets over the previous five years.

4. For example, one CEO of a customer stated that a breakup of CB&I would "weaken a good supplier, while not reconstituting a viable alternative supplier."

5. , testified that if as a result of a breakup "CBI was weakened enough so it couldn't compete with the outside international players, then it would have some impact by weakening the major U.S. player at this time."

6. At any given time, CB&I's Industrial Division has about 300 tank projects pending in various stages.

7. , LIN/LOX tank customers, would be concerned if a CB&I breakup occurred while CB&I was constructing a tank for them.

8. LNG customers have also commented that a breakup would be disruptive.

9. would scrutinize the financial status of any new owner of PDM to determine whether it would able to make the parent company guarantee. further noted that he would not want to work with a company any smaller than CB&I.

10. PDM was already losing business due to concerns related to PDM's financial status.

11. Customers have testified that the Acquisition has made them more comfortable in accepting a parent company guarantee from CB&I.

12. For example, in the year prior to the Acquisition, there were no sales whatsoever in three of the four markets, and only $5 million in sales in the LIN/LOX market.

13. Breakup is not appropriate when $66 million of the total $84 million in purchased assets relate to the construction of municipal water tanks, which Complaint Counsel does not challenge.

14. Complaint Counsel has not collected any evidence as to the impact of divestiture on the customers in all the other markets that are served by CB&I but not subject to challenge in this lawsuit, such as flat-bottom tanks.

15. Demand for field-erected LIN/LOX tanks is very low due to excess capacity of oxygen and nitrogen production in the U.S.

16. Due to excess capacity, traditional purchasers of LIN/LOX tanks are rarely in the market for new tanks or plants.

17 Graver Manufacturing went out of business due to an overall lack of demand in this tank market.

18. Moreover, six foreign LNG tank builders ventures have entered the U.S. market since the Acquisition.

19. The proposed Consent Decree includes a

20. The proposed Consent Decree offers

21. The proposed Consent Decree alleviates potential concern of TVC customers that

22 The proposed Consent Decree includes

23 The proposed Consent Decree includes

24. Customers have testified that they did not know whether a divested PDM would be allowed to bid on TVC projects because of its unknown financial circumstances.

25. Similarly, were a foreign competitor to acquire a divested PDM-EC, the customers do not know whether that divested company could bid because of the "made in the U.S.A." requirements in their government contracts which are imposed for reasons of national security.

26. If any remedy imposed by this Court resulted in CB&I's exit from the TVC market, it is entirely possible that no TVCs suppliers would exist in the United States, causing a true hardship for TVC customers.

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