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	)	Docket No. 9300
a corporation, and	)	**(PUBLIC RECORD VERSION)**
PITT-DES MOINES, INC.	)	
a corporation.	)	

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S <u>CORRECTED</u> REPLY BRIEF

Rhett R. Krulla
Morris A. Bloom
Deputy Assistant Directors

J. Robert Robertson
Senior Litigation Counsel

Susan Creighton
Deputy Director

Joseph J. Simons
Director

Bureau of Competition
Federal Trade Commission

Michael A. Franchak
Chul Pak
Hector F. Ruiz, Jr.
Eric M. Sprague
April Tabor
Robert S. Tovsky
Cecelia M. Waldeck
Steven L. Wilensky
Complaint Counsel

Yasmine Carson
Honors Paralegal

Mary Forster
Merger Analyst

Jacqueline Tapp
Investigative Assistant

March 14, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

Respondents Cannot Show That Other Competition Is Likely To Compete At Pre-Merger Prices Profitably 2

Proof of Anticompetitive Effects "Cements" Complaint Counsel's Case 5

This Tribunal Should Reject Respondents' Novel "Exiting Asset" Defense, Especially When They Cannot Satisfy Any Of Its Elements 6

Divestiture Is Required Under The Undisputed Facts Of This Case. 6

I. EXTRAORDINARILY HIGH CONCENTRATION IN THE RELEVANT MARKETS DEMONSTRATES THAT THE ACQUISITION MAY LESSEN COMPETITION SUBSTANTIALLY. 7

II. RESPONDENTS FAILED TO REBUT THE PRESUMPTION OF ANTICOMPETITIVE EFFECTS. 13

A. The Alleged Entry Is Not "*Timely*" (Within Two Years). 20

B. Entry Cannot Be "*Profitable at Pre-Merger Prices.*" 21

C. Entry Cannot Be "*Sufficient*" To Replace PDM. 22

D. None Of Respondents' Claimed Entrants Are Sufficient To Restore Pre-Acquisition Prices At Profitable Levels. 31

E. Respondents' Claims Of Entry Are Insufficient As A Matter Of Law. 31

1. There Is No Entry In TVCs. 31

2. Respondents Have No Proof Of Entry In LNG 34

3. There Is No New Entry Into the Market For LPG Tanks. 44

4. There Has Been No Entry Into the U.S. LIN/LOX Tank Market Since the Acquisition 47

III. POST-ACQUISITION EVIDENCE DEMONSTRATES THAT ANTICOMPETITIVE EFFECTS ARE LIKELY, BECAUSE THEY HAVE ALREADY OCCURRED. 51

A. By Eliminating its Only Significant Competitor, the Acquisition Increases CBI's Market Power 52

B. Actual Evidence Of Anticompetitive Conduct Independently Requires A Finding Of Liability Against Respondents In This Case. 53

C. Budget Prices Are Relevant. 54

D. Post-Acquisition, CBI Discourages Competitive Bidding 56

E. Following the Acquisition, CBI Has Increased Prices and Failed to Honor PDM's Prices. 58

F. Critical Loss Theory Confirms the Anticompetitive Effects of the Acquisition 58

G. Respondents' Criticism of Auction And Probability Theory Is Unfounded. 60

IV. RESPONDENTS' "EXITING ASSETS" DEFENSE FAILS AS A MATTER OF LAW. 62

V. DIVESTITURE IS REQUIRED TO RESTORE THE COMPETITION ELIMINATED BY CBI'S ACQUISITION OF PDM. 70

A. No Law Supports Respondents' Position That Any Remedy That Omits Divestiture Is Permitted Under Section 11(b). 70

B. Contrary To Respondents' Assertions, FTC Precedent Mandates Divestiture. 73

C. Contrary To Respondents' Claim, U.S. Supreme Court Precedent Mandates Divestiture. 76

D. It Is Respondents' Burden To Show That FULL Divestiture Should Not Be Ordered. 78

E. There Is Substantial Evidence in the Record to Guide the Tribunal in Ordering Divestiture to Remedy the Effects of the Acquisition if a Violation Is Found. 79

F. The Provisions of Complaint Counsel's Proposed Order Are Tailored to Restore the Competition that Existed Prior to the Acquisition 86

VI. CONCLUSION 88

TABLE OF AUTHORITIES

CASES:

Advo, Inc. v Philadelphia Newspapers, Inc., 854 F. Supp. 367 (E.D. Pa. 1994) 30

Advo, Inc. v Philadelphia Newspapers, Inc., 51 F.3d 1191 (3rd Cir. 1995) 30

Associated Press v. U. S., 326 U.S. 1 (1945) 72

Blue Cross & Blue Shield United v. Marshfield Clinic, 883 F. Supp. 1247 (W.D. Wis. 1995) 71

Blue Cross & Blue Shield United v. Marshfield Clinic,
65 F.3d 1406 (7th Cir. 1995)
152 F.3d 588 (7th Cir. 1998) 71, 72

Borden, Inc. v. FTC, 674 F. 2d 498 (6th Cir. 1982) 12

Borowski v. DePuy, Inc., 850 F.2d 297 (7th Cir.1988) 19

Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477 (1977) 70

California v. American Stores Co., 495 U.S. 271 (1990) 70, 77

California v. Sutter Health Sys., 130 F. Supp. 2d 1109 (N.D. Cal. 2001) 69

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 68

Coca Cola Bottling Co. of the Southwest, 118 F.T.C. 452 (1994) 3, 14, 15, 20

Coca-Cola Company, 117 F.T.C. 795 (1994) 11, 18, 23, 25, 28

Crown Zellerbach Corp., 54 F.T.C. 769 (1957) 78

Diamond Alkali Co., 72 F.T.C. 700 (1967) 71, 74

Elkco Products Co., 65 F.T.C. 1163 (1964) 24, 34, 72, 73, 74, 75, 78, 79

Ford Motor Co. v. U. S., 405 U.S. 562 (1972) 88

Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979) 9

Fruehauf Corp., 90 F.T.C. 891 (1977) 71, 78

Fruehauf Trailer Co., 67 F.T.C. 878 (1965) 78

FTC v. Alliant Techsystems, Inc.,
808 F.Supp. 9 (D.D.C. 1992) 8, 12, 15, 32

FTC v. Cardinal Health, Inc.,
12 F. Supp. 2d 34 (D. D.C. 1998) 2, 3, 13, 14, 15, 19, 23, 25

FTC v. Coca-Cola Co., 641 F. Supp. 1128 (D.D.C. 1986) 3

FTC v. Consolidated Foods Corp.,
380 U.S. 592 (1965) 5, 51, 59

FTC v. Food Town Stores, 539 F.2d 1339 (4th Cir.1976) 32

FTC v. Great Lakes Chemical Co.,
528 F. Supp. 84 (N. D. Ill. (1981) 10

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001) 3, 4, 7, 8, 11, 12, 13, 20, 52

FTC v. Harbour Group Investments, L.P., No. 90-2525,
1990 WL 198819 (D. D.C. Nov. 19, 1990) 64

FTC v. Libbey, Inc., 211 F. Supp. 2d 34 (D. D.C. 2002) 2, 5, 13, 51, 59

FTC v. National Tea Co., 603 F.2d 694 (8th Cir. 1979) 18, 74, 75, 76

FTC v. PPG Indus. Inc., 798 F.2d 1500 (D.C. Cir. 1986) 8, 64

FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) 12

FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) 3, 14, 23, 25, 28, 52

FTC v. Swedish Match N.A.Inc.,
131 F. Supp. 2d 151 (D.D.C. 2000) 3, 13, 23, 25, 28, 52

FTC v. Toys "R" Us, 221 F.3d 928 (7th Cir. 2000) 5, 51, 59

FTC v. University Health, Inc.,
938 F.2d 1206 (11th Cir. 1992) 14, 15

FTC v. Warner Communications, Inc.,
742 F.2d 1156 (9th Cir. 1984) 68

FTC v. Western Meat Co., 272 U.S. 554 (1926) 77

Grand Union Co., 102 F.T.C. 812 (1983) 74

Grumman Corp. v. LTV Corp.,
527 F. Supp. 86 (E.D. N.Y. 1981) 8, 13

Grumman Corp. v. The LTV Corp.,
665 F.2d 10 (2d. Cir.1981) 32

Heublein, Inc., 96 F.T.C. 385 (1980) 29

Int'l Distrib. Ctrs., Inc. v. Walsh Trucking,
812 F.2d 786 (2d Cir. 1987) 29

Jim Walter, 90 F.T.C. 671 (1977) 75

Lektro-Vend Corp. v. The Vendo Co.,
660 F.2d 255 (7th Cir. 1981) 13, 61

McGahee v. N. Propane Gas Co.,
858 F.2d 1487 (11th Cir. 1988) 30

Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System, 638 F. 2d 1255 (5th Cir. 1981) 27

New York v. Kraft Gen. Foods,
926 F. Supp. 321 (S.D. N.Y. 1995) 9

Olin Corp. v. FTC, 986 F.2d 1295 (9th Cir. 1993) 2, 9, 14, 62, 64, 68

Olin Corporation, 113 F.T.C. 400 (1990) 34, 62, 69, 75, 78, 79

Pillsbury Co., 93 F.T.C. 966 (1979) 18

R.R. Donnelly & Sons Co., 120 F.T.C. 36 (1995) 52

Rebel Oil Co., Inc. v. AtlanticRichfield Co.,
51 F.3d 1421 (9th Cir. 1995) 20, 28

Reichhold Chemical Inc., 91 F.T.C. 246 (1978) 24

Retail Credit Co., 92 F.T.C. 1 (1978) 71, 72, 73

RSR Corp, 88 F.T.C. 800 (1976),
aff'd, 602 F.2d 1317 (9th Cir. 1979) 74, 75, 85

Service Corp. Intern., 65 FR 35643 32

Tasty Baking Co. v. Ralston Purina, Inc.,
653 F. Supp. 1250 (E.D.Pa. 1987) 14, 52

UAW v. NRLB, 459 F. 2d 1329 (D.C. Cir. 1972) 6, 39

United States v. Azzarelli Const. Co.,
612 F.2d 292 (7th Cir. 1979) 53

United States v. Baker Hughes, Inc.,
908 F.2d 981 (D.C. Cir. 1990) 9, 11, 13, 15, 16, 19, 20, 23, 24, 27, 28

United States v. Blue Bell, Inc.,
395 F. Supp. 538 (M.D. Tenn. 1975) 64

United States v. Calmar, Inc.,
612 F. Supp. 1298 (D.N.J. 1985) 10, 20

United States v. Culbro Corp.,
504 F. Supp. 661 (S.D.N.Y. 1981) 69

United States v. E.I du Pont de Nemours Co.,
366 U.S. 316 (1961) 76, 77, 88

United States v. E.I du Pont de Nemours Co.,
353 U.S. 586 (1957) 76

United States v. El Paso Natural Gas Co.,
376 U.S. 651 (1964) 8, 12, 78

United States v. Falstaff Brewing Corp.,
410 U.S. 526 (1973) 19, 27, 41

United States v. Franklin Elec. Co., Inc.,
130 F. Supp.2d 1025 (W.D.Wisc. 2000) 23, 24, 37

United States v. General Dynamics Corp.,
415 U.S. 486 (1974) 5, 13, 18, 51, 54

United States v. Gillette Co.,
828 F. Supp 78 (D.D.C 1993) 28, 29

United States v. Greater Buffalo Press, Inc.,
402 U.S. 549 (1971) 64, 68

United States v. International Harvester Co.,
564 F.2d 769 (7th Cir. 1977) 18

United States v. M.P.M., Inc.,
397 F. Supp. 78 (D. Colo. 1975) 11

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 51, 71, 72

United States v. Pabst Brewing Co.,
296 F. Supp. 994 (E.D. Wis. 1969) 63

United States v. Phillips Petroleum Co.,
367 F. Supp. 1226 (C.D. Cal. 1973) 64, 68

United States v. Syufy Enter., 903 F.2d 659 (9th Cir. 1990) 10, 19

United States v. United Tote,
768 F. Supp. 1064 (D.Del. 1991) 15, 24, 37, 86

United States v. Von's Grocery Co., 384 U.S. 270 (1966) 76, 78

United States v. Ward Baking Co., 376 U.S. 327 (1964) 72

United States v. Waste Mgmt. Inc.,
743 F.2d 976 (2d Cir. 1984) 10, 30

Wsol v. Great North Asset Mgmt., Inc.,
114 F. Supp. 2d 720 (N.D. Ill. 2000) 27

STATUTES:

Clayton Act,
Section 7, 15 U.S.C. § 18 . . . . *passim*
Section 11(b), 15 U.S.C. §21(b) . . . . *passim*

Federal Trade Commission Act,
Section 5, 15 U.S.C. § 18 . . . . *passim*

OTHER AUTHORITIES:

2A P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law*, (2002)
¶ 420b 24

4 P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law* (rev. ed. 2000)
¶ 903a 31
¶ 911b 14, 25
¶ 952b 65
¶ 954d 63

Dalkir, *et al.*, *Mergers in Symmetric and Asymmetric Noncooperative Auction Markets: The Effects on Prices and Efficiency*,
2000 Int'l J. of Industrial Organization 18 60

Kovacic, William E., *Merger Policy in a Declining Defense Industry*,
36 Antitrust Bull. 543 (1991) 12

Kwoka & Warren-Boulton, *Efficiencies, Failing Firms and Alternatives to Merger: a Policy Synthesis*,
31 Antitrust Bull. 431 (1986) 62, 64, 68, 69

Posner, R., *Antitrust Law An Economic Perspective* (1976) 61

U.S. Department of Justice & Federal Trade Commission,
Horizontal Merger Guidelines (1992, rev'd 1997) . . . . *passim*

Von Kalinowski, J., *Antitrust Law & Trade Regulation* (2d ed. 1996) 5, 13, 51

Wonnacott, R., and T. Wonnacott, *Introductory Statistics* (4th ed. 1985) 61

INTRODUCTION

Respondents' brief reads as if they were not present at the trial. In 173 pages, all they could muster in defense against overwhelming evidence of anticompetitive effects is a few paragraphs of unsupported denials. Often misciting the law, most of their brief instead attempts to change the legal standards that apply to this case; the rest is devoted to a lengthy argument that several companies elsewhere in the world can build cryogenic tanks. Yet, substantial evidence shows that no company has restrained CBI from raising prices and margins in the United States, and thus, as a matter of law, CBI's illegal acquisition must be undone.

In TVCs, CBI is simply a monopolist. Whatever price competition CBI might have received from Howard, it quickly eliminated. As the customer, Mr. Neary said, "we're basically hosed." (Neary Tr. 1451) And since CBI insists that a divested company must be large, the public is entitled to a complete divestiture on the basis of this evidence alone. This Tribunal should take no comfort in Respondents' claim that it won't increase prices in TVCs "because it has voluntarily restricted itself to seeking no more than a four percent margin." (R. Brief at135, n.26) After raising prices and margins; after colluding on prices in LNGs and TVCs; and after taking out its closest competitor, the most CBI can offer in response is "Trust us we won't do it again." This isn't enough.

Throughout the trial, substantial evidence has made it abundantly clear that (i) Complaint Counsel has proven its *prima facie* case; (ii) Respondents fail to rebut that case with any showing that other competition is replacing PDM as a competitive force, profitably at pre-acquisition prices; and (iii) Complaint Counsel has offered undisputed evidence of anticompetitive effects that prove that no other competition can restrain CBI's anticompetitive behavior in the way PDM could. We

are well beyond the required proof of mere "incipiency" here, and thus an undoing of this illegal merger is mandated as a matter of law.

Respondents Cannot Show That Other Competition Is Likely To Compete At Pre-Merger Prices Profitably.

Under the law, once Complaint Counsel offers evidence of high concentration, it is then Respondents' "burden to rebut a *prima facie* case of illegality." *Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993); *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 51 (D. D.C. 2002) ("The FTC's *prima facie* case, which creates a presumption of anti-competitive effects, shifts the burden to the defendants to produce evidence to rebut that presumption."). Respondents' entry story, however, just doesn't work.

Respondents seem to believe, erroneously, that they need only prove that other competitors exist. They are wrong. Complaint Counsel knows that these so-called entrants have been building cryogenic tanks elsewhere in the world for many years. The existence of these companies cannot undo the effects caused by the elimination of PDM when they are not as cost-effective and hence, not as competitive as CBI is (and PDM was) in the United States. For decades, CBI and PDM, the only two low-cost, quality competitors, have dominated the U.S. market. All other companies are far off the mark in cost, price, and quality.

The law requires more than mere competition: Respondents must show that so-called competitors are likely to compete profitably at pre-acquisition prices. U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 3.0 (1992, rev'd 1997) (Entry must be "profitable" at "premerger prices" and "be sufficient to return market prices to their premerger levels"); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 58 (D. D.C. 1998) (Following *Guidelines*). The fact is that they cannot. For example, no companies besides PDM and CBI could compete

effectively in 1995 in Memphis for an LNG tank. [

] (CCFF 869, 872; RX 157 at [ ] *in camera*)

None could do so post-acquisition, when El Paso, [ ], CMS, and Poten & Partners all selected CBI. None can compete against CBI in TVC. Nothing has changed these facts since the acquisition – except that PDM is gone, and CBI is free to raise, and indeed has already raised, its margins and prices towards the price of the next lowest-cost competitor.

Almost every antitrust case in history includes evidence of some other competition. Even Microsoft faces competition from IBM and Apple. Coca-Cola Bottling had only a 54% market share after it bought the rights to distribute Dr. Pepper, and yet the Commission still ordered it to divest because there was "some evidence" of price increases "since the acquisition." *Coca Cola Bottling Co. of the Southwest,* 118 F.T.C. 452, 606-608 (1994).[1] Even if there were other competitors actually in the U.S. market, the deciding issues are that CBI bought its closest competitor, PDM, which is not likely to be replaced by an equally cost-effective and qualified competitor. Numerous recent cases from courts in the D.C. Circuit have used this economic principle to find liability.[2]

---

[1]*Cardinal Health,* 12 F. Supp. 2d 34 (Merger of four wholesalers enjoined even though there were 40-plus full-line pharmaceutical wholesalers in the United States); *FTC v. Staples, Inc.,* 970 F. Supp. 1066, 1079 (D.D.C. 1997) (Merger enjoined even though many other competitors sold office supplies besides Staples and Office Depot).

[2]*See, e.g., FTC v. H.J. Heinz Co.,* 246 F.3d 708, 725 (D.C. Cir. 2001) (By buying its closest competitor, Heinz would create a "durable duopoly" that "affords both the opportunity and incentive for both firms to coordinate to increase prices"); *FTC v. Swedish Match N.A. Inc.,* 131 F. Supp. 2d 151, 169 (D.D.C. 2000) ("A unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors..."); *Cardinal Health,* 12 F. Supp. 2d at 64-65 (By combining with its closest competitor to capture an 80% market share, defendants could "curb downward pricing pressure and adversely affect competition"); *Staples,* 970 F. Supp. at 1082 (By eliminating closest competitor, "this merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level."); *FTC v. Coca-Cola Co.,* 641 F. Supp. 1128, 1139 (D.D.C. 1986) ("The stark, unvarnished truth is that the Dr. Pepper brand has been a staunch effective competitor...that Coca-Cola Company has tried to stifle" and is "now seeking to buy"); *Merger*

Respondents failed to mention any of these cases – the most recent holdings from the courts in the D.C. Circuit that discuss the *Merger Guidelines*. Indeed Respondents fail to cite ***any*** Commission case after 1991, which would have used these *Guidelines*.

Since the acquisition and with competition eliminated, CBI is still the lowest cost provider. No one else comes close. As Mr. Glenn told his investors, "we can still be low bidder and make more money" than the competition and "win the work" at will, unless someone bids under cost. (Glenn, Tr. 4380-81; CX 1731 at 42, 44) The *Merger Guidelines* teach that a "merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller." *Merger Guidelines* § 2.21, n.21; *Heinz,* 246 F.3d at 717 (When two competitors competed for the lower price position, it is simply "an indisputable fact that the merger will eliminate competition between" them, and it would seem obvious that prices would rise).

Unlike Judge Henderson in *Heinz*, this Tribunal need not decide whether higher prices are likely to occur -- they have. One of the clearest examples is the history of prices at Cove Point. Prices and margins went down when CBI and PDM competed; they went up when CBI dropped out; they went up again when CBI bought the contract and eliminated PDM. CBI's prices then increased towards the next lowest competitor's price. The alleged new competition didn't restrain CBI one bit. For example, pre-acquisition, Whessoe's price was about 78-90% higher than CBI's. Since the acquisition, Whessoe' price is unchanged, but CBI's price has increased to a point where Whessoe's price is only 10% higher than CBI's. [ ] Thus, the uncontested facts prove that, CBI has now raised its prices and margins far above where they were pre-merger – and yet CBI's prices are still substantially lower than those of its alleged competition.

Guidelines n.21 ("A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller.").

Respondents have no proof that any competitor will replace PDM fully and drive prices back down in any market. In short, there simply is no ***sufficient*** entry – just the usual suspects that have competed ineffectively for decades. These so-called competitors have never impeded CBI in the past (unlike PDM), and there is no evidence that they will now.

Proof of Anticompetitive Effects "Cements" Complaint Counsel's Case.

Almost half of Complaint Counsel's closing was dedicated to anticompetitive effects, and yet Respondents' 173-page brief all but ignored this issue, offering a few unsupported paragraphs. Yet, Complaint Counsel's uncontested evidence of anticompetitive effects makes the remaining 171 pages of Respondents' brief irrelevant. That's because evidence of any "post-acquisition anticompetitive" conduct (*e.g.*, attempted collusion or higher prices) completely "cements" Complaint Counsel's case. Von Kalinowski, J., *Antitrust Law & Trade Regulation* (2d ed. 1996) (hereinafter "Von Kalinowski") at § 4.03[4] (Citation omitted); *United States v. General Dynamics Corp.*, 415 U.S. 486, 505 n.13 (1974) ("post merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit.").

Indeed, the sole purpose of using HHIs, entry, and experts is to predict whether anticompetitive effects may be likely. When there is evidence that such effects have occurred, no other analysis is needed. *Libbey*, 211 F. Supp. 2d at 49 ("'Proof of actual detrimental effects'" can "'obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects'"") (citations omitted); *FTC v. Toys "R" Us*, 221 F.3d 928, 937 (7th Cir. 2000); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) ("It is, of course, true that post-acquisition conduct may amount to a violation of § 7 even though there is no evidence to establish probability...").

Here, there is evidence of attempted or actual collusion as well as higher prices and margins. None of this evidence would exist if there were any genuine threat of entry at the same level as PDM. Thus, it is no surprise that CBI failed to offer any post-acquisition company documents even mentioning alleged entry as any kind of a threat. Nor did any CBI witnesses (*e.g.*, Lacy, Steimer, Miles, etc.) come in and counter any of the evidence of illegal conduct. *See UAW v. NRLB*, 459 F. 2d 1329, 1336 (D.C. Cir. 1972) (Failure to bring in documents and witnesses creates "the most natural inference, that the party fears to do so," and that the evidence "would have exposed facts unfavorable to the party.") (Citation omitted). Instead, CBI's true view is best summed up by Glenn's statement that the only change in competition is that CBI can now "win the work" whenever it wants. (Glenn, Tr. 4380; CX 1731 at 44) The bottom line is that, with PDM eliminated, no other competitor can stop CBI's quest for more profits at the expense of the customer.

This Tribunal Should Reject Respondents' Novel "Exiting Asset" Defense, Especially When They Cannot Satisfy Any Of Its Elements.

This Tribunal should refuse to follow Respondents' invitation to reject decades of U.S. Supreme Court and Commission precedent to create a new "exiting asset" defense, especially when the 1986 article Respondents rely upon proposes that at a minimum: (i) all the assets leave the market entirely; and (ii) no other alternative purchaser is available. Here, Respondents' unproven theory is that PDM would have liquidated by selling its assets to other competitors who would continue to build ongoing projects like Cove Point. Moreover, both Scheman and Byers – Respondents' only witnesses on this point admitted that they did not try to contact any other purchaser. There is simply no reason for this Tribunal ever to create new law.

Divestiture Is Required Under The Undisputed Facts Of This Case.

