UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE PROPOSED FINDINGS OF FACT

Respondents' Motion is a meaningless diversion. Shortly after filing its initial brief, Complaint Counsel discovered that in over 2,650 citations to the record in its initial Post-Trial briefing, five exhibits were inadvertently omitted from the Joint Exhibit list – as were two of Respondents' exhibits (CX 1571 and DX 131) – which Respondents cite in their findings but fail to even mention to the Tribunal that they were also not admitted. Complaint Counsel specifically noted its error in its Reply Findings at page 1. Only one exhibit supports a point that is not mentioned elsewhere, that two employees retired (CCFF 416, *citing* CX 1685), which obviously can be disregarded. Yet, none of the other exhibits affect the substance of any finding, each of which has many other citations to prove the same points.

As Respondents concede, prior to the reply briefing, Complaint Counsel agreed with Respondents to point out these minor errors to the Tribunal and that that would be, as Respondents agreed, the "appropriate" way to deal with this issue.[1] (R. Brief 83, n.77) Yet, inexplicably, Respondents filed this motion without any mention of it to Complaint Counsel. More importantly, since we already pointed out that these five exhibits were inadvertently omitted from the record, and the substance of all the findings remain amply supported by other citations in the record, there is simply no reason for any Motion to Strike.

But Respondents go further. They now claim that (i) two exhibits (CX 105 and CX 1572) that Complaint Counsel never even mentioned in any of its initial findings or brief are not in the record, (ii) that one exhibit (CX 823) is not in the record, when we told them and this Tribunal that this was a typo (the correct number is CX 832, which is in the record); that certain charts and graphs used in the findings are not exhibits (neglecting to state that these charts and graphs state that every basis for them is from admitted testimony and exhibits); that some summary findings have no citations (when they are each followed by multiple paragraphs with dozens of citations to the record); and that Respondents want any reference to Fan's testimony stricken, even though they lost such objections during trial.

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[1] Complaint counsel has reviewed Complaint Counsel's Responses to Respondents' Proposed Findings of Fact and Conclusions of Law, filed March 7, 2003 to verify the *in camera* status of cited evidence and to prepare a public record version of the filing. In the course of this review, Complaint counsel determined that not all *in camera* evidence had been so identified. In addition, Complaint counsel identified five incorrect citations. Complaint counsel will file a corrected copy