Finally, Respondents argue that this Tribunal should only consider divestiture as some kind of last resort. Respondents want to keep all the PDM assets and promise to teach others how to

compete better. No law supports their argument. Since this case began, Respondents have found no case where the Commission, or any court in an FTC case, declined to follow the mandate of Congress for some form of divestiture under Section 11(b) when a violation is found. Although it is conceptually possible that in some extreme case the Commission might find that no form of divestiture is possible, over many decades the Commission has not found such a case. (*See* Section V *infra.*) This case does not begin to rise to the level that would warrant any exception to clear Congressional intent.

In sum, the substantial evidence shows that CBI's acquisition of PDM may lessen competition and indeed already has done so. Thus, Complaint Counsel requests that this Tribunal, following Congress' mandate in Section 11(b) and established Commission precedent, order CBI to divest the assets it acquired from PDM, and take other steps necessary to reestablish PDM as a distinct and separate, viable and competing business in the relevant markets.

I. EXTRAORDINARILY HIGH CONCENTRATION IN THE RELEVANT MARKETS DEMONSTRATES THAT THE ACQUISITION MAY LESSEN COMPETITION SUBSTANTIALLY.

Respondents' brief, once again, does not challenge any of the market definitions at issue. Instead, they assert that proof of high market concentration alone does not satisfy a *prima facie* case. Not true. *Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's *prima facie* case that a merger is anti-competitive.") (Citation omitted).

Respondents also do not contest that the HHIs in this case are between 5,900 and 10,000. At best, they claim that by shortening the relevant time period and thus excluding one of the parties, the HHIs are at the maximum 10,000 in some of these markets. Their claim is that even if CBI bid and even won projects, it was not in the market because those projects were not built during the last couple of years before the merger. Respondents' theory makes no sense. Indeed, courts have

rejected this theory repeatedly. *E.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964) (Holding that "[u]nsuccessful bidders are no less competitors than the successful one" and ordering divestiture even though acquired company had not made any sales, but had only bid); *FTC v. Alliant Techsystems, Inc.*, 808 F. Supp. 9 (D.D.C. 1992) (Enjoining merger of competitors of ammunition for Abrams tank before sales ever took place); *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86 (E.D. N.Y. 1981) (Enjoining merger between defense contractors for attack aircraft even though one had not sold any products for years). Even under Respondents' theory, however, these HHIs, still prove "by a wide margin" the likelihood of anticompetitive effects. *Heinz,* 246 F.3d at 716 (pre-merger HHIs over 4,775); *Merger Guidelines* § 1.5 n.17. Indeed, it is a bit ridiculous for Respondents to say that foreign competitors, who never won any business here, are in the market, but that CBI, who competed and won projects, is not.

Respondents misstate the law when they say that Complaint Counsel has to show more than high concentration for its *prima* facie case. In the most recent pronouncement of the burdens of proof, ignored by Respondents, the D.C. Circuit plainly held that "[s]ufficiently large HHI figures establish the FTC's *prima facie* case that a merger is anti-competitive." *Heinz,* 246 F.3d at 716 (Citation omitted). Indeed, the very system of HHI analysis that Dr. Harris and Respondents criticize is exactly what the *Heinz* court used, and every court and agency have used since the *Merger Guidelines* have been published – even those that Respondents erroneously cite for this proposition. *See id.*, n. 9. Even the case they cite about the Guidelines not being "binding," *FTC v. PPG Indus. Inc.,* 798 F.2d 1500 (D.C. Cir. 1986) (Bork, J.), used the HHI method, holding: "There is no doubt that the pre-and post-acquisition HHI's and market shares found in this case entitle the Commission to some preliminary relief." *Id.* at 1503.

Respondents fail to mention that the very case they cite rejected Respondents' argument that high concentration does not satisfy the *prima facie* case. For example, *Baker Hughes* states the same rule as later enunciated in *Heinz*. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990) ("By showing that a transaction will lead to undue concentration,...the government establishes a presumption that the transaction will substantially lessen competition."). Because, Complaint Counsel shows post-acquisition HHI levels well above 1,800, the ***case is over*** unless Respondents "produce evidence" to rebut this legal presumption.

It is simply irresponsible for Respondents to argue that this case is "legally and factually similar" to *Baker Hughes* and thus should have the same outcome. (R. Brief at 14) As the Ninth Circuit pointed out to a defendant who tried to make this same argument, "[t]he clearest reason why *Baker Hughes* does not control" in this case "is that the Commission responded to the Company's rebuttal ...whereas in *Baker Hughes*, the government did not." *Olin*, 986 F. 2d at 1305.[3] None of the cases cited by Respondents, including *Baker Hughes*, hold that evidence of high concentration does not, by itself, establish a *prima facie* case.[4]

[3]Notably, in *Baker Hughes*, unlike the facts in this case, all competitors, including both of the merging parties were foreign companies that built the products overseas. *Baker Hughes*, 731 F. Supp. at 4. Moreover, there were already other competitors besides the defendants who had imported the products into the United States. *Id.* at 10. The court also held that the market shares were unrepresentative because these firms had traded competitive positions frequently over the years. *Id.* at 9. The Justice Department, however, never went beyond its *prima facie* case and offered no evidence of any anticompetitive effects. *Id.* at 12.

[4]Even the *Kraft* case, on which Respondents rely heavily, is to the contrary. There, the court used the *Merger Guidelines* expressly, found that the State of New York did show that the combined market share of only 14.52%, which had been declining, still reflected "significant antitrust concerns," but in light of the substantial evidence that the products at issue, Grape Nuts and Shredded Wheat, were not consumers' first or second choices and that the low market shares, which were declining, the State simply did not carry the day. *New York v. Kraft Gen. Foods*, 926 F. Supp. 321, 366 (S.D. N.Y. 1995). *Fruehauf Corp. v. FTC*, 603 F.2d 345 (2d Cir. 1979) is also inapposite. It involved a vertical merger (the parties did not compete) with resulting market shares of approximately 5.8% – hardly similar to this case. *Id.* at 355.

As pointed out in the Introduction above (at p.3, n.2), Respondents ignore the most recent D.C. Circuit cases on point as well as all the FTC precedent since the *Merger Guidelines*. Additionally, they miscite the few cases they can muster for their point. For example, they claim that "market share statistics are insufficient to void a merger." (R.Brief at 7, *citing U.S. v. Waste Mgmt. Inc.*, 743 F.2d 976, 982 (2d Cir. 1984). But the court in *Waste Management* held: "a post-merger market share of 48.8% is sufficient to establish *prima facie* illegality." *Id.* at 981.[5] *United States v. Syufy Enter., et al.*, 903 F.2d 659 (9th Cir. 1990) is no different. There, the court held that "[t]ime after time, we have recognized this basic fact of economic life: 'a high market share...may ordinarily raise an inference of monopoly power.'" *Id.* at 664.

Respondents then ask that this Tribunal simply ignore the statistics and rely instead on "commercial realities." (R.Brief at 8, *citing FTC v. Great Lakes Chemical Co.*, 528 F. Supp. 84 (N. D. Ill. (1981); *United States v. Calmar, Inc.*, 612 F. Supp. 1298, 1301 (D.N.J. 1985)). But the Respondents fail to mention that the court in *Great Lakes* decided that the "market share and concentration statistics" were "questionable," leading the court to determine, among other things that there was not any competitive "overlap" between the respondents' products. *Great Lakes* at 86, 92. As this was merely a preliminary injunction hearing, the court explained that if the FTC won at trial, "divestiture would be an effective ultimate remedy." *Id.* at 99. *Calmar,* another case cited by Respondents, held specifically that at 2,302 HHI, the "merger will result in a degree of concentration which establishes *prima facie* that it is likely to cause a substantial lessening of competition." *Calmar*, 612 F. Supp. at 1305 (Holding that defendants' evidence of entry rebutted the government's case). Finally, contrary to Respondents' position, *M.P.M.* held that "market statistics therefore

---

[5]The court then went on to find that the *prima facie* case has been rebutted only because entry was so easy in the garbage truck market where trucks from Ft. Worth could be easily driven to the Dallas market. *Waste Mgmt.*, 743 F.2d at 983.

present a *prima facie* violation of the Clayton Act" at which point the "burden then shifts to the defendants to demonstrate clearly that the merger portends no probability of substantial diminution of competition." *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 91-92 (D. Colo. 1975). Thus, ***none*** of these cases stand for the proposition offered by Respondents.

Here, the structural evidence of concentration is off the charts -- between 5,800 to 10,000 HHI. (*See* CC Post-Trial Brief, Section I). Respondents' own documents corroborate these conclusions.[6] For example, in early 2000, Mr. Scorsone estimated for the PDM Board that PDM and CBI ***each*** had a [ ] and Morse a [ ] market share in domestic cryogenic tanks for a total of [ ] market share for the combined CBI/PDM/Morse. (CX 660 at 3; Scorsone, Tr. 5179-5180). Mr. Scorsone also admitted that CBI was PDM's ***only*** competitor on domestic LNG, LPG and TVC projects. (Scorsone, Tr. 5183; CX 660 at 2, 5) There is no evidence to the contrary. Accordingly, the concentrations here are extraordinarily high.

Respondents claim that they would prefer a short time period that then excludes one of them from the market. Their basic principle is flawed, however, since they were in the market. But also the idea that one should use short time periods in this case when sales are so infrequent is against all established theory on this point and the facts in this case. For example, the ***Merger Guidelines***, established case law and economic theory teach that in markets "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." *Merger Guidelines* § 1.41; *see Baker Hughes*, 908 F.2d at 986 (criticizing the government's reliance on market data for only a three-year period where shares were

---

[6]The Commission, courts and the *Merger Guidelines* allow consideration of such pre-acquisition industry evidence. *E.g.*, *Merger Guidelines* §2.211, n.22 ("normal course of business documents from industry participants"); *In re Coca-Cola*, 117 F.T.C. 795, 945 (1994); *Heinz*, 246 F.3d at 717.

"volatile and shifting, and easily skewed"). Evidence that high market shares are sustained over many years is regularly used in antitrust cases to assess market power. *See Heinz*, 246 F.3d at 716; *Borden, Inc. v. FTC*, 674 F. 2d 498, 512 (6th Cir. 1982). Even Dr. Harris testified that he could see no reason not to go back to 1995 or any particular year for that matter. (Harris, Tr. 7228) He offered no alternate theory. Respondents' own documents list relevant projects that encompass the same time period Complaint Counsel proposes.

Nevertheless, Respondents still claim that CBI was not a competitor in the TVC market at the time of the acquisition, and so a shorter time period would yield no change in the market. This argument is wrong. ***First,*** CBI bid and then won a TVC project just six weeks before the merger, after promising to Spectrum Astro that it could rely on CBI as a "long-term supplier and partner" in the TVC business. (CX 1599 at 7). CBI had also bid on another TVC project just three years before and [

]

Second, the fact that CBI was a major force in bidding and even winning a recent bid demonstrates that they were a significant market participant and thus must be included in the market for merger analysis purposes. *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967) ("It is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market"); *El Paso Natural Gas*, 376 U.S. at 661 ("Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice"); *Merger Guidelines* § 1.41 n.15 ("Where all firms have, on a forward-looking basis, an equal likelihood of securing sales, the Guidelines indicate the agency will assign those firms equal shares."); William E. Kovacic, *Merger Policy in a Declining Defense Industry*, 36 Antitrust Bull. 543, 573-74 (1991) (Assigning share to bidders who have a likelihood of winning); *Alliant*

Techsystems, 808 F. Supp. at 24 (D.D.C. Nov. 23, 1992) (Enjoining merger of competitors of ammunition for Abrams tank before sales ever took place); *Grumman Corp.*, 527 F. Supp. at 106 (Enjoining merger between defense contractors for attack aircraft even though one had not sold any products for years).

Finally, this Tribunal should reject Respondents' one-sided argument that post-acquisition evidence is only useful to show pro-competitive behavior in the market, despite the U.S. Supreme Court having held that such evidence is pretty useless, except when it shows that the respondent actually did something, post-acquisition, that is anticompetitive. Indeed, the Court explained that "post merger evidence showing a lessening competition may constitute an 'incipiency' on which to base a divestiture suit." *General Dynamics*, 415 U.S. at 505, n.13; Von Kalinowski at § 4.03[4], *citing Lektro-Vend Corp. v. The Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981) ("[P]roof of post-acquisition anticompetitive effect cements the plaintiff's case.").

In sum, the acquisition has increased the concentration in each of the relevant markets to extreme HHI levels of [ ] to 10,000 – the level of "pure monopoly." *Merger Guidelines* § 1.5, n.17. When one compares these HHIs to recent decisions where the FTC has prevailed, it is apparent that Complaint Counsel's burden of proof has already been met overwhelmingly.[7]

II. RESPONDENTS FAILED TO REBUT THE PRESUMPTION OF ANTICOMPETITIVE EFFECTS.

Once Complaint Counsel has established a strong *prima facie* case through statistics, the burden shifts to Respondents to provide similarly strong evidence to rebut the presumption of anticompetitive effects. *General Dynamics*, 415 U.S. at 497-98; *Baker Hughes*, 908 F.2d at 991

[7] *See, e.g., Cardinal Health*, 12 F. Supp. 2d at 54 (D.D.C. 1998) (2,224 HHI); *Swedish Match*, 131 F. Supp. 2d at 167 (4,733 HHI); *Heinz*, 246 F.3d at 716 (5,285 HHI); *Libbey*, 211 F. Supp. 2d at 47 (5,251 premerger HHI).

("The more compelling the *prima facie* case, the more evidence the defendant must present to rebut it."); *Coca-Cola Bottling*, 118 F.T.C. at 586; *see* 4 P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law*, (rev. ed. 2000) (hereinafter "Areeda") at ¶ 941b ("Even relatively easy entry should not ordinarily be a defense to a merger creating a monopolist or dominant firm"). Respondents have no such evidence.

Contrary to Respondents' argument, all legal precedent places the burden of establishing entry upon Respondents. *See Olin*, 986 F. 2d at 1305 ("[I]t is Olin's burden to rebut a *prima facie* case of illegality."); *Cardinal Health*, 12 F. Supp. 2d at 54; *Staples*, 970 F. Supp. at 1083); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1264 (E.D.Pa. 1987) ("[T]he burden of proof would be on defendants."). *University Health*, the case Respondents cite, says the ***opposite*** of what they claim. (R.Brief at 12, *citing FTC v. University Health, Inc.*, 938 F.2d 1206, 1220 (11th Cir. 1992)). Indeed, the 11th Circuit explained that if the government shows high concentration, "a presumption of illegality arises," and it is then defendant's burden to "rebut this presumption." *Id.* at 1218.[8]

Respondents have offered several erroneous arguments in rebuttal: (i) efficiencies, (ii) ease of entry, (iii) a powerful buyer defense, and (iv) unique circumstances.[9] Respondents abandoned their efficiencies defense at the beginning of trial, and their other defenses fail.

First, the "powerful buyer" argument that Respondents argue is based on their unsupported argument that the customers are big, and thus they can keep CBI from raising prices. Respondents

---

[8]Nowhere did the court say that it was the government's burden to show an absence of entry or barriers to entry. In fact, when the government did so, as we did in this case, the court explained that this evidence was "added to its *prima facie* case," and that the FTC "bolstered this *prima facie* case with evidence" of barriers. *Id.* at 1219-20.

[9]Respondents also claim what they call an "exiting asset" defense, addressed in Section IV below.

did not actually cite any witnesses to prove this. Instead, their argument appears to be based on their notion that having large customers is enough. The Guidelines explains, however, that "[b]uyer size alone is not the determining characteristic," but that a defense may exist when large buyers tie up the market with "long-term contracting" so that collusion would be difficult. *Merger Guidelines* § 2.12. That scenario does not apply here. In any case, over the years, the "power buyer" defense has been given little weight and is generally insufficient to counter evidence of high concentration. *University Health*, 938 F.2d at 1213 n.13 ("[G]iven the FTC's strong showing that the proposed acquisition is likely to lessen competition substantially...we think that the existence of these sophisticated purchasers in the relevant market, which may inhibit collusion, is insufficient to overcome the FTC's case"); *see also Cardinal Health*, 12 F. Supp. 2d at 61 (Buyer power "alone cannot rebut the government's *prima facie* case."); *United States v. United Tote*, 768 F. Supp. 1064, 1085 (D.Del. 1991) (Rejecting defense because it left smaller buyers "unprotected"); *Alliant Techsystems*, 808 F. Supp. at 9, 24 (Granting preliminary injunction even though there was only one buyer – the United States military).

Another case not mentioned by Respondents is the most recent case in which the Commission considered and rejected this "power buyer" defense. In *Coca-Cola Bottling*, the Commission explained that the defense is meaningless unless most of the customers "facing an anticompetitive price increase could avail themselves of options other than paying the price increase and thereby force" the Respondents to lower their prices. 118 F.T.C. at 611 (1994) (Rejecting the defense). As there are no other ***lower*** price options for customers of LNG, LPG, or LIN/LOX tanks – and no options at all for customers of TVCs – this theory doesn't work at all here.

Yet even the example in *Baker Hughes* of "sophistication" of some buyers proves the point. There, the court found that the sophisticated buyers had competitive choices because they "typically

insist on receiving multiple, confidential bids for each order." *Baker Hughes* 908 F.2d at 986. Of course, in *Baker Hughes*, at least four companies competed, and two of the alleged entrants had already entered and ***sold*** products in the market. *Id.* at 988-989; 731 F. Supp. at 6. But those facts are not even close to those here. After the acquisition, the largest of all customers, [ ], El Paso, Poten & Partners, and CMS are dealing solely with CBI. Of these, [ ] and CMS looked at one other potential supplier, Whessoe, whose prices were much higher than CBI's. There is no chance that Whessoe, unlike one of the competitors in *Baker Hughes*, would become the number one supplier. 908 F.2d at 989 (top four competitors frequently switched relative positions in the market). Moreover here, CBI's price was at the same level as its Cove Point project, with its [ ] profit margin, which is nearly three times the margins achieved when PDM and CBI were competing. (*See* [ ] *infra*; CCFF 778-831).

There is no evidence that most of these companies have any idea that CBI is raising prices and margins. Nor could they, since PDM, the only other close comparison to CBI, is gone. Even those large customers who know that they are being "hosed," are still forced to deal with CBI: TRW, Boeing, Linde, and Memphis G&W are hardly small companies. Those companies that are small, like Spectrum Astro and Fairbanks are just out of luck altogether. Accordingly, there is no evidence that sophisticated buyers have prevented the anticompetitive effects of the merger.

Probably the best example of how a large customer is handling the lack of competition is CMS, which selected CBI as their LNG contractor. (Scorsone, Tr. 5074 *in camera*) Respondents, of course claim that CMS is sophisticated, but CMS's knowledge base is limited to CBI's high margin business at Cove Point and the even higher prices of Whessoe. CMS thought that the price of [ ] quoted by CBI for the 140,000-cubic meter, single containment tank, was within range of a competitive price. ([ ] *in camera*). CMS agreed to CBI's

LNG tank price only [

] *in camera*). Skanska/Whessoe quoted to CMS a price of approximately [ ], or about 10% higher than CBI's price. ([ ] *in camera*). Skanska/Whessoe's quote to CMS was essentially the same as Whessoe's earlier quote to [ ] for a 140,000 cubic meter, single containment LNG tank. (RX 157 at [ ] *in camera*); [ ] *in camera*). Thus, in comparison with CBI's high Cove Point price and the even higher price from Whessoe, CBI's price to CMS looked pretty good.

But CMS, of course, doesn't know that prior to the acquisition, CBI had quoted to [ ] a price of [ ] for basically the same kind of tank. (RX 157 at [ ] *in camera*). In fact, CBI's price to CMS for the tank is [ ] higher than the price CBI quoted for that size tank prior to the acquisition. [ ]. [ ] CBI is getting nearly three times the profit on [ ] job as it would have when PDM was competing. (*See* [ ] *in camera* (Using [ ] as a benchmark); [ ] *in camera*)(Profit margin on [ ] went from about [ ] with competition to over [ ] without). Thus, sophistication doesn't help if you can't see what the competitive price is because the only real competitor to CBI has been eliminated. That's why the companies who know they've been hosed ([ ] TRW, Linde, and Memphis G&W), are those who had pre-acquisition bids to compare with those, post-acquisition.

Second, Respondents also claim that this Tribunal should consider the "unique economic circumstances" of a "deteriorating" market post-acquisition. (R.Brief at 10-11) This argument makes little sense considering that CBI is making more money today than it ever has. (CX 1731 at 4, 28)

And Respondents offer no evidence to support this claim. The other argument about either PDM or CBI being weak doesn't match any facts in this case, since they were undisputedly the strongest competitors in the markets. (R.Brief at 11, *citing United States v. International Harvester Co.*, 564 F.2d 769, 776-79 (7th Cir. 1977)) But even *International Harvester* does not help Respondents, because the weakness there of the target company could only be solved by the merger to help both companies compete more strongly against existing competition. *Id.* That can hardly work in this case where there is no other serious competition to compete against CBI.

Respondents should have cited the ***only*** Commission opinions on point, which have rejected Respondents' interpretation of *International Harvester*. *Pillsbury Co.*, 93 F.T.C. 966, 1038-1039 (1979) ("[W]e conclude that if *International Harvester* reads *General Dynamics* to extend to a wide array of instances where 'financial weakness' constitutes a defense for otherwise clearly illegal mergers, we respectfully decline to follow it," declining to expand the "failing firm" defense).[10]

Finally, most of Respondents' brief covers their assertions of foreign "entry" – even though none of these have ever come close to winning any project against CBI in the United States. The further problem with their entry story, however, is that they fail to even address any of the three elements of the defense: entry must be (i) timely (within two years); (ii) likely to be "profitable at premerger prices"; and (iii) sufficient to "deter or counteract" the possible anticompetitive effects of the acquisition. *Merger Guidelines* §§ 3.1-3.4; *Coca-Cola*, 117 F.T.C. at 953 (Entry "must be able to restore competitive pricing – i.e., it must be effective in offsetting any loss of competition

---

[10]Respondents' citation at p. 24 to *FTC v. National Tea Co.*, 603 F.2d 694, 699-700 (8th Cir. 1979) for a "weak" company defense does not apply here. In that case, it was proven that the combined companies would only have a 14.2% market share, and thus any exit from the market by the target company would be picked up by the "vigorous competition" from other grocery stores, which would have actually made the market more concentrated. *Id.* at 701. Thus, the merger was no worse than that.

due to the business combination in question"). Yet, all that Respondents tried to prove was that Messrs. Glenn and Scorsone may think that foreign firms may enter the LNG market. *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 565-568 (1973) (Discounting defendant's testimony as to whether they would enter a market because "it is in the very nature of such evidence that in the usual case it is not worthy of credit"). But actions speak louder than words here: CBI's increased prices and margins, as well as their collusive conduct, are entirely inconsistent with fear of sufficient entry.

Again, Respondents miscite the law in an attempt to debunk the governing test for entry. Relying solely on *Baker Hughes*, Respondents claim that they do not have to show any evidence of the required three elements of entry.[11] It is no surprise that Respondents can cite ***Baker Hughes from 1990*** and show that it does not endorse precisely the views set forth in the ***1992 Merger Guidelines***! No kidding. Wouldn't it make more sense to cite the post-1992 cases – especially from the D.C. Circuit – that are on point and address the *Merger Guidelines* and appropriate merger analysis? That is precisely what we did, and Respondents failed to do.[12] And although Respondents deny that this is the standard now, their Pre-Trial Brief couldn't have said it better:

> "Ease of entry is established by evidence of timely, likely and sufficient entry. [Citing *Merger Guidelines* as not binding] 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.'

---

[11]Respondents also claim that "there have been no structural changes in the competitive landscape which facilitate the exercise of market power." (R.Brief at 130 (original in all caps)) But the acquisition combined the #1 and #2 dominant competitors in all the relevant markets. Respondents then claim that one couldn't possibly have coordinated effects when there is "competitive pricing from bidding" of "two to three" firms. (*Id.*) There is no such competition here. When CBI went to Howard Fabrication and proposed that they "coordinate on a bid," they obviously were not considering any other possible competition.

[12]It is not appropriate for Respondents to use an "ostrich-like tactic of pretending that potentially dispositive authority against [their] contention does not exist." *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304-05 (7th Cir.1988) (Citation omitted)).

United States v. Calmar, Inc., 612 F. Supp. 1298, 1301 (D.N.J. 1985)." R. Pre-Trial Brief at 9.

Moreover, one of the cases Respondents cite now for a different point, *Rebel Oil*, uses the *Merger Guidelines* to explain that "entry" must be "timely, likely, and sufficient," and that entry is not sufficient unless it can "take significant business away from" the defendant. *Rebel Oil Co., Inc. v. AtlanticRichfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995). Even more appropriate, however, is the precedent from the courts in the D.C. Circuit itself and the Commission in merger cases using this test. *Heinz*, 246 F.3d 715- 717 n.13; *Coca-Cola Bottling*, 118 F.T.C. at 586. Thus, the legal test is clear, and the facts do not begin to meet it.

A. The Alleged Entry Is Not "*Timely*" (Within Two Years).

Respondents claim that *Baker Hughes* has rejected the *Merger Guidelines'* requirement for timely entry (within two years), even though this requirement wasn't added to the 1992 *Merger Guidelines* until two years after that case in 1990. What *Baker Hughes* said was that the Department of Justice's argument for "quick" entry was undefined. 908 F.2d at 983. It is defined now, and courts and the Commission follow it expressly. *Merger Guidelines* § 3.2

There is no evidence that any of the so-called foreign entrants have won, or are likely to win, any bid for any relevant product in competition against CBI since the acquisition. It has already been over two years since the acquisition, and still there is no sufficient entry. Nor is there any proof that any sufficient entry is likely any time soon, since every project where CBI has shown any interest and that has been awarded, CBI has been selected. The only occasion where any foreign competitor may have a chance is the one project where CBI ***refused*** to bid, Dynegy, which tells us nothing about any entry's ability to restrain CBI's prices.

B. Entry Cannot Be *"Profitable at Pre-Merger Prices."*

Respondents' lengthy arguments that several competitors know how to build some of the relevant tanks miss the point entirely. The law requires that Respondents show that these competitors can compete profitably at pre-acquisition prices. The fact is that they cannot. They could not compete effectively when they tried in 1995 in Memphis for an LNG tank. They did not afterwards, when they were dropped from consideration by El Paso, [ ], and CMS, who all selected CBI. ATV's brief success in a few LIN/LOX projects proves only that ATV's final prices, including change orders, are higher than CBI's, and their quality of work is poor. Even ATV admits that it cannot compete on large projects and that its capacity is limited. And its building of a tiny LPG tank a few years ago shows only that they can build one tiny LPG tank in many decades and cannot do much more than that, as their President admits. In TVC, there is simply no evidence whatsoever of any entry or competition. CBI is a monopolist. (CCFF 221-226)

The evidence is undisputed that CBI and PDM were the low-cost and preferred suppliers in this industry. Foreign companies, with previous joint ventures, that tried to compete in 1995 in Memphis could not come within 20% of CBI and PDM's prices – and at least one of these competitors was already close to its cost. When a new LNG tank needed to be contracted for in Memphis, just last year, the customer ignored these companies and said that CBI was the only one qualified to do the work. [ ] reached the same conclusion. The high level of prices for other competitors is apparent in the LIN/LOX/LAR market as well. As discussed below, the main problem with CBI's argument is that only it and PDM were the low-cost producers with potential entrants like TKK and Whessoe pricing 20-50% higher than them. Thus, once CBI got PDM out of the way, it had enough room to improve its margins by raising prices without any real threat from these alleged entrants. (*Merger Guidelines*, n.21; CX 1721 at 42, 44-45; [ ] *infra*)

Indeed, Gerald Glenn, CEO of CBI, admitted that with the acquisition of PDM, CBI "now ha[s] unequaled capability in [its] chosen field." (Glenn, Tr. 4384; CX 1720). He also told his shareholders that CBI's costs were now lower than those of its competitors: "we can still be low bidder and make more money on it than most of our competitors, if not all of them." (Glenn Tr. 4381; CX 1731 at 42) The fact is that CBI can "win the work" whenever they want to, unless someone bids under their cost. (Glenn Tr. 4380; CX1731 at 44) PDM and CBI even discussed the fact that they had a "pricing advantage" that they could use to prevent any loss of market share. (CX1544 at 7941) Thus, no competitor will be successful in achieving profits at pre-merger prices -- instead, if they try to undercut CBI, as Mr. Glenn admitted, he'll just "watch them go out of business." (Glenn, Tr. 4380)

C. Entry Cannot Be *"Sufficient"* To Replace PDM.

There is simply no evidence that any of the supposed entrants can replace the competitive force that PDM was before. Indeed, CBI never expected that it would lose any of the market share it bought by buying PDM. (Glenn, Tr. 4252, 4259, 4315-16, 4321) So far, none of these foreign entrants have won any projects, and the only one that seems to be any possibility is Dynegy's LNG tank, for which CBI ***refused to bid***. Even that customer now has little choice and is concerned that it will have to pay a higher price than it would have if CBI had bid. (Price, Tr. 578, 622)

CBI's only other competition – though weak – is ATV for LIN/LOX, but it lacks capacity to replace PDM (Cutts, Tr. 2366, 2375; CX 460 at 7235; CX 1654) [

] (Kistenmacher, Tr. 862, 870; [

in camera; [ ] *in camera*) Recently, ATV did such a poor job on an [ ] job that the customer asked CBI to step in and do the project, but CBI refused.

(Scorsone, Tr. 5036) ATV's capacity is also so small that just recently it had to turn down two projects and could not get proper bonding for "larger jobs." (Cutts, Tr. 2366, 2375)

In case after case, the Commission and courts have found that potential expansion by smaller competitors like ATV was not sufficient to overcome the presumption of anticompetitive effects from mergers creating leading firms with large market shares. *Coca-Cola*, 117 F.T.C. at 960 ("If new entrants cannot sufficiently expand output to prevent existing producers from raising prices, their entry will not be sufficient..."); *Cardinal Health*, 12 F. Supp. 2d at 58 (The "absence of another national" competitor through "merger is too great a competitive loss – which the [smaller competitors] cannot sufficiently replace."); *Staples*, 970 F. Supp. at 1087-88 (Other less-dominant companies were not "likely to avert the anti-competitive effects resulting from Staples' acquisition of Office Depot."); *Swedish Match*, 131 F. Supp. 2d at 170 (D.D.C. 2000) (Effective expansion by smaller firms was "highly unlikely").

Despite the fact that well-settled case law clearly establishes Respondents' burden to rebut Complaint Counsel's *prima facie* case, Respondents nevertheless complain that it would be unfair to require them actually to demonstrate that entry would be sufficient to restore competition. (R.Brief, at 12-14). Respondents assert, rather, that if they can point to the presence of any firm and describe that firm as a "new entrant," that evidence will be sufficient to rebut the *prima facie* case, no matter how strong. (R.Brief at 9, 20). They are wrong. As the Court of Appeals explained in *Baker Hughes*, the ultimate issue is whether entry "would likely avert anticompetitive effects from [the] acquisition." *Baker Hughes*, 908 F.2d at 989. Contrary to Respondents' argument, therefore, the fact of entry does not, by itself, rebut a *prima facie* case.

Respondents must be able to demonstrate that competition from other firms will be sufficient to maintain the competition that PDM had provided against CBI. *See United States v. Franklin Elec.*

Co., Inc., 130 F. Supp. 2d 1025,1033-35 (W.D.Wisc. 2000) (rejecting defendants' assertions that the presence of newly established competitor, whose success was "highly uncertain," would maintain the competition that had existed prior to the acquisition);[13] *United Tote*, 768 F. Supp. at 1080-82 (actual entry insufficient to rebut *prima facie* case, unless it would "constrain anti-competitive price increases by incumbents.").[14] As the Commission explained in *Ekco Products Co.*, 65 F.T.C. 1163 (1964), *aff'd* 347 F.2d 745 (7th Cir. 1965):

> "A merger may violate Section 7 even though there do not appear to be formidable barriers to entry...; the existence of potential competition does not justify or excuse elimination of actual competition. In such a case, where the merger's effects on competition are those proscribed by Section 7, its illegality cannot be overcome by a showing of ease of entry. Section 7 would surely be violated in a case where all of the firms in an industry merged into one, even if the barriers to entry remained low.... A merger that has been proved to be so anticompetitive as to violate Section 7, even apart from difficulty of entry into the market, cannot be defended on a mere showing of absence of high entry barriers." *Ekco*, 65 F.T.C. at1208; *see also Reichhold Chemical Inc.*, 91 F.T.C. 246, 288 (1978)

Indeed, although Respondents rely heavily on *Baker Hughes*, it is striking that they do not cite to a single case which has applied Respondents' erroneous interpretation of *Baker Hughes* in the decade since that case was decided. The Courts and the Commission, before and since *Baker Hughes*, have recognized that the simple presence of other competitors cannot alone be sufficient

[13] In *Franklin Electric*, the defendants, the only two manufacturers in the U.S. of submersible turbine pumps, combined their operations. *Franklin Elec.* 130 F. Supp. 2d. at 1026. The defendants asserted entry and, like Respondents in this case, defendants claimed that historical lack of competition was not relevant. *Id.* at 1034. The court rejected this argument and held that the combination "should be viewed" as nothing "other than a merger to monopoly that by definition will have an anticompetitive effect." *Id.* at1035.

[14] *See* 2A P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law*, ¶ 420b (2002) ("In the case of mergers, by contrast, once high market concentration and a significant merger are shown, the defendant should bear the burden of persuading as well as that of introducing evidence that entry is sufficiently easy.... [D]oubt about ease of entry should be resolved against the defendant in order to carry out the prophylactic purpose of anti-merger law.").

to overcome the presumption of anticompetitive effects, unless those competitors are sufficiently capable of restoring the lost competition. As the District Court stated in *Cardinal Health*:

> "If the Defendants were to engage in anti-competitive practices after the mergers, these and other smaller distributors would certainly win more business away from the Defendants. However, ...this Court finds that the likely and timely expansion of entry into the market would not be sufficient to offset any post-merger pricing practices that would result from the lack of competition. ***The record developed at trial is not strong enough for this Court to conclude that the Defendants' claim of entry and expansion is sufficient to rebut the Government's prima facie case.***"

12 F. Supp. 2d at 58 (D.D.C. 1998) (emphasis added). *See Staples,* 970 F. Supp. at 1087-88 (Although other firms sold office supplies, they were not "likely [to] avert the anti-competitive effects resulting from Staples' acquisition of Office Depot."); *Swedish Match,* 131 F. Supp. 2d at 170 ("[D]efendants have been unable to substantiate their projections of [entry] by introducing any historical evidence to this effect. In fact, newly introduced...brands...have had marginal success at obtaining market share and at best a nominal effect on constraining the prices of existing brands of loose leaf."); *Coca-Cola*, 117 F.T.C. at 960 (Defendant must show that entrants can "sufficiently expand output to prevent existing producers from raising prices," otherwise "their entry will not be sufficient to prevent a cartel from raising prices.").

To rebut Complaint counsel's *prima facie* case, Respondents must establish that these companies would have the capability to compete as effectively against CBI as PDM had. *See Coca-Cola*, 117 F.T.C. at 953 ("To be 'sufficient' entry must be able to restore competitive pricing - - i.e., it must be effective in offsetting any loss of competition due to the business combination in question."). Since this merger created a "dominant firm," even "relatively easy entry" would not "ordinarily be a defense." Areeda at ¶ 911b.

In short, Respondents' denial of the relevant test -- timely, profitable at pre-merger prices, and sufficient -- as well as their lack of any evidence on these points lead to only one conclusion:

Respondents cannot rebut the *prima facie* case. Moreover, the evidence that there have been anticompetitive effects, such as price increases (*see* discussion in Section III *infra*), likewise proves that any supposed entry has been insufficient as a matter of law. Indeed, unlike PDM, the other firms that Respondents now rely upon to restore competition have major commercial disadvantages relative to CBI, including, variously, higher material and construction costs, lack of experience and track record, higher levels of constuction risk, and lower levels of quality and reliability. (*See* CCFF 291-419). All of these factors make it highly unlikely that the few marginal competitors, who do not have capabilities that PDM had, will be sufficient to maintain the level of competition and prevent a price increase by CBI in any of the relevant markets. *See Merger Guidelines*, § 3.4.

At best, Respondents provided some testimony from third parties that they believed there were "sufficient" competitors to maintain competition in some of the markets. *See, e.g.*, RFOF 3.381. However, given the lack of experience of Respondents' witnesses – particularly with respect to the history of competition between CBI and PDM – that testimony cannot be relied upon to establish that new competitors will replace PDM. For example, Respondents called Izzo, Eyerman and Carling, and not one of them had ever actually participated in a bidding process for any cryogenic tanks in the United States. Thus, as Izzo admitted, any view he might have as to the competitiveness of the prices of the foreign firms would be "speculation." (Izzo, Tr. 6526) In contrast, Complaint counsel presented several witnesses, all with experience in the purchase of the relevant products, who expressed concern that other companies could not restore the level of competition that had existed between CBI and PDM, and that the acquisition would reduce competition and lead to higher prices. (CCFF 710-728). Other witnesses that Respondents promised could testify on these issues never appeared at trial.

Rather than provide real evidence of entry, Respondents spend dozens of pages explaining that these foreign competitors can build tanks, which of course they have for decades. None have actually sold even one tank anywhere in the United States.[15] The couple of LPG tanks that were built by others, such as small tank by ATV and the Morse tank, built nearly a decade ago, have always been included in Complaint Counsel's statistics for the *prima facie* case. Obviously, one-time business in 1994 isn't "entry" today, particularly where the firm has exited through acquisition by CBI. The other small LIN/LOX tanks built by ATV at a higher cost and poorer quality than CBI does not establish ATV as a replacement for PDM. ATV has been here for years, and there is no chance that they will expand their small outfit to become a dominant player in any of the relevant product markets. (*See* CCFF 448-459).

Respondents also cite extensively to the testimony of their executives about their view of competition. (R.Brief, at 65-71, 96, 115-118). However, the evidence paints a different picture. For example, CBI's CEO, Glenn, [16] told his investors that CBI "can win" every job in the LNG market. (CCFF 769). That same level of confidence is also reflected in CBI's publicly filed SEC reports, where CBI detailed extensive competition before the acquisition and yet specifically omits any reference to any competitive pressures after it eliminated PDM as a competitor. (CCFF 753-760)

---

[15] In *Baker Hughes*, in contrast, it was quite clear that foreign companies could be effective competitors, since the merging parties were both based overseas, and the entrants had already sold products in the United States. *Baker Hughes*, 908 F.2d 981.

[16] Respondents' self-serving testimony is much less credible than their observations and course of conduct in the marketplace. *See Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*, 638 F. 2d 1255, 1269 (5th Cir. 1981) (statement of firm's intent "are probative, but may frequently be self-serving and, therefore, entitled to little weight"), *citing Falstaff Brewing Co.*, 410 U.S. at 565 (Marshall, J. concurring)). Justice Marshall reasoned in *Falstaff* that "it is in the very nature of such evidence that in the usual case it is not worthy of credit." *Falstaff*, 410 U.S. at 567-68. *Cf. Wsol v. Great North Asset Mgmt., Inc.*, 114 F. Supp. 2d 720, 725 (N.D. Il. 2000) (self-serving testimony describing business techniques "carries little weight").

As courts have regularly concluded, there is simply no reason that an interest of other firms in making sales is alone sufficient to restore competition and prevent CBI from exercising market power. *See Rebel Oil Company, Inc. v. Atlantic Richfield Co.*, 51 F. 3d 1421, 1440 (9th Cir. 1995) ("The fact that entry has occurred does not necessary preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power") (citations omitted). Rather, this Tribunal's inquiry must be focused on whether those firms will actually prevent an exercise of market power. *See Staples*, 970 F. Supp. at 1087-88; *Swedish Match*, 131 F. Supp. 2d at 170; *Coca-Cola*, 117 F.T.C. at 960 (Entrant must "be 'successful' in the sense of being profitable" and "sufficiently expand output to prevent existing producers from raising prices..."). The weight of evidence in this case establishes that other firms will not prevent, and indeed have not prevented, CBI from raising prices after eliminating PDM.

To make their points, Respondents misstate, overstate, understate and misapply the law. Specifically, Respondents attempt to mislead this court into believing that findings of barriers to entry in past cases apply to the case at hand and thus rebut a *prima facie* case.

For example, citing to *Baker Hughes*, Respondents state that, "Evidence regarding actual or potential entry rebuts a *prima facie* case." (R.Brief at p.9) This is not a accurate representation of what the court in *Baker Hughes* stated. The *Baker Hughes* decision clearly notes that, "If the totality of the defendant's evidence suggests that entry will be slow and ineffective, then the district court is unlikely to find the *prima facie* case rebutted." *Baker Hughes* 908 F.2d at 989.

Respondents also state that, "Other courts who have examined the definition of an entry barrier have found that experience, investment of time, and investment of money are generally not barriers to entry." Respondents cite *United States v. Gillette Co.*, 828 F. Supp 78, 85 (D.D.C 1993);

Int'l Distrib. Ctrs., Inc. v. Walsh Trucking, 812 F.2d 786, 792-93 (2d Cir. 1987) and *Heublein, Inc.*, 96 F.T.C. 385, 590-591 (1980) in support of their broad sweeping statement. (R.Brief at 9). Again, Respondents make a grotesque distortion of the holdings in those cases.

The court in *Gillette* stated that, "Although it may take a significant investment of time and money to build market share, the record demonstrates that there are new entrants into the fountain pen market which are able to check increases in price." *Gillette,* 828 F.Supp at 85. Respondents propose that this statement means that the investment of time and money are not barriers to entry under any set of facts. This is plainly incorrect. The *Gillette* court was specifically addressing the market for fountain pens, and not making a general holding for every market as Respondents assert. Furthermore, the court was not recognizing that any entry was sufficient to rebut a *prima facie* case, but only that from entrants "which are able to check increases in price." *Id.* at 85

In *Int'l Distrib. Ctrs.*, the court reviewed the market for carriage of garments on hangers in the Pennsylvania Corridor. A Justice Department report on entry into this segment of the trucking industry noted that, "these capital outlays, though relatively large for the trucking industry, still do not approach the entry costs into other industries." *Int'l Distrib. Ctrs,* 812 F.2d at 792. The court held, "Under the conditions in the market for the carriage of garments on hangers in the Pennsylvania Corridor, therefore, NRT's market share was not sufficiently significant to give rise to a dangerous probability that it would monopolize the market." *Id.* at 793.

Respondents also cite *Heublein* for the proposition that capital costs are not barriers to entry, but the Commission held no such thing. (R. Brief at 9, *citing* 96 F.T.C. 385 (1980)). Instead, the Commission found that "any 'capital cost' advantage was highly unlikely to have existed." *Heublein,* 96 F.T.C. at 594. Thus, none of these cases support Respondents' proposition.

Respondents assert that "location disadvantages and business management competence are not barriers to entry because they can be overcome over time." (R.Brief at 10). In support of Respondents' broad statement, Respondents cite *U.S. v. Waste Mgmt. Inc.*, 743 F.2d 976, 983 (2d Cir. 1984); and *Advo, Inc. v Philadelphia Newspapers, Inc.*, 854 F. Supp. 367, 375 (E.D. Pa. 1994). Neither case supports such a broad assertion. Again, Respondents attempt to mislead this Tribunal into believing that because location disadvantages were found not to be barriers to entry in one case, they are therefore, not barriers to entry in any case. A review of the case reveals that this simply is not what the courts in *Waste Mgmt.* and *Philadelphia Newspapers* intended.

In *Waste Mgmt.*, the court found that a person "wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself, and operate out of his home." *Waste Mgmt.*, at 982. The court's finding of easy entry was specific to the trash collection business, not to every market. In *Philadelphia Newspapers,* 854 F.Supp at 375, the district court recognized that, "Entry into the Advertising Circulars market is comparatively easy.... Little initial capital is required relative to many other businesses." *Id.* at 375. Again, the court was not making general conclusions about entry into every market. In fact, the appellate decision (to which Respondents failed to cite) makes this abundantly clear: "the importance of know-how can be determined only in the context of a particular business." *Advo, Inc. v Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1201-1202 (3rd Cir. 1995). The court explained: "While we do not question the judgment of other courts of appeals that in *other market contexts* reputation is a significant barrier to entry, Advo has failed to create a genuine issue over the existence of barriers to entry in this case." *Id.* at 1202 (emphasis in original).[17]

---

[17]Respondents' citation to *McGahee v. N. Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988) also does not stand for the proposition they claim, and it was a case brought under the Robinson-Patman Act.

D. None Of Respondents' Claimed Entrants Are Sufficient To Restore Pre-Acquisition Prices At Profitable Levels.

Another reason why these alleged foreign entrants are not likely to have much of an impact, if any, is that there are significant barriers to entry. As set forth in Complaint Counsel's Post-Trial Brief, there is substantial evidence of barriers to entry here. The most important one is that CBI has lower costs than any other supplier, except for the former PDM, which it bought. (Glenn, Tr. 4381, 84; CX 1720; CX 1731 at 42). The fact is that CBI can "win the work" whenever they want to, unless someone bids under their cost. (Glenn, Tr. 4380; CX 1731 at 44). PDM and CBI even discussed the fact that they had a "pricing advantage" that they could use to prevent any loss of market share. (CX 1544 at 7941). In sum, these barriers to entry make it unlikely that any potential competitor, or even a long-time small competitor in the U.S., such as ATV, will be able to replace PDM as a competitive force, by filling the capacity that PDM had or by being profitable at pre-merger prices at a level that controls CBI's ability to raise prices.

E. Respondents' Claims Of Entry Are Insufficient As A Matter Of Law.

1. There Is No Entry In TVCs.

Respondents have no valid defense in the TVC market, and thus this Tribunal should find in favor of Complaint Counsel on this basis alone. Rather than try to show even a chance of entry, Respondents assert that the court should ignore this market, which involves TVCs between $10-30 million, because it is in their view, too small. ***First***, as a matter of law, this argument is unfounded. (R.Brief at 11) There is no *de minimis* exception to the antitrust laws. Respondents' proposed exception to Section 7, is simply not found in the statute, and is inconsistent with the very purpose of Section 7. As Areeda's leading treatise explains: "Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets." Areeda at ¶ 903a. Indeed, courts have condemned mergers (from grocery store acquisitions to funeral homes) with small effects

on the economy and even when no sales had yet occurred. *See, e.g., Grumman Corp. v. The LTV Corp.*, 665 F.2d 10 (2d. Cir.1981) (Court enjoined merger even though target company was not currently selling any of the products); *FTC v. Food Town Stores*, 539 F.2d 1339, 1345 (4th Cir.1976) (Enjoined small supermarket merger, even though overlaps were "de minimis" -- "[t]he fact that the markets in which the firms compete may be small is irrelevant under the Clayton Act and does not affect the legality of the merger."); *Service Corp. Intern.*, 65 FR 35643 (FTC consent ordering divestiture of a funeral home); *Alliant Techsystems*, 808 F.Supp. 9 (D.D.C. 1992) (Enjoining $700,000 merger of competitors of ammunition for Abrams tank before sales ever took place).

Nor is the TVC market insignificant to the economy and defense of the United States. A strategic plan drafted by CBI in 1999 described demand as growing in "the commercial satellite market" and in "military and NASA programs" which drive TVC sales. (CX 1196 at PDM-HOU011519) ("good market for thermal vacuum and test facilities for the next 5 years"). NASA programs likely to generate demand for new TVCs include the Space Station and the "Next Generation Space Telescope," which will be several times larger than the Hubble telescope. (CX 212 at CBI-PL031717). Engineering work on this new telescope has already started and prime contractors are preparing proposal specifications. *Id.* Additionally, NASA has plans for extensive satellite developments that will require new test facilities. (*Id.* at 1716).

At trial, Mr. Gill of Howard Fabrication testified that "[t]here is a growing market for large, thermal vacuum chambers now." (Gill, Tr. 185). "[T]he Department of Defense is allotting large amounts of money to major aerospace companies for systems that are going to be required by the military in the future." (Gill, Tr. 212). For example, TRW, a defense contractor, plans to procure a large, field-erected thermal vacuum chamber in the next several years for the NPOAS program. (Neary, Tr. 1425, 1474). TRW began its procurement process for this TVC in 1999 by obtaining

ROM pricing from CBI and PDM. TRW plans to award the contract for this TVC in late 2003 and begin building it in 2004. (Neary, Tr. 1431, 1471-73, 1501). This bidding process is ongoing, and CBI has already attempted to collude with the only other bidder on that project, which by itself warrants a finding against CBI here.

Respondents argue that "CBI is not a player in the TVC market." Not true. For example, In August 1998, CBI informed Orbital Sciences: "The CBI - XL team has the strongest experience, both long term and current, of any large thermal vacuum supplier." (CX 1220 at CBI-PL013372). CBI's business and strategic documents refer to PDM as CBI's "only competitor" for TVC projects. (CX 212 at CBI-PL031721; *see also* CX 264 at CBI-H006780 ("only real competitor"); CX 265 at CBI-H007057 ("single USA competitor"). [

] *in camera*; *see also* CX 212 at CBI-PL031721 (PDM's strategic alliance was "the only competition for the thermal vacuum systems market")), and "our major competition if new work emerges" in TVCs. (CX 1040 at PDM-HOU 010889).

Not only has CBI definitely been a player in the TVC market, its presence had a considerable impact on prices. Mr. Scully, who was employed by CBI at the time of the merger, testified that since CBI "came back into the market there was a tendency for the pricing [of TVCs] to go down because of [CBI's] desire to get back into the market." (Scully, Tr. 1176). In 2000, a CBI e-mail from David Lacey, the head sales representative for TVCs, described customers' perceptions that CBI and PDM [ ], *in camera*). The same

e-mail recites the need to [ ] (*Id.*; *see also* Gill, Tr. 212, 213 (CBI and PDM competition lowered prices to customers).[18]

In short, CBI and PDM competed aggressively for the TVC business in the past. Now, that PDM is gone, CBI has increased dramatically the prices it quotes to customers. (CCFF 1207-1215). And it has asked the only bidder on a TVC project to collude on a current bid. (CCFF 1165-1180). There is no defense for Respondents here, and thus this Tribunal should grant the proposed remedy in this case based on the lessening of competition in this market alone. *See Ekco*, 65 F.T.C. at 1229 (Ordering reconstitution of product line for divestiture); *Olin Corporation*, 113 F.T.C. 400, 620-624 (1990) (Ordering divestiture of small product line, as well as another product line that was not at issue, so that divested company could fully compete).

2. Respondents Have No Proof Of Entry In LNG.

Most of Respondents' post trial brief is dedicated to attempting to depict an LNG tank market that is just filled with new entry. Respondents' main thrust is that other companies and consortiums such as Skanska/Whessoe, Technigaz/Zachry and TKK/ATV are big, qualified, and have past experience in building tanks. (R.Brief at 21- 41). However, this type of evidence, *no matter how many times they state it*, falls far short of the mark. Complaint Counsel has never taken the position that these companies do not have the capability to construct LNG tanks. What is lacking is a showing that these companies can and would compete profitably at pre-merger price.

---

[18]Inexplicably, CBI denied having made a TVC mailbox chamber in the past. This is misleading. They made a mailbox-shaped chamber, and they boasted about their ability to make it. In August 1998, CBI informed Orbital Sciences: "CBI built a mailbox-shaped vacuum chamber for Grumman Aerospace in Bethpage Long Island which included a complete gaseous nitrogen shroud similar to Orbital's baseline requirement." (CX 1220 at CBI-PL013372). Moreover, CBI told TRW that it could build the large, mailbox-shaped TVC which TRW plans to construct beginning in 2004. (Neary, Tr. 1452, 1500-01).

None of them have ever sold or even come close to selling an LNG tank in competition with CBI. Thus, there is no entry, much less timely entry (within two years). Moreover, the evidence is undisputed that these foreign tank suppliers' prices are far above the pre-acquisition competitive prices of CBI and PDM. Thus, "entry" by these companies, if it ever happened, could not possibly be profitable at pre-merger prices to force prices down to pre-merger levels.

For example, Respondents claim that Skanska/Whessoe entered the LNG market. Not true. Respondents state that for Dynegy,"Skanska beat" CBI. (R.Brief at 21) This simply is not true. Skanska did not beat CBI at anything, nor has it ever been awarded any job to build an LNG tank in the United States. CBI ***refused*** to bid on the EPC portion of the project. (Glenn, Tr. 4242; Puckett, Tr. 4563; CX 139 at CBI 019781-HOU). No company has won any bid for an LNG tank at Dynegy, and if Whessoe is lucky enough to win it, it will not be because its price is lower than CBI's. CBI refused to bid. And from the evidence depicted on [ ] (*supra* at p. 3), it is undisputed that Whessoe's prices are far above anything that CBI has bid for LNG tanks. Respondents ignore the fact that Dynegy wanted "competitive bidding" to give them the lowest prices. (CX 139 at CBI 019777-HOU). Yet, with CBI refusing to bid, the customer is concerned the cost of the tanks will be higher than they would have been with CBI and PDM bidding. (Price, Tr. 622; 590 (Foreign competitors prices are higher than CBI's). They are right. (*See* [ ])

Respondents' claim that Dynegy was "satisfied with prices received by foreign competitors" is absolutely untrue. (R.Brief at 72) The customer was asked a different question: "At this time in the process, speaking for Dynegy, you are satisfied with those bids." *Id.* And when CBI refused to bid, Dynegy was "very concerned" about "maintaining competition" for the LNG tank. (Price, Tr. 609). Dynegy even attempted to persuade CBI to rethink its position, but CBI never offered a bid of any kind. (CX 518 at CBI 019777-HOU). Dynegy did not want to change the bidding rules, as

demanded by CBI, only because "it was so late in the bidding cycle...that [Dynegy] did not feel it would be fair to the other bidders." (Puckett, Tr. 4572). In the end, the customer was concerned that its prices would be higher without any bid from CBI or PDM. (Price, Tr. 578, 622).

Respondents attempt to further support their assertion that Skanska/Whessoe has *entered* the U.S. LNG tank market by citing to evidence that Skanska/Whessoe has provided "preliminary information" to Yankee Gas, "called on Freeport LNG" and "provided budgetary pricing" to CMS. This is hardly evidence of entry which will constrain an increase in price by CBI. Indeed, as [

] testimony shows, Whessoe was so far above CBI that they weren't being seriously considered, and as [ ] shows, that was after CBI raised its price levels significantly after the merger. Providing information to Freeport proves nothing, since the customer had no experience in any pre-merger prices in the United States to match it against. (Eyerman, Tr. 7030). Thus, there is no proof that Skanska/Whessoe will enter the market with two years, profitably at pre-merger prices, and sufficiently to drive prices back to pre-merger levels.

Respondents' story about TKK/ATV is even more tenuous. (R.Brief at 28) TKK/ATV has never come close to winning any bid for any LNG tank in the United States. The supposed tank builder in the consortium, AT&V, ***has never built an LNG tank of any kind.*** (Cutts, Tr. 2393-94, emphasis supplied). Indeed, ATV has such a shortage of capacity and size that it cannot compete on large jobs and recently had to turn two tank jobs down. (Cutts, Tr. 2366, 2375) It is impossible to believe that this unsuccessful tandem will become a dominant player, replacing PDM.

Technigaz/Zachry cannot do it either. Respondents point to Dynegy as an example of Technigaz' entry, but they were eliminated from contention early in the process. (R.Brief at 37). There is simply no evidence that this group can be a replacement for PDM when it admittedly cannot even [ ]

in camera); *See Franklin Elec. Co.*, 130 F. Supp. 2d at 1033-35 (Rejecting defendants' assertions that a newly established competitor, whose success was "highly uncertain," would maintain the competition that had existed prior to the acquisition); *United Tote*, 768 F. Supp. at 1080-82 (Because success of entry remained uncertain, such entry "would not constrain anti-competitive price increases by incumbents."). What is also telling is that Technigaz would [

] *in camera*) It knows what will happen if PDM comes back – prices will go down.

In addition, Jolly testified that Technigaz/Zachry [ ] (Jolly, Tr. 4721-2). [

] (Jolly, Tr. 4713, 4721-2, [ ], *in camera*). Jolly further states that CBI would have a cost advantage in the United States because they possess a fabrication facility. (Jolly, Tr. 4715). Jolly acknowledges that [

] *in camera*, RX 738 at FTC001537 (Jolly, Dec.) *in camera*). Mr. Jolly goes on to say, ["

"] (RX 738 at FTC 001535 (Jolly, Dec.) *in camera*, emphasis supplied). Fahel, from Zachry, agreed and testified that [

], *in camera*) And the only time Technigaz/Zachry have [

] *in camera*) They felt [

] *in camera*) Thus, to claim that Technigaz has now replaced PDM in any way is baseless.

Other so-called entrants, such as Daewoo or Tractebel, IHI or MHI surely build tanks elsewhere in the world, but there is absolutely no evidence that they will enter the United States LNG market in a timely fashion (indeed, they already have missed the two-year window) with prices that are profitable and sufficient to drive prices down to pre-merger levels.

In short, Respondents' LNG story is that there are foreign firms that may be interested in competing here, and since they can make tanks in Korea, Trinidad, or Africa, this Tribunal should ignore CBI's acquired dominance, where, as their CEO stated, CBI can "win" these projects any time they want. Their arguments for low entry are mostly recitations of these companies' ability to build tanks. No evidence offered by Respondents deals with the economic issue of whether the foreign firms can compete profitably at pre-merger prices – the key issue here. Without such an ability, they will simply compete at CBI's higher price level, which harms customers.

One of Respondents' most transparent claims is that "Double and full-containment tanks...are the wave of the future," and as such CBI has no competitive advantage. (R.Brief at 47). Respondents omit the fact that PDM is the only company that ever built a double or full containment LNG tank anywhere in the United States since 1971. (Scorsone, Tr. 4831, 4920; CX 125 at PDM-HOU 2017164) Moreover, Respondents mischaracterize the extent to which LNG customers "see a trend toward double and full containment tanks in the United States." Respondents cite Messrs. Izzo and Cutts, neither of whom have ever been involved in the construction of an LNG tank in the United States, and, in the case of Mr. Cutts, has not been involved in the construction of an LNG tank anywhere. (Izzo, Tr. 6513-14; Cutts, Tr. 2393-94). Mr. Izzo testified that Calpine has not decided what type of containment system it will build, and if FERC authorizes the construction of

a single containment LNG tank, Calpine will not build a double or full containment tank. (Izzo, Tr. 6522-23). Mr. Cutts testified that for "smaller applications," customers will continue to build single containment tanks, and for larger applications, Mr. Cutts does not "really" know because he does not "understand the FERC regulations," has not been a "party to any first hand meetings with FERC regulators associated with permitting LNG tanks," and has not been told by anyone at FERC that requirements for LNG tanks are going to change in the future. (Cutts, Tr. 2394, 2498-99).

Furthermore, a look at the projects being built confirms, there is no "trend" toward double or full containment tanks in the United States. CBI is in the process of constructing a single-containment tank at Cove Point, Maryland. CMS Energy chose a single containment tank for the expansion of its LNG import terminal at Lake Charles, Louisiana. (J. Kelly, Tr. 6260, 6271). Southern Natural Gas, an affiliate of El Paso, is planning on building a single containment LNG tank at Elba Island, Georgia. (Bryngelson, Tr. 6214). Memphis Light Gas & Water will likely build a single containment tank when it expands its current facility. (Hall, Tr. 1831, 1842).

Ultimately, from Mr. Glenn's perspective, it does not matter whether the "trend" is for single, double or full containment tanks. If CBI really had a fear that any such trend would cause significant foreign entry and thus damage CBI's business, one would expect that he would tell his investors so when they ask him specifically what changes there are in the market. His response to that precise question was, CBI "can win the work every time technically." (CX 1731 at 44-45). Respondents produced no records of any kind from CBI showing that its market position has somehow changed due to some alleged trend towards double or full containment tanks or that there is any real entry in the LNG business. Thus, it should be assumed that these alleged fears are simply exaggerated for litigation purposes. *See UAW v. NRLB*, 459 F. 2d at 1336 (Inference against party who fails to produce evidence on a point).

Respondents' own documents and admissions support the fact of barriers, as detailed in Complaint Counsel's Post-Trial Brief at 22-26. For example, contrary to Respondents' claims, Mr. Glenn does not tell his investors that reputation, welding and engineering capability are not barriers. Much to the opposite, Glenn assures his investors that it is these very things that will ensure CBI's future profitability. In an investors conference call on October 31, 2002, Glenn addressed the competitive landscape and clearly indicated that not only do these barriers exist, but that CBI relies on these barriers to give them a competitive edge. Glenn told his investors that, particularly on "LNG project[s]" CBI has a better "track record" than other competitors who may have "shoddy welding" or do a "second-class job." (CX 1731 at 44-45); *see* other testimony on this point Cutts, Tr. 2379-80; Kistenmacher, Tr. 881-82; Fahel, Tr. 1628-29, *in camera*); CCFF 326. Moreover, contrary to Respondents' claims, Glenn admits that an LNG project or LNG tank is "very specialized, very sophisticated" work CBI does. (CX 1731 at 44-45) The plan was to "create barriers to entry" and charge premiums, i.e. raise prices (CX 101).

Since Respondents could not actually find any entry in the United States, they claim that one could look at the Trinidad bid contest off the coast of Venezuela to "provide[] a natural experiment that *sheds light* on whether such barriers actually exist." (R.Brief at 59) This makes no sense for many reasons. ***First***, Eyerman stated the obvious when he explained that one cannot compare foreign tank projects to those in the United States. (Eyerman, Tr. 7071). ***Second***, Whessoe built the first two out of the four tanks years ago, which begs the question why that shouldn't indicate that Whessoe could have won a bid in the United States? We know the answer to that because it did bid on the Memphis project at almost the same time and was almost 50% higher than CBI. ***Finally***, TKK may have won (there was no actual evidence that anyone won, just "state of mind testimony") simply because CBI raised its price, increasing it charges for material and other costs in addition to

a [ ] price increase for margin alone. (JX 11 at ¶ 2). We do not know if TKK was profitable at all. Thus, the simple fact that TKK may have won a bid recently in Trinidad after CBI bid up its price doesn't tell us whether TKK or Whessoe could compete profitably in the United States at pre-acquisition prices, when they never could before and haven't since.

The only other so-called evidence of entry proffered by Respondents "that new entry will constrain CBI's pricing" is the testimony of Glenn and Scorsone that they read a couple of press releases and thus have decided that there may be entry in the LNG market. (R.Brief at 64) This unsupported testimony, offered solely for "state of mind" should be afforded little or no weight. *Falstaff Brewing*, 410 U.S. at 564-565. Moreover, their self interested testimony is not corroborated by any internal documents at all. Respondents could not present a single sales presentation, strategic planning document, or even an e-mail which remotely discusses this supposed threat to CBI. This is in stark contrast to the numerous pre-merger business records in which CBI fretted that PDM "is eating our lunch" (CX 243 at CBI-PL 4004707) and that PDM loomed over CBI as its "main" competitor (CX 163 at CBI-PL006679). If these foreign companies threatened CBI as much as Respondents contend, one would expect a flurry of similar e-mails, presentations and memos articulating the nature of the threat and proposed countermeasures that CBI should undertake. Thus, an inference should be drawn that such evidence exists against Respondents' position.

Indeed, the public statements made by Gerald Glenn completely contradict his testimony to this Tribunal regarding CBI's "fear of new competitors." CBI has won every LNG project for which it made any offer since the acquisition. Yet, it hasn't had to lower its prices. Indeed, its prices and margins are going up dramatically. ([ ]; CX 1576 at 1; *compare to* CX 1628 at 23). When asked specifically how the competition had changed "over the last five to ten years," Mr. Glenn answered as follows:

"There are some [competitors] that have run on hard times. There are those that have stubbed their toe. You know, you're only as good as your last job. And we're really proud of the fact that, you know, **a lot of owners out there, if they go to build a sophisticated project, like an LNG project or an LNG tank, they don't want to take a chance on a low price and a potential second class job or shoddy welding or any of that kind of stuff.** The kind of work that we do is very specialized, very sophisticated. We have an excellent track record.

And we think that, short of somebody coming in, which they do, and just taking a big dive on the price, that **we can win the work every time** technically. And if they want to dive in and take the work for less than they can execute it for, that's fine, **we'll just sit and watch them go out of business, too.**" (CX 1731 at 44-45) (emphasis supplied).

When asked about CBI's higher margins, Mr. Glenn responded as follows:

"**The margin levels are high**.... [W]e're trying to focus more of our energy, more of our efforts, more of our resources on the higher margin work... And that's work that we – you know, we have to compete in some manner with others and because of our concentration on lowering our costs and keeping our costs down, **we can still be low bidder and make more money on it than most of our competitors, if not all of them.**" (CX 1731 at 41-42) (emphasis supplied).

When asked about CBI's prospects going forward, Mr. Glenn answered as follows:

"With this report, CBI has exceeded many of our previous records... The results speak for themselves, so I will only comment that **our markets and prospects appear more attractive to us today than at any time in our recent past. ... than at any time since the IPO** [in 1997]." (CX 1731 at 4, 28 (emphasis supplied)

See also CX 1735 at CBI 004168-HOU (new business taken has risen dramatically since 2001); Scorsone, Tr. 5302, *in camera*).

In short, the admissions of Respondents together with uncontroverted evidence of increased prices and margins proves that there is no entry of any significance here. But talk is cheap. The bidding at CMS, raised by Respondents in their brief, tells what really happened when CBI eliminated its closest competitor, PDM. (The comparisons are reflected on [ ], *infra* at p.3)

[

], *in camera*). Skanska/Whessoe quoted to [ ] a price of approximately $39 million to $40 million, or about 10% higher than CBI's price. ([ ] *in camera*). Skanska/Whessoe's quote to [ ] was essentially the same as Whessoe's earlier quote to [ ] for a 140,000 cubic meter single containment LNG tank. (RX 157 at [ ] *in camera*). After reviewing the Skanska/Whessoe budgetary quote, [

], *in camera*). CMS did not know that prior to the acquisition, CBI had quoted to [ ] for a 140,000-cubic meter single containment LNG tank. (RX 157 at [ ] *in camera*). In fact, CBI's price to CMS for the tank is [ ] higher than the price CBI quoted for that size tank prior to the acquisition. ([

]); *see* [ ].

Moreover, when CMS accepted CBI's [ ], CMS [

]. ([ ], *in camera*). CMS observed, [

] ([ ], *in camera*). CMS was unaware that the Cove Point price of [

] gave CBI over a [ ] profit margin, nearly three times higher than the pre-acquisition margin when CBI and PDM competed. (Scorsone, Tr. 5333-34 *in camera*).[19]

[19]Respondents' comment about Elba Island omits any evidence that any other company is actually competing for that job. Thus, it has no relevance.

In sum, CBI's prices and margins in LNG tanks are going up. No actual, perceived or phantom entry is keeping them down to pre-merger levels. Thus, Respondents' entire LNG entry story is untenable as a matter of law.

3. There Is No New Entry Into the Market For LPG Tanks.

Respondents claim that "actual entry has already occurred in the LPG market, and more is foreseeable." (R.Brief at 89) This statement is simply outrageous. There has been *absolutely no new entry* into the market. The two examples raised by Respondents are a small tank, built by Morse (now owned by CBI), nearly a decade ago, an a very small tank built in 2000 by ATV. Neither has even bid on, much less built one since. Moreover, since ATV is the only one left, it can hardly be qualified to replace PDM and keep prices at pre-merger levels.

Respondents state, "AT&V has recently entered the market for LPG tanks." (R.Brief at 89) and direct this court to projects built by ATV 1994 (CX 397 *in camera*). Why Respondents claim this is relevant while they tell this Tribunal to disregard all evidence prior to 1999 is baffling. Additionally, the project constructed in 1994 is *not a tank*. The very document Respondents cite to illustrates that the 1994 project was a sphere, which is not in the relevant product market. ATV's first LPG tank project was for [ ] *in camera*). The projects value was only [ ], less than 1/5 the value of the next largest tank built from 1990-2001. (CCFF 172). As discussed *infra*, it is only on these much smaller tanks that ATV believes it can be competitive on.

In addition to falsely claiming ATV had built an LPG tank in 1994, Respondents claim that ATV has beat CBI on past projects because "it had the best price." (R.Brief at 90) Respondents also offer evidence that ATV has an "excellent reputation." (*Id.* at 91) However, a review of the evidence reveals these assertions are not accurate.

Despite their assertion to this tribunal that ATV has an "excellent reputation," the evidence at trial indicates otherwise. For example, Respondents' cast a negative image of AT&V in their profile of competitors. A PDM "Competitor Profile" states that AT&V's "quality" and "safety" are "poor." (CX 86 at PDM-CH 002617). Another PDM document notes that on past projects, AT&V "performed poorly in terms of supplying a quality tank or sphere and has not met customer safety standards. Kellogg and Bechtel threw AT&V off projects due to poor quality or poor safety practices. Moreover, in the past, Dupont, Shell-Norco and Exxon (Baton Rouge) would allow AT&V to bid" on their projects. (CX 606 at PDM-CH 002617). CBI describes AT&V's safety practices as "severely lacking ... and are being labeled as an undesirable risk by many." (CX 263 at CBI-HOU-004606). More importantly, ATV admitted that it lacks capacity to replace PDM (Cutts, Tr. 2366, 2375; CX 460 at 7235; CX 1654) [.] (Kistenmacher, Tr. 862, 870; [ ] *in camera*; [ ] *in camera*) Recently, ATV did such a poor job on an [ ] job that the customer asked CB&I to step in and do the project, but CB&I refused. (Scorsone, Tr. 5036) ATV's capacity is also so small that just recently it had to turn down two projects and could not get proper bonding for "larger jobs." (Cutts, Tr. 2366, 2375)

Respondents' other examples of purported entry are Matrix and Chattanooga Tank. Their only support for supposed entry by Matrix was that it was "permitted" to bid on a project. (R.Brief at 90) This is hardly evidence of entry. The fact remains, that Matrix has never built an LPG tank in the United States. In fact, Newmeister testified that Matix had never even bid on one. (Newmeister, Tr. 1596, 1609). Moreover, contrary to Respondents' claim that Chattanooga Boiler and Tank is "poised for entry," Chattanooga has been vaguely expressing its interest in building LPG projects since 1976 and has never won any project. (JX 35 at 9, 145, 146 (Stetzler, Dep.) ("Q. Has

Chattanooga Boiler & Tank ever sold a liquid petroleum gas storage tank? / A. I don't know."); *id.* at 146-47 ("Q. To your knowledge, has Chattanooga Boiler & Tank ever sold a field-erected tank intended to store liquefied gas of temperatures around negative 50 degrees Fahrenheit? / A. I really don't recall.") If their prices on LIN/LOX are any comparison (which prices are the only evidence in this case for Chattanooga), Chattanooga is well above every other player in the field. (CCFF 499).

As explained above in the discussion about LNG tanks, Respondents' claim that there are no barriers to entry is simply without basis. Moreover, Mr. Kelley of ITC testified that he will not purchase an LPG tank from a company with no prior experience because "I don't want to be a guinea pig." (N. Kelley, Tr. 7104-05; *see also* Warren, Tr. 2290-91; CX 415 at 2). LPG customers want a tank supplier with a long track record building several LPG tanks. (Carling, Tr. 4512 (the last ten years would be the most relevant experience); JX 27 at 72 (N. Kelley, Dep.) (would "definitely want [an LPG tank supplier] to have had prior experience building an LPG tank before I would hire them to build an LPG tank for me.")). Engineering and design capabilities are also barriers in the LPG market. (RX 682 at MCG 000059 ("Texaco will verify that bidder is not overcommitted to perform that work."); Warren, Tr. 2295 (Before allowing a company to bid, Fluor reviews a potential LPG tank supplier's volume to ensure the supplier is capable of managing multiple projects simultaneously, and to ensure there is not too much backlog to prevent Fluor from accessing the supplier's resources promptly as needed); *see* CX 415 at 2).

Additionally, the evidence demonstrates that for larger LPG tanks, ATV cannot compete with CBI because ATV cannot build the larger tanks. (CX 303 at CBI/PDM-H 4001285 (CBI is PDM's "only competition on tanks over 100,000 [barrels])). ATV's competitiveness is generally limited to "small tanks...$500K & under." (CX 86 at PDM-CH 002618). It also cannot obtain the required bonding for larger jobs. (Cutts, Tr. 2366) ("we can't bond these larger jobs because of our financial

strength and the bond market's attitude"). There is no evidence that Matrix or Chattanooga, which are also small companies like ATV, would have any greater success. They have not had any in decades, and there is no evidence that they will in the future.

4. There Has Been No Entry Into the U.S. LIN/LOX Tank Market Since the Acquisition.

Respondents claim that entry has occurred in the LIN/LOX market. (R.Brief at 98) By whom? The only company that has sold any LIN/LOX tanks recently, other than PDM, CBI and Graver (which went out of business), is ATV. Since December 1998, Matrix has bid on six LIN/LOX projects in the United States, and won none of them. (CX 705 at 8; Kamrath, Tr. 1987)[20]

Despite having some recent success in the LIN/LOX market, ATV has encountered numerous problems. As Respondents concede, ATV has had problems on a LIN/LOX job with [ ] (R.Brief at 100) The problems [ ] has had with ATV are not minor, as Respondents would have this court believe. Nor should the problems ATV has had on this project be pinned on the customer as Respondents attempt in their brief. Rather, these problems go to the very essence of whether ATV is a supplier that can replace PDM. [ ] testified that AT&V has "not performed well from our perspective," and that AT&V's "ability to manage a project is far worse than I would have possibly imagined." ([ ]*in camera*). [ ] specifically stated that it will not use AT&V again on a LIN/LOX tank project based on their poor performance on the [ ] project. ([,]*in camera*).

ATV is not exactly a replacement for PDM. Its handful of engineers and crews cannot compete head to head against CBI with its over 1,000 engineers and crews all over the world.

[20] Respondents reliance on the testimony of V. Kelly is misplaced. After the LIN/LOX tanks were awarded to AT&V, Mr. Kelley's responsibility for the project ended. (Kelley, Tr. 4624) From others more knowledgeable about ATV's work, we know that ATV's work was poorer and more costly than CBI. (CCFF 466-467, 472-477)

Moreover, ATV has a poor reputation in the industry, which prevents it from filling the competitive role PDM played. [ ], admits his firm faces reputational and marketing disadvantages compared to Respondents. ([ ] *in camera*). Likewise, Dr. Kistenmacher of Linde BOC testified that AT&V has "a very poor track record." (Kistenmacher, Tr. 862). Moreover, Cutts testified that ATV is capacity constrained and because of this has had to turn work away. (Cutts, Tr. 2375).

Respondents counter this undisputed testimony by asserting that [ ] was happy with ATV as a supplier. (R.Brief at 111) This reliance is misplaced. ATV has never constructed a project for [ ]. Additionally, [ ] testimony confirms that neither Matrix and ATV can constrain CBIs ability to raise prices. [

]

([ ] (*in camera*)). While [ ] testified that he was "satisfied" with CBI's price in New Johnsonville, he wanted a "better price" from them. ([

] ([ ], *in camera*). [

] ([ ], *in camera*)).

Respondents' reliance on ATV's performance in [ ] is misplaced. Not only has [ ] been dissatisfied with ATV's performance, [ ] recently asked [ ] to take over the project, but [ ] refused. (Scorsone, Tr. 5036). Respondents then state that "BOC was extremely satisfied with ATV's price at Midland." (R.Brief at 114) Respondents fail to mention that ATV "they had many change orders, [so] that in the end the price was higher than" CBI's. (Kistenmacher, Tr. 932). BOC told CBI that it would discuss a sole source

alliance arrangement with CBI. (RX 273). This doesn't sound like a company that is that happy with ATV.

ATV is a weak competitor. Plagued with insufficient size, financial strength and a poor reputation and quality, ATV is unable to price profitably at pre-acquisition prices and does not have the sufficient capacity to drive CBI's prices back to pre-acquisition levels.

Matrix likewise has not been price competitive, and its bids have been too high on recent projects. (Newmeister, Tr. 2156-58). Air Liquide's representative testified that Matrix's prices have "never been below what we'd seen from any of the other competitors." (Kamrath, Tr. 2000-2001). Likewise, Air Products, who purchased a LIN tank from Matrix, believes that Matrix has "more limited capacity to produce field-erected cryogenic storage tanks," as compared to CBI or PDM, and that the former PDM is "much deeper in crews and manufacturing capabilities than Matrix is." (Hilgar, Tr. 1354, 1382-83; JX 25 at ¶ 14 (Hilgar Dec.)). Additionally, Matrix sold its fabrication facility, known as Brown Steel, in late 2000. (Newmeister, Tr. 1589-90). By losing its fabrication capability, Matrix is required to subcontract the fabrication work for these tanks, and subcontracting could increase Matrix's costs. (Newmeister, Tr. 1569, 1570, 1602). Therefore, as Mr. Newmeister testified, the sale of Brown Steel could have the effect of diminishing Matrix's competitive strength.

Finally, Respondents' claim that Chattanooga Tank would somehow replace PDM is without any support. (R.Brief at 107) The evidence at trial clearly shows that Chattanooga cannot act as a price constraint on CBI. On the one occasion when it recently bid on a LIN/LOX project, Chattanooga's price was higher than any other competitor. (CX 189 at CBI-PL015105; [ ] *in camera* (Chattanooga's price was [ ] higher than [ ]). CBI's internal documents confirm Chattanooga's weakness as a competitor. CBI questioned whether the customer will "trust a 'newbie' firm like CBT to do cryo tanks." (CX 40 at CBI-E007246). An August 2001

report from a CBI salesman reports that MG Industries "has doubts" of Chattanooga's "abilities." (CX 41 at CBI-E007336); *see also* Cutts, Tr. 2333 (ATV doesn't even consider Chattanooga as a competitor).

In short, these so-called entrants have been here in the United States for years and have never made any significant impact in the LIN/LOX market. Only one (ATV) has built any recently, and its prices are higher and its quality is lower and its capacity is less than CBI's. Moreover, it is not likely that anything will change in this market any time soon. Representatives from both ATV and Matrix have testified that there are significant barriers to entry. For example, ATV recognizes developing a reputation similar to CBI's for supplying cryogenic tanks can take as much as ten years. (Cutts, Tr. 2372) Mr. Newmeister (of Matrix) testified, "Well, I was involved with Matrix Service as they penetrated in that market, and it took a long time to *develop the engineering expertise* to have a quality product to offer and it takes a long time to be accepted by the customer base." (Newmeister, Tr. 1567) Additionally, the evidence demonstrates that Matrix would need to spend about $2 million for a large press and a large number of dyes and $2-3 million for the automated blast and paint system to be able to fabricate LIN/LOX tanks. (Newmeister, Tr. 1591). Moreover, the welding processes used on a LIN/LOX tank are different from the processes used for ambient temperature tanks. (Newmeister, Tr. 1582). The welding processes for a LIN/LOX tank require very specialized know-how; not any company can do it easily. (Kistenmacher, Tr. 842; Hilgar, Tr. 1347-48). Welding technology is so important in maintaining a competitive advantage that CBI regards its welding procedures as proprietary and does not give them to competitors. (Rano, Tr. 6028-29).

Respondents' assertions of entry cannot explain how any of these companies will prevent CBI from raising prices. Nor can they explain how it was that CBI was able to raise prices for LIN/LOX projects to Linde and Praxair by 8.7% after the acquisition and get away with it, if entry

is such a threat. (CCFF 1053-1057) Moreover, as discussed above, CBI has never mentioned to any one, outside this hearing, that there is any such threat to its business.

In sum, Respondents have simply failed to show that any of this supposed entry is timely, likely to include profitable entry at pre-merger prices, or sufficient to replace the competition lost by the demise of PDM. Thus, based on this failure of proof alone, Complaint Counsel is entitled to judgment as a matter of law.

III. POST-ACQUISITION EVIDENCE DEMONSTRATES THAT ANTICOMPETITIVE EFFECTS ARE LIKELY, BECAUSE THEY HAVE ALREADY OCCURRED.

Respondents ignore the actual evidence of anticompetitive effects. Under the law, all that we have discussed thus far in this brief, and almost all that Respondents claim, is surplusage, since we have proof that this acquisition has caused harm to competition. The sole purpose of HHIs, entry analysis, and expert hypotheses is to predict whether anticompetitive effects may be likely to occur. When there is evidence that such effects have indeed occurred, no other analysis is needed. *Libbey,* 211 F. Supp. 2d at 49 ("'Proof of actual detrimental effects'" can "'obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects...''") (Citations omitted); *Toys "R" Us*, 221 F.3d at 937; *Consolidated Foods,* 380 U.S. at 598. Where there is such evidence that Respondents have increased price, "the existence of monopoly power is clear" and "cements" Complaint Counsel's case. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); Von Kalinowski at § 4.03[4] (Citations omitted).

And there is more evidence of anticompetitive effects here than Complaint Counsel can find in any prior FTC case where divestiture has been ordered. Anticompetitive effects have actually turned up here in spades: CBI has colluded with a potential competitor and prices and margins have increased dramatically. Under the law, if Complaint Counsel had nothing else, it could base its entire case on just one of these instances. *General Dynamics*, 415 U.S. at 505, n.13 ("[P]ost merger

evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit..."); *Merger Guidelines* § 2.2; *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1267 (E. D. Pa. 1987) ("The most recent evidence of defendants' monopoly power is found in defendants' post-acquisition pricing decisions.").

Respondents cannot rebut these price increases. Harris cannot do so either. (*E.g.*, Harris, Tr. 7498 (regarding price increase at Cove Point: "I don't remember every little price, . . . I don't remember the details"); *id.* at 7506 (Doesn't remember Boeing price increase); *id.* at 7508-9 (Doesn't "remember one way or the other" Linde price increase); *id.* at 7466 ("unaware" of change in competition for Spectrum Astro higher bid)). Instead, Respondents simply claim that Complaint Counsel has not offered a "shred of evidence" of price increases and that any apparent price increases are really "budget prices," and thus in their view irrelevant. As detailed in Complaint Counsel's Post-Trial brief there are far more than shreds of evidence here: The evidence is overwhelming.

A. By Eliminating its Only Significant Competitor, the Acquisition Increases CBI's Market Power

The resulting elimination of PDM as a "substantial independent competitor" is evidence of anticompetitive effect that warrants judgment against Respondents. *Heinz*, 246 F.3d at 716; *Swedish Match*, 131 F. Supp. 2d at 169; *Staples*, 970 F. Supp. at 1083; *Merger Guidelines* § 2.21; *R.R. Donnelly & Sons Co.*, 120 F.T.C. 36, 193-201 (1995)(discussing unilateral exercise of market power through merger of 2 closest substitutes and citing to *Merger Guidelines* 2.21.). By any standard, all the evidence set forth in our Post-Trial Brief demonstrates that CBI eliminated its closest competitor and achieved more than double the 35% safe harbor level of the *Merger Guidelines*.

B. Actual Evidence Of Anticompetitive Conduct Independently Requires A Finding Of Liability Against Respondents In This Case.

Respondents ignore all the evidence of anticompetitive effects and simply blow it off in a few paragraphs of their brief, simply charging that "there is not a shred of evidence...only speculation and conjecture" that there are any anticompetitive effects. (R.Brief at 129-30) This is not true. Although not required to prove that anticompetitive effects have occurred in order to establish a violation of the law, Complaint Counsel has done so in spades. As our Post-Trial brief detailed, evidence of collusive behavior and price/margin increases are abundantly clear from CB&I's dealings with Spectrum Astro, TRW, Boeing, Memphis L&G, Cove Point, Linde, and Praxair.

As explained below, Respondents' plea that all the price increases are budget prices is not relevant; however, the prices CB&I offered to Cove Point, Spectrum Astro, TRW and CMS are the ***actual*** prices the customer is supposed to pay. In the end, Respondents' entire case boils down to this: Tell these customers not to worry about paying millions of dollars above the price that they would have paid if PDM were still competing – an even higher priced foreign competitor is on the way. This is not the law. Moreover, the collusion CB&I engaged in with Spectrum Astro, TRW and Cove Point cannot be justified by any excuse that Respondents can muster. Such collusion is a *per se* offense under the Sherman Act, for which there is no defense (like, "we were only trying to get the customer a better price"). *United States v. Azzarelli Const. Co.*, 612 F.2d 292, 294 (7th Cir. 1979) (recognizing bid rigging has been recognized as a *per se* violation of the Sherman Act).

Respondents, however, raise the example of CMS to show that competition is alive and well in the LNG business. As explained in the Introduction above, CB&I's dealings with CMS demonstrate anticompetitive effects. [ ] As explained in detail at page 41, above, in the lack of entry section for LNG, CMS accepted a price from CBI for an LNG tank of about [

]. CMS couldn't tell if this price was competitive, so it [

] What CMS didn't know is that before the acquisition, CBI's price was [ ] lower than Whessoe's (for similar tanks) and that CBI's current price at Cove Point was substantially higher than the pre-acquisition competitive price and had nearly triple the profit margin as the one resulting from competition between PDM and CBI pre-acquisition. ([ ])

The evidence from [ ] also shows where Whessoe's price was in comparison to CBI's prior to the acquisition, as did the evidence from Memphis in 1995, where Whessoe's price was also far higher than either CBI's or PDM's. In short, the unmistakable facts demonstrate that CBI was able to extract a much higher price and margin from CMS that it ever could if PDM were competing. Likewise, its current sole-source arrangements with [ ] and Poten Partners are likely to lead to the same result. Indeed, [ ] is relying on the fact that the next lowest competitor now, Whessoe, is still much higher than CBI. This evidence of post-acquisition price and margin increases, as well as the other evidence of price increases and collusion detailed in our Post-Trial Brief and Proposed Findings demonstrate that this acquisition must be undone, as a matter of law. *General Dynamics,* 415 U.S. at 505 n.13 ("post merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit...").

C. Budget Prices Are Relevant.

Respondents argue that the many documented examples of price increases by CBI following the acquisition should be ignored because some of these involve only "budget prices." (R.Brief at 126-29). This argument is a smoke screen. Following the acquisition, CBI has increased both ***actual***

transaction prices and budget price quotes. No one can question that the Cove Point and Spectrum Astro prices were actual, not budget, prices.

Nevertheless, budget prices are indeed relevant here. Even they went up after the acquisition. Prior to the acquisition, CBI was forced to price close to its cost, in order to compete against PDM, which enjoyed a similar cost position to CBI. Since the acquisition, CBI is no longer constrained to price as low. After the acquisition, all but one of the supplier selections for LNG tanks has been to sole-source from CBI (the other (CMS) awarded the project to CBI outright). For all of these deals, budget prices are the only competitive price information available to a customer when it makes the decision whether to choose CBI. Thus, budget prices determine the outcome.

Respondents are wrong when they assert that "[c]ustomers simply do not purchase products based on budget prices." (R.Brief at 126). A budget price is an initial price quote that provides the basis for selecting a supplier and negotiating a final price. (Neary, Tr.1440 ("We first receive their initial price. Then we select the vendor"). Mr. Cutts of AT&V explained that bids can be awarded solely on the budget prices. (JX 23 at 27-28 (Cutts Tr.)) That is exactly what happens.

When CBI and PDM competed for the Cove Point LNG tank they reduced their bids to match the budget prices each had earlier supplied to [ ]. CCFF 889-97. When CBI and PDM competed for a TRW TVC project, CBI's final price to TRW was close to the original budgetary price. (Neary, Tr. 1440-41). [.] ([ ] *in camera*). Atlanta Gas Light Company selected PDM over CBI, in 1998, based on budget price bids submitted by CBI and PDM. (CX 161 at CBI-PL006113-114). PDM outscored CBI in the bidding competition "on the basis of their lower budget price." (CX 161 at CBI-PL006113). Indeed, CBI's own documents reveal the fact that bids are won or lost on the budget prices. (CX 161 at CBI-PL006114) (Customer's selection "[a]ll in all - boiled down to

making a decision based on a budget price"). In putting together a proposal for an LNG peak shaving facility, Praxair decided to work with another contractor to develop the project based on CBI's budget price being substantially higher than the other supplier's price. (Harris, Tr. 7634). Dr. Harris concluded that Praxair compared CBI's budget price to another supplier's firm bid. (Harris, Tr. 7635-36).

Respondents claim repeatedly that BOC's Oregon LIN/LOX tank job was "competitively bid," yet they fail to mention that that competition was based on budget prices. (R.Brief at 99-100, 111, 118). Kelly of BOC confirmed that "costs were solicited and ATV had the low bid." (V. Kelley, Tr. 5292). The only bid submitted by CBI was a budget price. (Scorsone, Tr. 5017-18). Thus, these budget prices are indeed relevant.[21]

D. Post-Acquisition, CBI Discourages Competitive Bidding.

Respondents agree that budget prices are usually the first round of prices provided by competitors. (R.Brief at 128) ("The evidence shows that the more rounds of bidding and/or pricing that occur, the lower the prices go"). Yet, with its new-found clout, CBI now can simply offer a budget price, be selected, and forgo any further competition. CBI gives the budget prices to customers to "meet their requirements that they have some sort of competition before they select

[21] Respondents' assertion that budget prices do not reflect actual costs savings CBI realizes on a project misses the point – [

] (Scorsone, Tr. 5334 *in camera*). In fact, [.] (Scorsone, Tr. 5337-5339 *in camera*). Delay of the Cove Point LNG tank enabled CBI to "stretch" the margin on the project by lowering its cost. (CX 1617 at CBI 061611 ("The Delay allowed the Project Team to implement Best Practices that might not have been able to implement if the schedule had been tighter.")). CBI's Luke Scorsone presses his staff to identify ways to "stretch" CBI's margins after a project is awarded to CBI. (CX 1617 at CBI 061612 ("We need from you the amount of margin in excess sold that will be 'stretch' for you to deliver.")).

someone to move forward with." (Glenn, Tr. 4126). But now CBI pressures customers to sole-source from CBI and has walked away from customers who insisted on competitive bidding.

CBI's refusal to bid on Dynegy's Hackberry LNG project, either for FEED contractor, for EPC contractor, or for the LNG tanks, demonstrates CBI's ability to discipline a customer who believes it can obtain lower prices by insisting that CBI competitively bid the work. Dynegy is not satisfied with the pricing it has received from foreign suppliers, as asserted by Respondents. (R.Brief at 134). Dynegy will pay more and incur greater risks because Dynegy is unable to source the LNG tanks from CBI or PDM. (Price, Tr. 622, 626-28).

The lesson CBI taught Dynegy has not been lost on CMS, [ ], El Paso, and Poten & Partners, who have lined up to sole-source their U.S. LNG projects through CBI. CCFF 582-586. For the many projects being sole-sourced through CBI, budget prices provide the only competitive price information upon which customers must rely to make their purchase decisions. No customer, at least in the past 25 years, has elected to source a U.S. LNG tank from anyone other than Respondents. (CCFF 882) Thus, except for further price increases resulting from change orders, in today's environment, CBI's budget price is the actual price that the customer will pay.

For example, CBI provided a budget price to CMS for an LNG tank, which has been accepted by the customer. [

]. ([ ] *in camera*) ("there really wasn't a competitive price for the tank"). And, as discussed above, the price CMS received was at the same level as the final price for Cove Point with its profit margin of over [ ], nearly double that of CBI's company-wide margin levels and three times that of the margins that resulted from competition between PDM and CBI pre-acquisition. (*Id.*; [ ])

E. Following the Acquisition, CBI Has Increased Prices and Failed to Honor PDM's Prices.

Respondents concede that a "company providing a firm, fixed price is expected to 'stand up to their price and do the work for that price.'" (R. Brief at 126). However, following the acquisition, when customers have asked CBI for a firm price, or to reconfirm a firm price, that PDM had committed to prior to the acquisition, CBI has provided the customer a higher price than PDM had previously accepted for the work. CBI's unwillingness to stand up and do the work for the price agreed to by PDM prior to the acquisition is an anticompetitive effect of the acquisition.

Thus, when Boeing asked CBI, following the acquisition, to renew the firm fixed price PDM had provided to Boeing for a TVC, CBI increased the price by [ ] and labeled the price an "ROM" signifying that CBI would not commit to honor even that higher price. (CCFF 1213-16). When Spectrum Astro asked for an updated bid, CBI told the customer that it had to increase the bid by over a $1 million due to cost increases. Of course, this was absolutely false: CBI was covertly increasing its margins from [ ]. (CCFF 1151). Shortly after signing the acquisition letter of intent, PDM provided budget pricing for the Cove Point LNG tank that was higher than the firm bids CBI and PDM had previously submitted for the tank. CCFF 825. In each successive pricing round thereafter Respondents further increased the price ***and*** margin of the Cove Point LNG tank. CCFF 825. Accordingly, CBI's claim that a supplier should stand by its last competitive bid does not apply to it. That is solely because there is no competitive force like PDM to keep it honest.

F. Critical Loss Theory Confirms the Anticompetitive Effects of the Acquisition

Respondents' claim that a "critical loss" analysis shows that CBI would not increase price after acquiring PDM is incorrect. At the outset, this entire argument is moot. The only purpose of doing this analysis is to predict whether a company could profitably raise prices in the future. When

it already has, it proves the point – not with expert hypothesis, but with facts. *See Libbey*, 211 F. Supp. 2d at 49 ("'Proof of actual detrimental effects'" can "'obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects'"") (Citations omitted); *Toys "R" Us*, 221 F.3d at 937; *Consolidated Foods*, 380 U.S. at 598.

Dr. Simpson's analysis proves that CBI can raise its prices without losing profitability. Respondents and their economic expert argue that Dr. Simpson's analysis is flawed for two reasons. ***First***, respondents claim that Dr. Simpson overestimated the critical loss because he incorrectly identified fabrication cost, drafting and engineering cost, project management cost, and certain field erection costs as variable rather than fixed. Respondents' claim that these costs are fixed is based entirely on Mr. Scorsone's statement that CBI would not vary these costs if it lost business. However, other evidence indicates that CBI and PDM would vary their use of these resources as output changed. (Scorsone Tr 4887-4888) And, Mr. Scorsone's admission that these resources could be redeployed to other projects indicates that these costs are variable. Dr. Harris, Respondents' economic expert, relied on Mr. Scorsone's statements about variable costs in his own analysis but later admitted that this caused him to erroneously identify a cost as fixed when it was in fact variable. (Harris, Tr. 7901-7903)

Second, Respondents claim that the state of mind of CBI executives is such that they think they cannot raise prices. But CBI has raised prices. So, who's state of mind is relevant Messrs. Steimer, Lacey and Miles who raised the prices but who did not testify? Or Mr. Glenn, who simply reverts to a "trust us," generalized denial that they would ever raise prices? Complaint Counsel respectfully suggests that this Tribunal look at the facts: prices and margins have gone up. Since CBI was able to do so with almost no opposition of any kind, as Dr. Simpson's testified, "we would expect [CBI] to learn what the conditions are in the marketplace" so they can sustain these higher

prices and margins. (Simpson, Tr. 5781) That's exactly the kind of success Mr. Glenn repeatedly tells his investors. Never once did Glenn or anyone else at CBI tell investors or their own employees that market forces were going to keep them from raising margins. CBI's [ ] price increase to CMS from pre-acquisition to post-acquisition levels is twelve times the price increase assumed by Dr. Harris and would be profitable even if CBI lost 80% of its sales volume. (CX 1642 critical loss is (.62/(1.62 - .85) = .805)); *see* CCFF 633. Yet, the customers still want and need CBI, because there simply are not good alternatives.

G. Respondents' Criticism of Auction And Probability Theory Is Unfounded.

The acquisition enables CBI to increase its price because CBI has eliminated its closest and most cost effective competitor. The *Merger Guidelines* explain that the anticompetitive effects apply both to negotiated awards and to bidding for project awards: "[I]n some markets sellers are primarily distinguished by their relative advantages in serving different buyers or groups of buyers, and **buyers negotiate individually with sellers.** Here, for example, **sellers may formally bid against one another for the business of a buyer, or each buyer may elicit individual price quotes from multiple sellers.** . . . A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller." *Merger Guidelines* § 2.21 n.21 (emphasis added); Dalkir, *et al.*, *Mergers in Symmetric and Asymmetric Noncooperative Auction Markets: The Effects on Prices and Efficiency*, 2000 Int'l J. of Industrial Organization 18 at 395 ("in a sealed bidding environment] suppose that [firm] *i* merges with some other firm, . . . it realizes that with some probability it has eliminated the second lowest cost firm, . . . Hence *i*'s (with a partner) expected price rises"). Dr. Simpson explained how the theory under the *Merger Guidelines* works. (Simpson, Tr. 3072-3086).

Respondents do not disagree, but claim that in a scaled bid environment one might only find price increases of "less than 5 percent." (R.Brief at 136-37) While this theoretical argument is incorrect (Simpson , Tr. 5764, 3072-3086), even if prices were only increasing 1-5%, that is an anticompetitive effect that must be stopped. Sealed bidding with fewer bidders also facilitates collusion. R. Posner, *Antitrust Law An Economic Perspective* 61 (1976). And we have seen that here in the TRW bidding.

Respondents also incorrectly state that Dr. Simpson assumes that many firms participated in all of the LNG bids back to 1990. (R.Brief at 137). Respondents miss the point. Dr. Simpson' probability analysis for the LNG market shows that customers couldn't possibly consider that any other supplier except CBI and PDM were on equal footing competitively, because they never selected or even approached any other suppliers. (Simpson, Tr. 5753). Respondents also claim that Dr. Simpson said that "probability theory essentially involves flipping coins." (R.Brief at 137). This is a cheap shot. While it is true that Dr. Simpson referred to flipping a coin to explain probability theory, many statistics books do the same. (Simpson, Tr. 3393-4; Wonnacott, R., and T. Wonnacott, *Introductory Statistics* at 93 (4th ed. 1985)). ***Finally,*** Respondents are incorrect that "these companies entered the market in the past two years. (R. Brief at 137). Not one of the foreign firms has been awarded let alone built a LNG tank in the United States.

* * * * *

In sum, any one of these undisputed acts of actual or attempted collusion or price/margin increases "cements" Complaint Counsel's case. *Lektro-Vend*, 660 F.2d at 276. In the end, Complaint Counsel could not find a reported case with so many instances of such post-acquisition conduct. Against the backdrop of over five decades of divestiture orders from this Commission and federal courts on far less evidence, it is clear that complete divestiture is warranted here.

IV. RESPONDENTS' "EXITING ASSETS" DEFENSE FAILS AS A MATTER OF LAW.

Respondents admit that their so-called "exiting asset" defense is not based on any accepted law but rather upon barely six pages of an 1986 article: Kwoka & Warren-Boulton, *Efficiencies, Failing Firms and Alternatives to Merger: a Policy Synthesis*, 31 Antitrust Bull. 431 (1986). (R. Brief at 154). Respondents also admit that, when faced with such a proposed defense, the Commission "declined" to "adopt[] the defense," but Respondents nevertheless petition this Tribunal to "adopt this defense" anyway. (*Id.* 154, n.29, *citing Olin*, 113 F.T.C. 400, 618 (1990) (The "facts would not support the description of the proposed defense, even if we adopted the defense, and we decline to do so in this case.")). Thus, the question for this Tribunal is whether it wishes to ignore the Commission's decision in *Olin*, as well as the *Merger Guidelines* §§ 5.1, 5.2, and institute a new defense that the Commission and the Ninth Circuit both called a "novel" defense. *Olin*, 986 F.2d at 1307; 113 F.T.C. at 618. We respectfully suggest that it should not do so.

Yet, there's more. Respondents want this Tribunal to adopt this novel defense and ***ignore*** its requirements as proposed by Kwoka and Warren-Boulton. In their 1986 article, which has never been adopted by anyone in over 16 years, the authors argue that, at the very least, the respondent must prove two elements:

- As Judge Hyun explained in *Olin*, "the authors would 'insist, whenever possible, on alternatives short of merger to achieve particular efficiencies.'" *Olin*, 113 FTC at 583, *quoting* 31 Antitrust Bull. at 432-433. As the Commission put it, respondents would have to show that they "conducted an exhaustive effort to sell" the assets. 113 FTC at 618.

- 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." (31 Antitrust Bull. at 446).

As in *Olin*, Respondents have proven neither element here, and since this is an affirmative defense, it is "undoubtedly" their burden to do so. *Olin*, 986 F.2d at 1307.

First, Respondents have failed to prove that CBI is "the only available purchaser" for PDM's EC and Water Divisions and that they have conducted an "exhaustive" search for alternative buyers. *Id.* at 1307. Glenn admitted on cross-examination that PDM could have sold the EC and Water divisions to "any number of competitors." (Glenn, Tr. 4262). Scheman testified that once CBI was identified as a "preemptive buyer...we didn't go down the route of calling other people." (Scheman, Tr. 2931, 2939-40). The reason they only went to CBI was, as Glenn testified, PDM was worth more to them than to anyone else. (Glenn, Tr. 4261; Scheman, Tr. 2967-68 ("It was unlikely that someone could match [CBI's] price...because any other buyer would have to compete with CBI")).

Whereas Tanner contacted twenty-five prospective buyers for another division of PDM, it contacted no one for the EC Division. Instead, PDM's CEO simply called up CBI's CEO, and they made the deal that would give both the most value. Indeed, PDM even rebuffed expressions of interest from other prospective purchasers. (Scheman, Tr. 6930; Vetal, Tr. 418-423) Byers also admitted on cross-examination that other companies would have been interested in buying the divisions, and yet there was no evidence that anyone else was ever contacted. (Byers, Tr. 6799, 6858, 6806-6812; DX 29 at PDM-C 1006327 (Even as of closing, "few potential buyers," and "some competitors might be interested" in buying the EC division). PDM's CEO even promised the Board that he would contact other purchasers if the CBI deal fell through. (Byers, Tr. 6864; CX 1590 at 6065) They just never did. They just went to the buyer with the most money to offer. (Byers, Tr. 6796) Quite clearly, therefore, PDM has not made a "clear showing" that it "undertook a well conceived and thorough canvas of the industry such as to ferret out viable alternative partners." *United States v. Pabst Brewing Co.*, 296 F. Supp. 994, 1002 (E.D. Wis. 1969), *quoted in* Areeda at

¶ 954d ("Failure even to inquire of such obvious candidates as competitors...presumptively indicates that the search has not been diligent").[22]

Second, Kwoka's novel defense further requires that the assets are actually exiting the market.[23] Respondents' plea that they would have liquidated does not meet this requirement. Byers' idea was to sell the current contracts, the plant, and the engineering and intellectual property assets to other competitors who would carry out the current business. (Byers, Tr. 6802-05, 6829; DX 29 at PDM-C 1006327 (Assets would be sold to others ***in the market***)). In short, if CBI had not purchased PDM, under Byers' plan, some other company other than CBI (such as Matrix, Nooter or Pasadena Tank) would be building Cove Point as we speak! *Id.* In other words, the assets would ***not*** "exit" the market. *Olin*, 986 F.2d at 1307 (Rejecting defense because "assets would not be exiting the relevant market"). That simply doesn't satisfy even this novel defense. *Id.* Thus, Respondents cannot even make out Kwoka's novel defense, which has never been adopted by any court or agency.

That no court or agency has ever adopted the proposed "exiting asset" defense" is no surprise. Even Kwoka and Warren-Boulton say that it "would seem unlikely...that a leading firm would wish to acquire capacity with the characteristics of exiting assets," and thus the authors "cannot cite an example of a dominant firm" ever doing so. 31 Antitrust Bull. at 446. Nor would it make any sense

[22] Respondents' claim that it was enough to send out a press release is also simply insufficient as a matter of law. *FTC v. Harbour Group Investments, L.P.*, No. 90-2525, 1990 WL 198819, at *3 (D. D.C. Nov. 19, 1990) (Merely sending "offering materials" and "brochures" and "exploratory phone calls" was insufficient to establish the defense).

[23] Simply ***wanting*** to exit isn't enough to trigger this requirement, and that is all Respondents really claim here. *See, e.g., United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971) (Even though "owners wished to sell," defendant still had to prove that "there was no other prospective purchaser for it"); *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1260 (C.D. Cal. 1973), (Desire by management to exit the business does not satisfy the defense); *United States v. Blue Bell, Inc.*, 395 F. Supp. 538 (M.D. Tenn. 1975) (Company's intention to divest itself of its business is immaterial); *PPG*, 798 F.2d at 1507 (That company simply wanted to "sell the company...for the best price available" is "irrelevant").

for CBI to pay anything for PDM if it truly were going to disappear from the market and leave nothing for smaller competitors to grab.

Indeed, that is exactly the issue raised by Respondents in their example of Graver. Respondents claim that what happened to "Graver thus constitutes a natural market experiment of what would happen if" PDM were liquidated. (R. Brief at 152) If Respondents are correct, ***they have proved that they cannot use the novel "exiting asset" defense*** here. As Respondents point out, Graver's assets did not exit the market either: Chattanooga Tank became more competitive, Respondents argue, because it "acquired 'quite a bit of...equipment' from Graver -- a former competitor in the LIN/LOX tank market -- when it went out of business in 1999." (R. Brief at 105, *citing* Stetzler, Tr. 6317-19; R. FOF 5.59).

There can be no doubt, therefore, that the sale of PDM's EC division, even in a "liquidation," to smaller competitors, whose ability to compete in the relevant markets would be improved, would be far more beneficial to competition than a transaction that makes CBI more dominant so it can now "win" every job it wants. (CX1731 at 44); *see* Areeda at ¶ 952b ("[E]xit might be preferable on competitive grounds to acquisition by an already dominant firm because without such acquisition small rivals may have a better opportunity to pick up the failing firm's customers or resources"). Accordingly, Respondents cannot satisfy even the novel exiting asset defense.

What is striking, however, is the extent to which Respondents would miscite their own testimony to make their argument here. For example:

Respondents unequivocally tell this Tribunal that "Mr. Scheman ***evaluated*** the potential purchasers and determined that only one -- CBI -- had the requisite ability to purchase the EC and Water Divisions at above liquidation value." (R. Brief at142, *citing* Scheman, Tr. 6924-26) (Emphasis added). Respondents even claim that Scheman "conducted" an "analysis" to determine

that "none of the purchasers potentially available to purchase the EC Division could have done so at greater than liquidation value." (R. Brief at146) These statements are ***false.***

In his deposition (Respondents did not call Scheman at trial), on pages 6924-26 – the pages Respondents cite – Scheman was asked whether he did such an analysis and he unequivocally admits that he "was never asked to do this, so I'm not sure –." Then Respondent's counsel asks him if he has "an opinion" as to what he might have done. Scheman answers, "we would have ... regrouped and evaluated all the options." (Scheman Tr. 6924-25) In short, Scheman ***did no analysis.*** At the deposition, Respondents' counsel tried to get Scheman to be more committal than he was, and thus occurred the unmistakable question and answer:

> "Q. And based on your years of experience and those of your partners, did you see any other purchaser who could have made a bid for the EC Division who was already a competitor in that industry whose bid would have been higher than the liquidation value that you had determined for the EC Division?
>
> A. Higher than the liquidation value? I mean, ***we were never asked to undertake that study....*** " (Scheman Tr. 6952) (emphasis added).

Respondents then claim that "Scheman concluded that financial ***purchasers*** would not have been interested in purchasing the EC Division, and would have had extreme difficulty raising enough capital to make a purchase." (R. Brief at 146, *citing* Scheman, Tr. 6930) (Emphasis added). This sure sounds like Tanner conducted a "study" involving "***purchasers***" except that Scheman's testimony is about only ***one*** financial buyer ***who called to "express a potential interest."*** (*Id.*)(emphasis added) Scheman simply "walk[ed] away" from the conversation, because he thought that such a sale would have been "very difficult." This is hardly evidence that no financial investor would have been interested. In fact, Scheman wrote the opposite in his report that there were a "few potential buyers" as well as "some competitors" that might wish to buy the EC Division. (Byers, Tr. 6820-21; RX 29 at PDM-C 1006327).

Respondents also assert that "A press release was published in the Wall Street Journal and relevant trade publications. This effort was successful." (R. Brief at 142) Although no one at this trial ***has ever seen*** this press release -- despite all our efforts to find any evidence in the Wall Street Journal database (the alleged press release was never produced in discovery or offered at trial), it is simply not true that it was "successful." Mr. Glenn admitted that the "first time [he] heard that PDM was up for sale" was when PDM's CEO – not Scheman – called him directly. (Glenn, Tr. 4203).

Respondents also state: "In December 2000, Mr. Byers became convinced that there would be no other purchaser for the EC division." (R. Brief, *citing* Byers, Tr. 6776-77) But there is simply nothing in these pages or anywhere that supports this statement. (*See Id.* (reading RX 28, but not discussing Byers' being convinced of anything). On cross-examination, Byers admitted that, at that time, he "was still thinking about the possibility of liquidation" and "had not at that point investigated whether there was a possibility of another purchaser." (Byers, Tr. 6895).

Contrary to Respondents' assertions that Scheman's and Byers' testimony proves that PDM would have "liquidated," Scheman's testimony is only that it was ***his*** "belief" that it would be liquidated but that "it's a possibility that" others "would have made us offers," and Byers' testimony was that it would have been his recommendation to liquidate, but he never made this recommendation and he would not have made it until he had actually confirmed that there was no alternate buyer. (Scheman, Tr. 6925, 6952-53; Byers, Tr. 6797-98, 6815-16, 6895). The only recommendation Byers actually made was to take the company "private," but this was rejected. (Byers, Tr. 6845) The cited portion of Byers' testimony simply doesn't state what Respondents assert at all. (R. Brief at145; Byers, Tr. 6774-75) Indeed, Byers' purported commitment to liquidation was never as firm as Respondents' counsel claimed. On cross-examination, Byers admitted that when he "was still thinking about the possibility of liquidation, [he] had not at that point investigated whether there was

a possibility of another purchaser." (Byers, Tr. 6895) In short, we don't need to take counsel's, Scheman's or Byers' speculation on what the CEO or PDM Board would have done. The final word on this topic was the documented offer by Mr. McKee to the PDM board "that if the CBI deal fell through, that PDM would continue its efforts to sell its PDM EC and PDM Water Divisions by seeking other purchasers." (Byers, Tr. 6894-95; CX1590)

Respondents' use of case law is also misleading. Respondents question whether it is ***their burden*** to prove this defense. Yet the case they cite, *Citizen Publishing*, holds unequivocally that the "burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." (R. Brief at146, 154; *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138-39 (1969); *Olin*, 986 F.2d at 1306-7 (It is Respondents' "burden").

Respondents also claim that Complaint Counsel's assertion that under the traditional "failing firm" defense, PDM EC had to be on the "brink of insolvency or bankruptcy" is "too narrow" a reading of *Citizen Publishing*. (R. Brief at154, *citing Citizen Publishing*, 394 U.S. at 137.) Not true. In that case, the U.S. Supreme Court held that Respondents must prove the company's resources are "so depleted and the prospect of rehabilitation so remote" that it faces "the grave probability of a business failure." 394 U.S at 137. Moreover, Respondents' suggestion that the Kwoka, Warren-Boulton article is a permissible interpretation of *Citizen Publishing* is ridiculous. ***First,*** the U.S. Supreme Court specifically held: "We confine the failing company doctrine to its present narrow scope." *Id.* at 139.[24] ***Second,*** the article itself acknowledges that it proposes a change in current law.

---

[24] Courts have repeatedly emphasized that the "failing firm" defense has "strict limits" and is not justified on a showing, as is the case here, that the defendant simply wants to leave the market. *FTC v. Warner Communications, Inc., et al.*, 742 F.2d 1156, 1164 (9th Cir. 1984) (The defense has "strict limits" and "a company's stated intention to leave the market or its financial weakness does not in itself justify a merger"); *U.S. v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1258-59 (C.D. Cal. 1973) (A company's intention to leave the market is not enough); *Greater Buffalo Press.*, 402 U.S. at 555 (1971) ("That test is met ***only*** if two requirements are

(Kwoka at 447-49) (Using a table to show which facts would work under their proposed defense versus current law.) That is why, of course, Judge Hyun, the Commission and the Ninth Circuit called Respondents' "exiting asset" defense, "novel." *Olin*, 113 F.T.C. at 618 ; 986 F.2d at 1306-7.

Respondents also claim that under the law, Matrix's "expression of interest" is insufficient to block the defense.[25] (R. Brief at 148), *citing California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1136 (N.D. Cal. 2001). But Respondents fail to mention that in *Sutter Health*, the defendant had proven that it had conducted a three-year "extensive good faith search for purchasers" in which it "formulated a detailed and thorough proposal process and sought out numerous potential partners." *Sutter Health Sys.*, 130 F. Supp. 2d at 1137. Indeed, the one "expression of interest" mentioned in the case came only after the defendant, Summit, "repeatedly contacted" the potential buyer who "failed to make any offer in response to these inquiries." *Id.* at 1137. *Sutter* did not involve potential buyers who were turned away or a complete failure to contact any prospective purchasers, as happened here. Thus, Respondents' use of this authority is not a fair reading of that case.[26]

In sum, Respondents acknowledge that they cannot meet the accepted "failing firm" defense, but wish that this Tribunal would adopt the less stringent "exiting asset" defense proposed by a 1986

---

satisfied:...grave probability of business failure...and that there was no other prospective purchaser," and rejecting defense even though "owners wished to sell")(emphasis added).

[25]Complaint Counsel's Post-Trial Brief establishes that Matrix was indeed interested in purchasing PDM's EC business. (CCPB at 43) What is bizarre, however, is Respondents' argument that even if Matrix bought PDM EC, that it couldn't be an effective competitor. (R. Brief at 157) Yet, earlier in its brief, Respondents claim that Matrix is some kind of competitive threat to CBI. (*Id.* at 103-04)

[26]Respondents also cite *United States v. Culbro Corp.*, 504 F. Supp. 661, 668 (S.D.N.Y. 1981), which is odd. Eli Witt was in Chapter 11 and was seeking to modify a consent decree to allow Culbro to purchase it. Neither the acquirer nor the seller were competitors of the other. The Court also noted that "several" potential purchasers "discussed the prospect of investing in Eli Witt but, upon consideration, made no offer and declined to invest." *Id.* That is not this case at all.

article, but one they cannot qualify for either. Accordingly, this Tribunal should reject Respondents' attempted defense, which is not supported in law.

V. DIVESTITURE IS REQUIRED TO RESTORE THE COMPETITION ELIMINATED BY CBI'S ACQUISITION OF PDM.

Respondents cannot get around the plain language of Section 11(b) of the Clayton Act, which mandates that the "Commission...***shall***...issue and cause to be served on such person an order requiring such person to...***divest*** itself of the...assets, held." 15 U.S.C. § 21(b) (Emphasis added). Instead, they incorrectly assert that the Commission has rejected this plain language.

A. No Law Supports Respondents' Position That Any Remedy That Omits Divestiture Is Permitted Under Section 11(b).

Respondents lead off their argument with the claim that the "purpose of an antitrust remedy is not a punitive one." (R. Brief at 165, *citing Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 485-86 (1977)). While Complaint Counsel is not seeking punishment here, just an application of the established law, it is odd that Respondents would miscite this case or even use it here. The only issue on appeal was whether damages was appropriate, and the case actually holds that damages in an antitrust case "were provided in part for punitive purposes," but could not be awarded when the plaintiff suffered no antitrust injury. *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) Moreover, *Brunswick* is not even a Section 11(b) case (it didn't involve the FTC); it was a private plaintiff case.

Relying on a case that does not even mention the governing law here, Respondents simply ignore binding precedent. Indeed, they never mention that:

- The U.S. Supreme Court has held that under Section 11(b), the Commission has the "***duty***" to order divestiture in a Section 7 case (*California v. American Stores Co*, 495 U.S. 271, 284-85, n.11 (1990) (emphasis added));
- The Commission has specifically held that "a ***presumption*** should favor total divestiture" versus even partial divestiture "in merger cases," and that "the

burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found." *Fruehauf Corp.*, 90 F.T.C. 891, 892 (1977) (Emphasis added);

- The Commission held – quite contrary to Respondents' entire theory – that "it is ***our obligation*** to order divestiture of assets." *Retail Credit Co.*, 92 F.T.C. 1, 164 (1978) (emphasis added); and

- The Commission held that Respondents' proof against total divestiture must be "clear and convincing." *Diamond Alkali Co.*, 72 F.T.C. 700, 742 (1967).

Ignoring this binding precedent to the contrary, Respondents lead their argument that Complaint Counsel somehow "bears the burden" for showing that divestiture is "appropriate," with the *Marshfield Clinic* case. (R. Brief at 158, *citing Blue Cross & Blue Shield United v. Marshfield Clinic*, 883 F. Supp. 1247 (W.D. Wis. 1995).)[27] One might think that *Marshfield Clinic* was a Section 7 (merger) case, since Respondents state unequivocally that there was an "acquisition at issue." (*Id.*) But again, Respondents have misstated the case: there was ***no acquisition at issue!***

Marshfield Clinic is ***not a merger case!*** It's a private-party Sherman Act case ("essential facilities"), where the plaintiffs were trying to get the court to order damages and divestiture of what was ***legally*** attained. *See Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Defendant achieved monopoly without using any "improper means"). As the district court points out, the plaintiffs there "did not cite to a single case in which retroactive divestiture was awarded in a private section 1 or 2 [Sherman Act] case," noting, by way of contrast, that "Divestiture has been awarded in section 7 cases in the context of proposed mergers and in cases brought by the government." 883 F. Supp. at 1264.

Respondents' only other case law they cite for their false proposition is *Microsoft*. (R. Brief at 158-59) Yet, ***Microsoft was also not a merger case,*** and yet, like Respondents here, the Antitrust

[27]Respondents fail to note that the case was also ***reversed***, not once but twice -- Not exactly the kind of case that sounds like solid precedent, especially when it has nothing to do with Sections 7 or 11(b) of the Clayton Act or the FTC. *Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995); 152 F.3d 588 (7th Cir. 1998).

Division in *Microsoft* tried to equate that monopolization case to a merger case. The D.C. Circuit rejected this analogy, explaining: "'***complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.***'" *Microsoft*, 253 F.3d at 105 (Citations omitted) (Emphasis added).[28]

Thus, both the *Microsoft* and *Marshfield Clinic* courts got it right: divestiture ***is*** the appropriate remedy in Clayton Act (Merger), Section 7 cases, but is not the norm in Sherman Act (Monopolization) cases. So, why do Respondents cite these cases and ignore all the case law to the contrary - especially after Complaint Counsel pointed out their error a month ago in response to their Motion for Directed Verdict? We respectfully submit that this careless use of case law is symptomatic of a much broader misuse of case law by Respondents in this case.

For example, Respondents omit the most recent U.S. Supreme Court opinion on this point and the most recent FTC precedent. They erroneously cite *Retail Credit* (1978) and *Ekco Prods.* (1964) for the false proposition that the "Commission" held that Complaint Counsel has to show that divestiture is the appropriate remedy (vs. other remedies) in Section 7 cases. They also claim that the Supreme Court has held that divestiture is "not a required remedy" in Section 7 cases involving the FTC. (*Id.*, *citing du Pont* and *International Salt* – neither of which were FTC cases). This is a complete misapplication of precedent. Let us first go through the FTC precedent in date order and then include the most recent precedent. Then, we will do the same with the Supreme Court precedent.

---

[28]Respondents note that *Microsoft* relied upon *U.S. v. Ward Baking Co.*, 376 U.S. 327 (1964) and *Associated Press v. U.S.*, 326 U.S. 1 (1945), yet neither of these case are even remotely on point either. *Ward Baking* was a price fixing case where divestiture was not even an issue. 376 U.S. at 334. *Associated Press* was likewise a Sherman Act – not a merger – case and has nothing to do with remedies under Sections 7 or 11(b). It simply held that a "full exploration of facts is usually necessary," but even that case had ***no evidentiary hearing,*** and still the Supreme Court was "unable to say" if there wasn't enough basis for the relief ordered. *Id.* at 7, 21. These cases are hardly support for Respondents' position here.

B. Contrary To Respondents' Assertions, FTC Precedent Mandates Divestiture.

Respondents claim that in *Ekco* "the Commission has also recognized that Section 7 does not require divestiture as the only available remedy." (R. Brief at 162, *citing* 65 F.T.C. 1163 (1964)). But that is not what the case decided at all. The issue the Commission confronted was that the "disappearance" of the assets purchased by Ekco prevented the Commission from doing more than a simple divestiture. *Id.* at 1212. Since divestiture of what was acquired was not a practical option (the assets had "disappeared"), the Commission held that Ekco could be ordered to "reconstitute" one of the acquired companies as a "going concern" by providing it with all the assets it would need to "be an effective competitor" in the market – Ekco would then be ordered to "divest" the reconstituted entity. *Id.* at 1228-1229. This remedy, which is far beyond the strict contours of 11(b), hardly suggests that the Commission would allow a remedy less than divestiture in that case or in the one at hand. Notably, the Commission also held that if its Order did not do whatever is "practicable" to restore competition to the state that it would have been in absent the merger, "'the government has won a lawsuit and lost a cause.'" *Id.* at 1216 (Citation omitted). In short, what the Commission ordered in *Ekco* was not less than divestiture, it was more and it is far broader than the remedy sought in this case.

Respondents also claim that in *Retail Credit* the Commission held that divestiture is not "an automatic sanction" in merger cases. (R. Brief at160, *citing* 92 F.T.C. 1, 123 (1978)) The first problem is that the Commission never said this Administrative Law Judge Hyun did! And, again, Respondents quote this statement out of context. Judge Hyun was trying to decide whether ***"complete"*** versus ***"partial"*** divestiture was required under 11(b), which does not make such a distinction. Judge Hyun decided that he could exclude the West Coast offices (among many other offices) from his proposed divestiture order. *Id.* at 163, n.60. The Commission, however, ***reversed***

Judge Hyun and ordered the divestiture of the San Francisco office in addition to the others (Portland was excluded) and held:

> "The purpose of relief in Section 7 cases is to undo the probable anticompetitive effects of the unlawful merger, to restore competition to the state in which it existed at the time of the merger, or to the state in which it would be existing at the time relief is ordered.... In order to achieve this goal, a strong presumption favors total divestiture of the unlawfully aquired entity as the surest means of achieving it." *Id.* at 161 (Citations omitted)

Respondents never mention the Commission's decision. Moreover, as in *Ekco*, the Commission decided that it had the power to order ***more*** than divestiture. Indeed, it held that "it is ***our obligation*** to order divestiture of assets necessary to assure the viability and attractiveness to would-be purchasers of the divested entity." *Id.* at 164 That is, of course, exactly what Complaint Counsel seeks in this case.[29]

In *RSR Corp.*, not cited by Respondents, Judge Hyun had made the same decision – partial divestiture – and was similarly reversed by the Commission, which held that "a presumption should favor total divestiture of the acquired assets" even if it means divestiture of equivalent plants that were not part of the original acquisition! *RSR Corp*, 88 F.T.C. 800, 9892-97 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979); *see also Diamond Alkali*, 72 F.T.C. 700, 742 (1967) (ordering divestiture of the acquiring company's factory, where the acquired company's assets had been eliminated and holding: unless "clear and convincing" proof is offered "to the contrary" the assumption of this Commission must be that "only divestiture can reasonably be expected to restore competition and make the affected markets whole again," *quoting National Tea Company*, 69 F.T.C. 226 (1966).

[29]Respondents also cite *Grand Union Co.*, 102 F.T.C. 812, 1028-1029 (1983) (R. Brief at162) for the irrelevant conclusion that "partial" divestiture (of grocery stores in that case) may be appropriate when a violation is only found as to those assets. Since the Commission found no violation at all in that case, it is difficult to see how to apply that *dicta* here.

Judge Hyun obviously heard the aggressive voice of the Commission in *Ekco* and *RSR Corp*. Later, in *Olin Corp*, 113 F.T.C. 400, 584 (1990), Judge Hyun held, "It is axiomatic that the normal remedy in Section 7 cases is the divestiture of what was acquired unlawfully. Indeed, divestiture is the remedy specified in Section 11(b) of the amended Clayton Act." *Olin*, 113 FTC at 584. He thus ordered: "As for relief, it is determined that the customary divestiture of the acquired assets and business is appropriate." *Id.* at 416. In addition, Judge Hyun followed the Commission's lead in *Ekco* by ordering more than divestiture: "The administrative law judge is of the view that full restoration of competition in the relevant markets and the need to insure the viability of the divested business require that the divestiture include" both the product at issue as well as another factory for a product where no competitive effects had been found. *Id.* at 416. The Commission affirmed.[30] *Id.* at 590. Once again, this is exactly the remedy that Complaint Counsel seeks in this case – divestiture of both the EC and Water Divisions to, as Judge Hyun found, "ensure the viability of the divested entity." *Id.* at 619.

Apparently, only once did the Commission order something different than a classic form of divestiture and that was in *National Tea*, where it found no evidence that the post-acquisition market was not competitive, but it feared that any further acquisitions might make it so. Thus, the Commission decided that then was an "appropriate place at which to call a halt" and ordered National Tea to stop buying any more grocery stores. *National Tea*, 69 F.T.C. at 277, quoting *Brown Shoe Co. v. United States,* 370 U.S. 294, 346 (1962). Yet, it made it clear that this was an unusual case. The Commission in *Diamond Alkali* explained this unusual holding:

---

[30]*See also Jim Walter*, 90 F.T.C. 671, 764 (1977) ("Divestiture is particularly desirable where, as here, the Section 7 violation is premised in part on the elimination of a substantial independent competitor. No other form of relief can compensate for such loss as well as the restoration of that competitive force in the market.").

"[T]here are exceptional circumstances where the economic evil inherent in the acquisition is not so much the immediate elimination of a competitor...but in the longer-term trend toward concentration of which the merger is symptomatic. In cases such as these an order confined to the prohibition of future mergers is itself an ***indirect form of divestiture***, since it frustrates systematic acquisition programs ...

These exceptions to the general rule can be reasonably invoked however only when the proof of their probable efficacy is ***clear and convincing***. In the absence of proof to the contrary the assumption of this Commission must be that '***only divestiture*** can reasonably be expected to restore competition and make the affected markets whole again.'" *In re Diamond Alkali Co.*, 72 F.T.C. 700, 742 (1967), *quoting National Tea Co.*, 69 F.T.C. 226 (1966).

Thus, the Commission held that divestiture is the presumed remedy unless an exception is proven by Respondents with "clear and convincing" evidence. *Id.* This doesn't sound like the unsupported "law" Respondents attempt to sell to this Tribunal.[31]

C. Contrary To Respondents' Claim, U.S. Supreme Court Precedent Mandates Divestiture.

Respondents then turn from their misapplication of FTC precedent to argue that the *du Pont* case somehow held that "divestiture is not a required remedy under Section 7." (R. Brief at 161, *citing U. S. v. E.I du Pont de Nemours Co.*, 353 U.S. 586, 607-08 (1957); *U. S. v. E.I du Pont de Nemours Co.*, 366 U.S. 316, 348 (1961) Of course, this case never even mentions the rule proposed by Respondents here. Moreover, it isn't even an FTC case under Section 11(b), as it was a Justice Department case. But in *du Pont*, the Court reversed the lower court and ordered full divestiture without any further hearing. 366 U.S. at 348. The Court noted that "[t]he very words of § 7 suggest"

[31] It should be noted that within weeks of *National Tea*, the Commission pulled back on its holding, in *General Foods*, which held in a similar case: "It is settled...that divestiture is normally the appropriate remedy in a Section 7 proceeding.... This case would be a particularly inappropriate one in which to make an exception." 69 FTC 380, 428 (1966) *quoting In re Proctor Gamble Co.*, 63 F.TC. 1465, 1584 (1963) But even the chance of ordering something other than divestiture in a case like *National Tea* quickly vanished when, just two months later, the U.S. Supreme Court decided a nearly identical case in *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 279 (1966) and reversed the District Court, even though the post-acquisition market was still competitive, and ordered "divestiture without delay."

that divestiture "is a natural remedy," under Section 7 and that other remedies might be appropriate – though rare (*citing* dozens of cases ordering divestiture), and it further explained that the case was not brought under Section 11(b) (involving the FTC), where divestiture might be obligatory – an issue it did not need to decide. *Id.* at 330, n. 9.[32] Thus, to use *du Pont* as precedent to say that divestiture is one of many remedies under Section 7 in an FTC, Section 11(b) case is wrong.

Years after *du Pont,* the Supreme Court did deal with the issue of what Section 11(b) meant in *American Stores*:

> "In § 11 of the Act, Congress directed the FTC to issue orders requiring that a violator of § 7...'divest itself of the [assets] held' in violation of the Act. ... "The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it...divest itself of what it had no right to hold.'"

California v. Am. Stores, 495 U.S. 271, 284-85, n.11 (1990), (quoting *FTC v. Western Meat Co.*, 272 U.S. 554, 559 (1926)). This "duty" to order divestiture of what CBI had wrongfully acquired is clear. From this clear precedent, there can been no misunderstanding from any decision by the Commission or the U.S. Supreme Court that the FTC can award more than divestiture, but that at least divestiture must be part of the final order under Section 11(b). Respondents have offered ***no*** contrary precedent.

Inexplicably, in their previous briefs and at closing, Respondents failed to mention any of this pertinent case law or even the governing provision of the Clayton Act, § 11(b). Accordingly, as all the pertinent case law dictates, divestiture is the proper remedy for illegal mergers under Section 11(b). In addition, Section 5(b) of the FTC Act expressly authorizes the Commission to award any further relief that would restore competition. And the Commission has determined that this authority allows it to order "broad divestiture" including divestiture of assets outside of the relevant product

[32] The Court also held "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." 366 U.S. at 334.

market "in order to increase the likelihood of a restoration of competition." *Olin,* 113 F.T.C. at 619; *see id.* at 584.[33] Respondents have failed to cite any cases to the contrary.

D. It Is Respondents' Burden To Show That FULL Divestiture Should Not Be Ordered.

While there is simply no precedent suggesting that anything less than divestiture is required under Section 11(b), Respondents have the "burden" through "clear and convincing" evidence to show that complete – rather than partial – divestiture should not be ordered. *Fruehauf*, 90 F.T.C. at 892; *Diamond Alkali,* 72 F.T.C. 700, 742. Respondents turn this mandate around and say that it is Complaint Counsel's burden to show some other less restrictive remedy other than any kind of divestiture wouldn't restore some competition. (R. Brief at162) This is unfounded. Indeed, the Commission has clearly held "the Commission need not justify its order beforehand by showing" that a divestiture "will unquestionably restore competition." *Diamond Alkali,* 72 F.T.C. at 742.

If Respondents were correct, then the U.S. Supreme Court was wrong, when in facts far less egregious than those in this case it ordered divestiture without any further hearing whatsoever. *See El Paso Natural Gas,* 376 U.S. at 661-662; *Von's Grocery,* 384 U.S. at 279. Was the Commission wrong when it ordered divestiture in dozens and dozens of cases since the birth of the Clayton Act

[33] *See, e.g. Olin,* 113 F.T.C. at 619 (Order to divest relevant product as well as a corollary one as well);*In Re Crown Zellerbach Corp.*, 54 F.T.C. 769, 808 (1957) (Order to restore whatever assets "as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition"); *Fruehauf Trailer Co.*, 67 F.T.C. 878, 939 (1965) (order to divest "all assets of its Strick Trailers Division and such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent"); *Ekco*, 65 F.T.C. at 1229 (1964), *aff'd* 347 F.2d at 754 (Order to divest "all other assets as may be necessary to reconstitute McClintock Manufacturing Company as a going concern and effective competitor").

in 1914, never once mentioning that Complaint Counsel had this alleged burden? In short, the standard advocated by Respondents simply doesn't exist under the law.

Rather than seek less than divestiture, the Commission has consistently erred on the side of adding more remedies ***in addition*** to divestiture. *Olin*, 113 F.T.C. at 619, 585 (the CA facility must be divested together with a related ISOS facility in order *"to ensure the viability of the divested entity"* as an ISOS producer – "Anything less [would] be a divestiture in name only and would" not restore competition); *Ekco*, 65 F.T.C. at 1217 (Ordering divestiture to "recreate a viable concern"). In short, a complete and broad divestiture is the appropriate remedy to successfully restore a viable competitor to the marketplace. Anything less will be ineffective.

E. There Is Substantial Evidence in the Record to Guide the Tribunal in Ordering Divestiture to Remedy the Effects of the Acquisition if a Violation Is Found.

Respondents erroneously assert that Complaint Counsel has some burden to show that divestiture is appropriate here and to disprove that Respondents' mentoring remedy would be less desirable. Nevertheless, as set forth in Complaint Counsel's initial brief, there is ample evidence in the record establishing the need for complete divestiture to remedy the effects of the acquisition.

Respondents claim that Complaint Counsel "failed to ask any" witness whether it would be beneficial to have PDM compete against CBI once again. (R. Brief at 162) Not true. Several witnesses testified as to the desirability of Complaint Counsel's proposed remedy. (Neary, Tr. 1489, 1502) (Reestablishing PDM would give his company the "competition" they're "looking for"); (Simpson, Tr. 3606-09) (PDM EC was as strong a competitor as it was because it possessed certain tangible and intangible assets). Numerous witnesses were asked what the benefits were in having

PDM compete against CBI. In addition, many customers testified that it helped their company to have PDM compete against CBI and that PDM's absence hurt them.[34]

But Respondents miss the point entirely. This isn't a matter for a vote. Divestiture is required under 11(b). The only thing under consideration is whether the divestiture should be partial or complete and whether additional relief should be granted. In their quest to prove that any kind of divestiture is not warranted, Respondents fail to challenge any of these relevant remedy issues. Instead, they miscite testimony to argue that any kind of divestiture would be bad. Their usual trick is to take a broad question in a deposition, like "what if CBI were split into two companies," or "what if CBI were cut in half," etc., and then take the answer to mean that any kind of divestiture would be harmful. Even then, Respondents mislead this Tribunal with snippets of deposition. That, of course, is why we asked for live testimony at the outset of this case. For example:

First, Respondents argue erroneously that any kind of divestiture will "not create competition, and that it will harm consumers." (R. Brief at 165) Respondents highlight their argument with their first example, Hilgar, who they claim testified that any "divestiture would be 'bad for Air Products'" (R. Brief at 165, *quoting* Hilgar Tr. 1540) Sounds pretty clear – but here's the actual testimony:

---

[34] *See, e.g.*, Neary, Tr. 1502 (TVC competition would be restored if PDM EC were returned to the marketplace); Gill, Tr. 212, 213 (CBI and PDM competition lowered prices to customers); Gill, Tr. 211 (post-acquisition pricing for these chambers "can't be as good" as when two suppliers are competing for these projects); Thompson, Tr. 2051 (Spectrum Astro competitively bid the project, because "we wanted obviously to get the best price we could get"); [ ] ***in camera*** **([ ] was able to use the close competition between CBI and PDM to lower the price of a TVC);** Hall, Tr. 1804 (CBI and PDM provided "very competitive" supply options.); Price, Tr. 558 (the two competitors with the lowest prices were CBI and PDM); Warren, Tr. 2304, 7-8 (the only competitors available were PDM and CBI; by leveraging Respondents against each other, Fluor obtained a lower LPG tank price); [ ], ***in camera*** **("not having a PDM bid took away – took away what could have been the lower – lower price [ ]);** Crain, Tr. 2592 (CBI lost some projects to PDM because of PDM's "very low" pricing levels); Kistenmacher, Tr. 876 (the merger has "reduced the number of vendors, experienced vendors from prior to Graver going out of business, we had three experienced, with PDM we had two, and now we have one").

"Q. Do you have any opinion as to whether breaking up at this point CBI into two separate companies would be beneficial or harmful to competition in LIN/LOX?

A. That's an interesting question. ***To the extent that there was nothing left*** o[f] either of the two companies after any FTC action, yes, I think that would inhibit -- that would be bad for Air Products and the industrial gas business in general." (*Id.*)

Thus, it is clear that Hilgar somehow believed that we are liquidating both CBI and PDM. Obviously, if there was "nothing left" of CBI and PDM, that would be bad, especially since Hilgar also testified that Air Products tried to get a foreign firm (BSL) to work with them on LIN/LOX tanks, but they simply could not compete on price. (Hilgar, Tr. 1378-79) Without either CBI or PDM, Air Products would be in a fix – since there is no competitive foreign competition. Nothing in Hilgar's testimony, however, states that a divestiture – rather than liquidation – would be bad.

[ ] testimony is not any more supportive of Respondents' assertion. In the passage they cite, [ ] is asked about [

] That is all the information [ ] is given. [ ] answer is that

["] [ ] is then asked if [

."] ([ ] *in camera*) This is hardly strong evidence that a divestiture will, in Respondents' words, "harm consumers." [ ] said nothing of the sort. The mere assertion that it might be ["difficult"] is fair – ***but we don't want*** [ ] ***to do it.*** That is why we have a professional Compliance Division and a Monitor Trustee. Respondents fail to point out that

[ ] also stated that it would be [

]. ([ ], *in camera*)

Second, Respondents assert that a remedy is unworkable because it would be difficult to assign contracts or employees to PDM. (R. Brief at 166) Their sole support for this is the self-serving testimony of Gerald Glenn. Yet, the evidence at trial reveals that Respondents dealt with this

issue when Praxair divested CBI and when PDM sold its assets to CBI. Indeed, Byers testified that PDM was fully prepared to go out to customers, "and get consents to make sure these contracts could be transferred to another company." (Byers, Tr. 6803-6084). Byers did not suggest this was difficult, but testified that getting consents from customers was something he believed the company could do. (Byers, Tr. 6805) There is no suggestion, other than Glenn's self-serving testimony, to the contrary. Moreover, El Paso's Bryngelson testified that he would even be willing to give PDM "one or two" contracts. (Bryngelson, Tr. 6156).

Third, Respondents assert that the proposed remedy will make both companies "incapable" of competing. (R. Brief at 166) There is no support for this claim. Byers' idea is that anything smaller than the mammoth CBI simply won't do. Not only does this assertion make no sense, it contradicts Respondent's argument that size doesn't matter or that ATV, Chatanooga or Matrix do not need to be large to compete. (R. Brief at 57) (bonding is not a barrier to entry). Respondents cannot have it both ways.

In an attempt to further support their assertion, Respondents cite to Larry Izzo and his purported concern over whether two residual companies would have the requisite bonding capability. (R. Brief at 167) However, on cross examination, Izzo admitted that his testimony regarding what would happen if CBI was required to divest the assets it acquired was speculation. (Izzo, Tr. 6538) Izzo also admitted he did not know what the company would look like if it was broken up. *Id.*

Bryngelson's testimony doesn't support Respondents either. (R. Brief at 168). All he says is that El Paso would be "less inclined to do any more than one or two jobs with" the new PDM. Indeed, the fact that Bryngelson would even consider, sight unseen, hiring a new PDM for "one or two" jobs demonstrates that Respondents are wrong. Moreover, the quoted transcripts show the lengths to which Respondents had to go to get even this testimony: Respondents repeatedly asked

what would happen if CBI were "split in two." (R. 168, Tr. 6156). No one has even suggested such a remedy. CBI bought PDM for less than a months' revenues and has many other businesses, such as HBI, that give that company its immense size. The fact is that CBI was doing great even before it nearly tripled its size with the acquisitions of HBI, Morse, and PDM. Divesting PDM from this conglomerate would still leave CBI much larger than it had been when it was successful as a dominant player for decades.

Respondents also cite [ ] to claim that a remedy would reduce the number of competitors with sufficient financial strength. (R. Brief at 168) Respondents offer [

] that [

] *(in camera)* The problem is that [ ] is talking about CBI before the merger, but he was simply not familiar with the history of CBI's size at that time. [ ] *in camera*. Additionally, [ ] testimony indicates that CMS has not made an assessment of the proposed remedy's effect on CMS. In fact the testimony regarding a break up of CBI was, [

] (*Id.* at 28).

Respondents also assert that a remedy would disrupt projects already in progress and directs this court again, to the [ ]. (R. Brief at 169) However, [ ] testimony does not support Respondents' assertion that Complaint Counsel's proposed remedy would not restore competition. [ ] merely claims that it might be disruptive if the break up "occurred during our project." ([ ]) This is merely a claim of inconvenience at most, which could certainly be addressed during the divestiture process.

Fourth, Respondents assert that the proposed remedy would leave two companies without sufficient resources or personnel to service their customer. (R. Brief at 170, *citing* Sawchuck Tr. 6066) Respondents asked Sawchuck from BP if he had any concerns if the FTC tried to "split up"

CBI into "two separate companies." (Sawchuck Tr. 6066) His answer was clear: "I think we would have to see the final outcome and how it was – how it was finally set up." (*Id.*) His only concern in the deposition (Respondents did not call him live) was whether CBI would have "to split one person in half when they may have one or two – only have one or two people in certain disciplines." (Sawchuck, Tr. 6077-6078) But there is substantial evidence in the record that CBI has no such limits on its personnel. Glenn testified that "We probably have about a thousand graduate engineers in the company. We may have a thousand people in the company that in some way are designing or engineering projects around the world. I don't have an accurate number, but it is a large number." (Glenn, Tr. 4356) Likewise, CBI's internal documents clearly illustrate that not only does CBI have sufficient resources not to be concerned with having to "split one person into two," but has eight times the field resources of ATV or Matrix, which Respondents claim can compete as they are. (CX 460; CX 1654)

Fifth, Respondents also claim that since they have over 2,000 contracts, a break up will affect them all. (R. Brief at 170) All this proves is that there is plenty of business to keep the new PDM busy.

Finally, Respondents claim that a divestiture would not create two low-cost companies. Yet, their only support for this assertion is Dr. Harris' claim that there is no evidence that he's seen to "suggest that's true." (*Id.* 171, Harris Tr. 7367-68) Perhaps Dr. Harris should look at the undisputed evidence that both CBI and PDM were the lowest cost competitors before the acquisition. Nevertheless, the law is that "the Commission need not justify its order beforehand by showing" that a divestiture "will unquestionably restore competition." *Diamond Alkali*, 72 F.T.C. at 742.

Respondents' claims of future woe are not unprecedented. In at least two other cases, the Commission has considered the risk that a divestiture order might weaken the resulting competitors.

In *Diamond Alkali*, it even decided to order divestiture of the only factory the respondent had (since the acquired company's assets had already been dissipated). It heard all the same arguments presented by Respondents here and still held that "the assumption of this Commission must be that 'only divestiture can reasonably be expected to restore competition and make the affected markets whole again.'" 72 F.T.C. 700, 742 (1967). The Commission reasoned that:

> "It can either leave Diamond Alkali *in statu quo* on the assumption that it probably will not be a potential competitor if we order divestiture, and thus nothing would be gained by ordering divestiture, or we can order divestiture on the assumption that Diamond will remain a potential competitor notwithstanding its declared intent to the contrary. If we select the first course, we are simply throwing up our hands and surrendering all chance that this Section 7 violation will be remedied. If we select the second way, we preserve whatever promise of enhancement of competition is implicit in Diamond Alkali as a potential competitor. For the reasons set forth above we have chosen this second course." *Id.* at 751.

In *RSR Corp*, the Commission made an even more extreme choice. It took away several plants from the acquiring company to make the divested company as strong as it would have been if an acquisition had not occurred – even if that would lead the acquiring company into bankruptcy. 88 F.T.C. 800, 892-97 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979). It reasoned that this course of action was better than allowing the acquiring firm to keep the advantage it gained from illegal conduct. *Id.*

In this case, Complaint Counsel is not asking for anything as extreme as in *Diamond Alkali* or *RSR*, where the acquiring company may have been eliminated as a competitor altogether. Here, CBI would still have revenues of over $1 billion and would still be larger than it was prior to the acquisitions of HBI, Morse, and PDM. Although Complaint Counsel could have sought the divestiture of Morse as well, it has not done so. Thus, CBI will be left with one more fabrication plant than it had at the beginning of its strategy of monopoly by acquisition.

In sum, these witnesses and the law do not support Respondents' position. Moreover, the issue under Section 11(b) is not whether the witnesses should take a vote on the remedy, it is simply

to carry out the express will of Congress by determining whether the acquisition "may be substantially to lessen competition," and if it does, to order CBI to "divest" itself of the assets illegally acquired and take other steps to ensure the competitiveness and viability of the divested PDM. 15 U.S.C. §§ 18, 21.

F. The Provisions of Complaint Counsel's Proposed Order Are Tailored to Restore the Competition that Existed Prior to the Acquisition

Complaint Counsel's proposed Order in this matter is the appropriate remedy for restoring competition. Respondents ignore these proposed remedies. Instead, Respondents' only alternative remedy is a mentoring program or some means to give others "assistance" so they could compete.

This Tribunal should seriously consider the implications of Respondents' argument: It undermines all the rest of their entire brief. If competition can be restored with some "assistance" or mentoring from CBI, why can't a divested PDM compete as well? Even though it would still be several times larger than ATV or Matrix, why couldn't CBI do a little mentoring to reestablish the company they illegally purchased?

Nevertheless, the law is clear, CBI cannot escape divestiture with a promise of mentoring. No Commission or court decision has allowed such a cop-out that allows the offender to keep the illegal acquired assets.[35] *See Diamond Alkali*, 72 F.T.C. at 744-45 (Rejecting Respondents' offer to mentor another potential competitor); *United Tote*, 768 F. Supp. at 1086 (Finding that divestiture is proper and that respondents presented "no reasonable alternative to the Court" other than retaining the assets from the proscribed acquisition).

---

[35]Of course, the evidence is that such a remedy would not work in any event. (*See, e.g.*, Gill, Tr. 202)("It would take more than mentoring"); Neary, Tr. 1458 (Mentoring wouldn't make Howard a "real viable competitor)).

Moreover, the testimony that Respondents use to buttress this argument is miscited and indeed undermines their entire case. For example, Respondents assert unequivocally that Cutts testified that ATV "could fully compete against CBI on all fronts" if he received some employees, technical advice, customer lists and specifications from CBI. (R. Brief at 171) That's simply not true. Cutts was never asked that question, or anything close to it. He was simply asked what he would be willing to "buy" that "would improve their ability to compete," period. (Cutts, Tr. 2371) No mention was made about competing "fully against CBI on all fronts," or anything like that. Moreover, the list he mentioned included many items that CBI forgot to list, like:

> "[A]ll their bids, everyone they've bid to in the last ten years. Second, their technical specifications associated with cryogenic LNG applications. Their welding systems associated with certain cryogenic applications. Their name, so I don't have to spend ten years building our name and fighting everybody in the industry who says things that aren't true about us. And probably acquire a couple of their people. I know one in particular. After that, I'm not sure who." (*Id.* at 2371-2372)

As one can see from the question and the answer, Cutts wasn't asked about competing "fully against CBI on all fronts," nor did he complete his list of what he might want to "buy." This is why cross examination of live witnesses, rather than Respondents' use of snippets of imprecise deposition testimony, is more illustrative of the truth. Indeed, Respondents failed to mention that, elsewhere, Cutts actually spoke about why ATV wasn't a strong competitor, and he testified that his company is too small to be as competitive because ATV cannot "bond these larger jobs," and in fact recently had to refuse "to bid two cryogenic tanks" because they lacked "capacity." (Cutts Tr. 2366, 2375; *see* CX 460 at 2 and CX 1654 (showing ATV's capacity is dwarfed by CBI)). ATV's woes were also corroborated by Kistenmacher – Linde BOC Process Plants who testified that ATV had a "very poor track record" and "had many change orders [so] that in the end the price was higher than of the conventional vendors." (Kistenmacher, Tr. 862, 870) [ ]

([ ], *in camera* (wouldn't use ATV because of lack of experience and bad

reputation)). Moreover, the undisputed evidence is that mentoring isn't even a viable option. (*See, e.g.*, Gill, Tr. 202) ("It would take more than mentoring"); Neary, Tr. 1458 (Mentoring wouldn't make Howard a "real viable competitor")).

The very case Respondents cite, *Ford Motor Co., U. S.*, 405 U.S. 562 (1972) held: to "permit Ford to retain the [manufacturing] plant and name and to continue manufacturing spark plugs would perpetuate the anticompetitive effects of the acquisition," and it "'would be novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination... [the defendant] must be left in possession of the power it has acquired.'" 405 U.S. at 574 (Citations omitted). Then, the Court ordered divestiture holding that "'doubts as to the remedy are to be resolved in [the government's] favor.'" *Id.* at 575, *quoting du Pont*, 366 U.S. at 334.

In short, Respondents' misuse of deposition transcripts does not eliminate the fact that they violated the Clayton Act when they combined CBI with PDM. As in every case the Commission has considered, divestiture is required together with further relief to ensure PDM's competitive position in the marketplace. The remaining CBI will remain as a competitor. There is no evidence to the contrary.

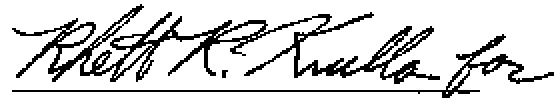
VI. CONCLUSION

After reviewing dozens and dozens of divestiture cases in all contexts and fora, we cannot find a case that screams out more for divestiture than this one. On facts far less severe than these, the Commission has ordered divestiture of what was acquired, and even what was not acquired despite the chance that it would throw the respondent into bankruptcy. If this case does not warrant a finding of liability and an order of divestiture, then Section 11(b) has no meaning whatsoever. Complaint Counsel therefore respectfully asks this Tribunal to apply the established law in the tradition of Judge

Hyun and the many other judges and examiners that have carried out this difficult mission since the Clayton Act was first adopted in 1914 to stop anticompetitive effects in their incipiency.

Dated: March 14, 2003

Respectfully submitted,



J. Robert Robertson
Counsel Supporting the Complaint

Federal Trade Commission
600 Pennsylvania Ave. N.W.
Washington D.C. 20580
(202) 326-3498

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of public record version of Complaint Counsel's Corrected Reply Brief to be delivered by hand to

The Honorable D. Michael Chappell
Federal Trade Commission
H-104
6th and Pennsylvania Ave. N.W.
Washington D.C. 20580

Administrative Law Judge

and by express mail to:

Jeffrey A. Leon
Duane M. Kelley
Winston & Strawn
315 W. Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600

Counsel for Respondents Chicago Bridge & Iron Company N.V. and Pitt-Des Moines, Inc.

Linda Cunningham, Merger Analyst

Dated: March 14, 2003

United States District Court, District of Columbia.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
HARBOUR GROUP INVESTMENTS, L.P., et al., Defendants.

Civ. A. No. 90-2525.

Nov. 19, 1990.

MEMORANDUM OPINION

THOMAS F. HOGAN, District Judge.

*1 On November 8, 1990, the Court issued an order granting plaintiff's motion for a preliminary injunction. The Court held that the defendants had not met their burden in establishing their entitlement to the "failing company" defense. The order stated that a memorandum opinion in support of the Court's order would be forthcoming. This is the memorandum opinion in support of the Court's order of November 8, 1990.

Background

This antitrust action was filed by the Federal Trade Commission ("FTC" or "Commission") on October 15, 1990, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Section 13(b) of the FTC Act authorizes the FTC to bring an action in federal district court to seek preliminary relief pending the completion of administrative proceedings by the FTC to determine whether the challenged acquisition violates the antitrust laws. The FTC seeks preservation of the status quo pending full consideration by the FTC at an administrative trial. The standard for issuance of a preliminary injunction under Section 13(b) is that "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). [FN1]

In the interest of time, cost, and simplification of the issues, all parties decided to stipulate, for the purposes of the plaintiff's motion for a preliminary injunction, that the FTC met its burden in proving an adequate *prima facie* case on all relevant issues. Accordingly, the only issue before the Court is whether defendants have met their burden in establishing their entitlement to the "failing company" defense. [FN2] The Court holds that the defendants have not met this burden, and that entry of a preliminary injunction is therefore appropriate.

The Parties and the Challenged Transaction

Defendant Harbour Group Investments, L.P. ("Harbour Group") is a Missouri limited partnership that buys and sells companies. Harbour Group acquired Meade Instruments Corporation ("Meade") in December 1986. Meade, a California corporation founded in 1972, manufactures and sells Schmidt-Cassegrain telescopes ("SCTs"), used by amateur astronomers. Meade is located in Costa Mesa, California.

Defendant Diethelm Holding (USA) Ltd. ("Diethelm"), a Nevada Corporation, is a subsidiary of Diethelm & Co., Ltd., a Swiss company. Diethelm owns Celestron International ("Celestron"), which is located in Torrance, California. Like Meade, Celestron manufactures and sells SCTs.

The proposed transaction involves a joint venture between Harbour Group and Diethelm regarding their two telescope subsidiaries, Meade and Celestron. Meade and Celestron are the two dominant manufacturers in the SCT market in this country. Under the proposed joint venture, Harbour Group and Diethelm will each own 50% of the joint venture, to be named Celestron Meade International ("CMI"). The proposal calls for combining the two businesses at a single production site with centralized management, production and sales. The agreement regarding the joint venture was signed on May 25, 1990.

Analysis

*2 Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits any acquisition by a corporation of the stock or assets of another corporation "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." [FN3] The "failing company" defense is a judicially created defense to a suit brought under § 7 of the Clayton Act, and was first recognized by the Supreme Court in *International Shoe v. FTC* 280

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

U.S. 291 (1930). The defense is to be narrowly construed, *see Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) ("[w]e confine the failing company doctrine to its present narrow scope."), and the party seeking protection under the defense bears the burden of proof.

Subsequent to its decision *International Shoe*, the Supreme Court has reiterated the necessary standard to successfully invoke the defense. A company invoking this defense must show that "its resources [are] so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure ... [and] that it tried and failed to merge with a company other than the acquiring one." *U.S. v. General Dynamics Corp.*, 415 U.S. 486, 507 (1974), (internal citations omitted). The defense will not succeed "unless it is established that the company that is acquiring the failing company or brings it under dominion is the only available purchaser.' *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969). [FN4]

Probability of Business Failure

The parties contest how close Meade is to business failure. Indeed, they sharply contest what measurements the Court should use in deciding whether or not a company is near failure.

Harbour Group acquired Meade on December 18, 1986, purchasing approximately 86% of Meade's outstanding shares from its owner, president and chief executive officer, John Diebel, for a purchase price of $6.5 million. [FN5] The principal lender for the Meade acquisition was the Bank of Boston. Harbour Group used the assets of Meade as collateral for its loan from the Bank of Boston. Meade remains indebted to the Bank of Boston for just over $4 million at this time. Harbour Group claims that the Bank of Boston intends to call in its loan at any moment. The FTC counters that Harbour Group has produced no evidence directly from the Bank of Boston that the loan will be called in immediately. [FN6]

The telescope industry has experienced an across the board decline in business ever since the public's interest in Halley's Comet waned in 1986. Meade's operating profits reached their highest point in fiscal year 1986. Following 1986, Meade's sales declined. Its operating profits for the first part of this fiscal year showed a loss.

Certainly Meade is not experiencing the best financial health at this time. Its sales are down, it holds considerable debt, and its future is uncertain. Despite these difficulties, the Court finds it unnecessary to decide how close Meade must come to financial failure before it can be considered to be facing the "grave probability of a business failure," since Harbour Group failed to demonstrate that the merger is the "only available" alternative open to Meade. [FN7]

Only Available Purchaser

*3 The burden is on the party claiming entitlement to the defense that the acquiring company is the " *only* available purchaser. *Citizen Publishing Co. v. United Stat.* 394 U.S. 131, 138 (1969) (emphasis supplied). The "only" suggests that the burden on the defendant in proving compliance with this requirement is quite heavy. The Ninth Circuit has stated that "merely proving that some or all of the most logical purchasers have declined is not enough to prove that the challenged purchaser was the only prospective purchaser *Golden Grain Macaroni v. F1* 472 F.2d 882, 887 (9th Cir.1972), citing *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971).

In *U.S. v. M.P.M.*, 397 F.Supp. 78 (D.Colorado 1975), the District Court found that the failing company defense had been established by the acquiring company. In its review of the company's efforts to find additional sources of funding, the Court found that the company explored "virtually every potential source of funding." [FN8] The company's president had contacted numerous firms, government agencies, and persons. One of the main stockholders "devoted substantially all of his time toward the task of exploring investment and sales prospects after the Bank threatened drastic action if new funds were not raised immediately. He participated in approaches to as many as 12 persons in an effort to save or sell Mobile." *Id.* at 100-102. The Court found that the "officers of Mobile conducted an earnest, wide-ranging, and good faith effort to locate potential investors or purchasers in order to maintain Mobile as a going concern. The contacts were numerous and varied during time when Mobile faced a grave probability of business failure." *Id.* at 102.

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

In the instant case, the Court finds that defendants have not shown that the joint venture with Celestron is the only available alternative open to Meade. In reaching this conclusion, the Court looks particularly at the fact that the deal between Harbour Group and Diethelm had already been struck at the time any serious efforts to find alternatives to the joint venture really began. [FN9]

The evidence shows that a potential merger between Meade and Celestron had been considered by Harbour Group as a possibility as early as 1987. *See* Plaintiff's Exhibits 73, 170 at 37. In late 1989, pressured by financial difficulties, Harbour Group attempted to initiate new discussions with Diethelm, and by February 1989, serious discussions were underway regarding the possibility of combining the businesses. Affidavit of Ralph Lobdell at 7. [FN10] The President of Harbour Group testified that "[b]y April of 1990, it seemed likely that a joint venture agreement with Celestron could be achieved on acceptable terms. *Id* at 8. Harbour Group and Diethelm signed an agreement on May 25, 1990.

It was not until May 18, 1990, that Harbour Group first contacted Merrill Lynch, the broker which Harbour Group contends handled most of the search, to discuss a possible search for alternative purchasers for Meade. [FN11] Merrill Lynch only agreed to handle the search the following week. Defendant Harbour Group Exhibit U, Deposition of Curtis McWilliams at 33. The efforts made by Merrill Lynch on behalf of Harbour Group did not comport with a normal Merrill Lynch exhaustive search. For one, the search was not handled by the division within Merrill Lynch that had expertise in selling small companies. Two, offering materials prepared by Merrill Lynch were minimal, containing a brief two page executive summary, with financial information and product brochures attached. Three, the search consisted of minimal exploratory phone calls, with little follow-up or attention by the brokers who were responsible for the search.

*4 The Court does not find that a company seeking protection under the failing company defense is obligated to hire a big name broker to attempt to sell the company, or to print the most sophisticated materials in an attempt to sell. However, here the departure from the normal business operations at Merrill Lynch supports the FTC's assertions that Harbour Group's search for an alternative to the joint venture with Celestron was characterized by a minimal effort and designed primarily to be perfunctory.

Despite the fact that the agreement between Harbour Group and Diethelm had taken at least five months to work out, Merrill Lynch was advised that Harbour Group was only interested in an alternative purchaser, "if they came up with a purchaser before the joint venture was consummated." Affidavit of Ralph Lobdell at 11. The short time frame within which alternative purchasers would be considered is underscored by the deadline imposed in the joint venture agreement itself. The joint venture agreement contained an express provision that either Harbour Group or Diethelm was free to solicit acquisition offers from third parties and that if a *bona fide* offer was received by Meade or Celestron by June 29, 1990, the joint venture could be terminated. *Id.* at 12-13. [FN12]

Defendants argue that it makes no difference that an agreement between Harbour Group and Diethelm was already pending at the time searches for alternative purchasers took place. In particular, they point to the fact that Harbour Group specifically instructed Merrill Lynch not to reveal the pending joint venture in any of their approaches to potential purchasers. However, regardless of Harbour Group's instructions, the joint venture between Harbour Group and Diethelm was common knowledge among those in the telescopic industry. In June 1990, Meade announced the pending joint venture to its distributors and customers. Plaintiff's Exhibit 110. No mention was made that other purchasers or mergers would still be considered by Meade. The distinct impression given by the memorandum was that the joint venture was a nearly completed deal. Thus, any potential purchaser of Meade that received this memorandum would likely have believed that no opportunity remained to acquire Meade. [FN13]

Harbour Group suggests that it is unreasonable to require it to approach smaller companies in the industry that could not be expected to have an interest or ability to purchase a larger company such as Meade. The Supreme Court has implied that, at least in some cases, approaching smaller companies in a given industry might be exactly what is

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

required of a company seeking the protection of the failing company defense. In *Greater Buffalo Press*, the Supreme Court reviewed an acquisition by Greater Buffalo Press, Inc., of all the stock of International Color Printing Co. Both companies were in the business of printing comic supplements used on the weekends by most newspapers. In reaching its decision that the District Court had erred in finding that the acquisition in question was within the failing company defense, the Supreme Court pointed to the fact that "only King and Greater Buffalo were considered as prospective purchasers; the numerous other smaller comic supplement printers were never even approached." *Id.* at 555-556.

*5 The FTC contends that there are at least three purchasers who are interested in buying Meade, and that they represent viable alternatives to the Meade/Celestron joint venture. *See* Plaintiff's Answer to Defendants' Prehearing Memoranda, at 4 *See also* Plaintiff's Exhibits 173 and 174, Deposition Transcripts filed November 6, 1990. Harbour Group's response to these assertions by the FTC has not been to approach the potential purchasers seriously to determine if a successful agreement could be reached. Instead, defendants have spent substantial energy in trying to disprove the FTC, and show why these potential alternatives are not options at all.

The Court has reviewed the depositions filed at the time of the hearing. In both the depositions, the tenor of the testimony is that these people would consider purchasing Meade, have financial backers in mind that they would approach if they were to pursue such an option, but that they lack sufficient financial information about Meade to entertain seriously such a purchase. The lack of information known by such potential purchasers regarding Meade points not to a weakness in the FTC's case, but to the fact that prospective alternatives to the merger exist which have never been seriously contacted by Harbour Group. Such lack of information in the hands of potential purchasers undermines the defendants' position that they are entitled to exception from the antitrust laws under the failing company defense. The FTC is not obligated to prove that these companies are immediately ready and willing to purchase Meade. Instead, it is Harbour Group's burden to show that the Meade- Celestron joint venture is *tonly*" available alternative. The FTC's revelation regarding these companies points only to the fact that Harbour Group's search has been narrowly structured, and still has not seriously considered options within the very industry occupied by Meade.

Certainly Celestron thought other companies might be interested in acquiring Meade. Indeed, it appears that one of the primary reasons that Celestron was interested in Meade was its concern that if it did not acquire Meade, another company might. A memorandum obtained from Diethelm during discovery reviewed the opportunity provided to Celestron by Meade's financial difficulties. The memorandum states, in pertinent part:

[I]t appears we have made progress over our competitor during the last twelve months. My major concern with this situation is the possibility of someone else acquiring MI [Meade] that is willing to invest more money to maintain their market share. One such company could be Vixen.... Vixen is extremely interested in distributing more of their own products in the U.S. Meade could be the opportunity Vixen is looking for to expand their sales in the U.S. Such an acquisition by Vixen could be extremely detrimental to our domestic sales as well as significantly reduce our sales in Japan. Of course, Vixen is the obvious company that comes to mind that could see the acquisition of MI as an opportunity but I am sure there are several others that may also fall into this category.

*6 I believe it would be in CI's [Celestron's] best interest to ask Willi to contact the Harbour Group to explore the purchase of MI. It would be extremely difficult to another company to seriously compete against us if we were able to acquire MI.

Plaintiff's Exhibit 37.

The Court does not, in its ruling today, create a *per se* rule that all small companies within a given industry must be contacted before one can successfully invoke the failing company defense. Instead, the Court holds that, in the case before it, Harbour Group's invocation of the failing business defense cannot succeed, in part because the evidence shows that it made minimal efforts, if any, to contact obvious companies in its own industry that appear to be willing to at least entertain the

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

notion of purchasing Meade. Additionally, the search that was conducted by Harbour Group was perfunctory, was commenced after the deal with Diethelm was close to finalization, and was not designed to result in serious alternatives to the joint venture between Meade and Celestron that was near fruition.

Conclusion

One can wonder why the FTC has chosen to sink such a substantial amount of its resources into blocking a merger of two small subsidiaries in an industry that makes hobby telescopes for a minuscule part of the population. On the scale of consumer goods, it does not strike the Court as crying out for such substantial governmental attention. However, the Court acknowledges that this decision lies within the Government's prosecutorial discretion. The Court cannot create a small company defense to the antitrust law, nor is it inclined to rewrite the failing company defense, which has rightly been construed very narrowly. As antitrust law now stands, the effect of the proposed joint venture between Harbour Group and Diethelm "may be substantially to lessen competition or to create a monopoly." The defendants have not met their burden in showing that they are entitled to the narrowly construed failing company defense, even though this may well mean the demise of the defendants, and a concomitant take-over of the market by foreign competition. Accordingly, the FTC is entitled to a preliminary injunction.

For the foregoing reasons, the Court finds that defendants are not entitled to the failing company defense, and the FTC's motion for a preliminary injunction shall be granted.

FN1. This standard places a lighter burden on the FTC than that imposed by the traditional equity standard for issuance of a preliminary injunction. The FTC does not have to show the traditional equity standards of irreparable injury, probability of success on the merits, and that the balance of equities favors the petiti *FTC v. Weyerhaeuser Co* 665 F.2d 1072, 1081-82 (D.C.Cir.1981).

FN2. The stipulation, signed on October 17, 1990, and filed on October 19, 1990, provides, in part:
1. For the purposes of determining the motion for preliminary injunction under Section 13(b) of the Federal Trade Commission Act, it is stipulated that plaintiff has offered an adequai *prima faci* case on all relevant issues except the affirmative defense of failing company, and that defendants will not contest that suc *prima faci* showing meets the standards under 13(b) for issuing a preliminary injunction except for the issue of the failing company defense.
2. The failing company defense is the only legal and factual matter at issue in this proceeding, and defendants bear the burden of proof on that issue.

FN3. In order to determine an acquisition's likely impact on competition, a Court looks to the relevant product market, geographic market, and the transaction's impact on competitic *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957). If the acquisition may substantially lessen competition in any market, it violates the law.

FN4. In *Citizen Publishing*, 394 U.S. 131 (1969), the Supreme Court, relying on its holding in *International Shoe*, restated a third requirement for a successful invocation of the failing company defense: that the prospects of reorganization through receivership, or through Chapter X or Chapter XI of the Bankruptcy Act, would have to be dim or nonexistent to make the failing company doctrine applicable *Ic* at 137-138. The viability of this requirement is currently questionable since, in two later decisions, the Supreme Court did not include this requirement while discussing the failing company defense *See U.S. v. General Dynamics*, 415 U.S. at 507; *U.S. v. Greater Buffalo Press, Inc.* 402 U.S. 549, 555 (1971). The Court need not decide whether or not defendants must prove that the prospects of reorganization under the bankruptcy laws are dim or nonexistent, since it finds that defendants have failed to show that the merger is the "only available" alternative for Meade. Accordingly, the Court will not reach the issue of reorganization under the bankruptcy laws.

FN5. Shortly after the purchase, Harbour Group negotiated with Mr. Diehel for a retroactive $1.5 million reduction in the purchase price.

FN6. Harbour Group presented no affidavit from any official at the Bank of Boston, did not depose any official from the Bank of Boston, and did not file any document from the Bank of Boston which establishes precisely what the Bank of Boston intends to do regarding Harbour Grou loan at

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works

the present time.

FN7. Likewise the Court finds it unnecessary to decide the viability of a "failing division" defense. The FTC has urged the Court to hold that Meade is a division of Harbour Group, and that as a division of a healthy company, it is not entitled to protection from the antitrust laws under the "failing company" defense. The Court will not accept FTC's invitation to construe this unsettled area of the law.

FN8. The bank had informed the company that it had to raise an additional $200,000 in new capital before it would extend further credit. *Id.*, at 101.

FN9. Indeed, it appears that Harbour Group's efforts to find alternative purchasers were motivated by advice of legal counsel, after most of the deal with Diethelm had been completed. Ralph Lobdell, the President of Harbour Group, testified by affidavit that "[i]n early May 1990, we were advised by our counsel that if we were going to rely on the fact that Meade was a failing company to protect the contemplated joint venture from any possible antitrust challenge, it would be necessary for us to demonstrate that there were no alternative purchasers who would pay a reasonable price to acquire Meade." Affidavit of Ralph Lobdell at 9.

FN10. Ralph Lobdell testified that in the fall of 1989, Harbour Group "went out and made inquiries into several businesses ... to buy them." Plaintiff's Exhibit 170 at 38. However, it appears that these contacts were to explore the possibility of Harbour Grou purchasing another business. Regardless of the purpose for which Harbour Group approached these businesses, the Court finds that the approaches were not matched by the interest and intensity with which Harbour Group approached Celestron.

FN11. Although Harbour Group contacted other brokers, most refused to conduct the search, given Meade's small size. Additionally, the Court finds that other brokers contacted by Harbour Group handled the Meade project informally, with a pronounced lack of direction and effort. It is not surprising that this half-hearted effort resulted in no interested purchasers for Meade.

FN12. Harbour Group contends that the June 29, 1990, date was chosen to comply with the Hart-Scott-Rodino waiting period, which would expire on that date. Defendant Harbour Group's Proposed Findings, at 30. They further imply that Harbour Group's hands were tied by Governmental regulation, suggesting that it is impossible to seek out alternative purchasers and obtain FTC approval of a proposed merger simultaneously. The FTC's rules require attestation that a contract, agreement in principle or letter of intent to merge be executed before the FTC's process of antitrust review commences. Harbour Group misses the point. *Before* it was close to reaching a final agreement with Diethelm, Harbour Group should have conducted the *bona fide* search for an alternative purchaser required by the antitrust laws. Waiting to commence the search until the deal is near completion and until the process of governmental review begins will unlikely result in a search that will pass muster under the "failing company" defense.

FN13. According to the FTC, potential alternative purchasers, knowing of the pending deal between Harbour Group and Diethelm, would unlikely take steps toward structuring an alternative purchase, for fear of liability for interference with a preexisting agreement, akin to the liability recognized in *Texaco v. Pennzoil*, 729 S.W.2d 768 (Tex.Ct.App.1987). Plaintiff's Answer to Defendants' Prehearing Memoranda, at 36-37.

1990 WL 198819, 1990 WL 198819 (D.D.C.), 59 USLW 2370, 1990-2 Trade Cases P 69,247

END OF DOCUMENT

Copr. © West 2003 No Claim to Orig. U.S. Govt. Works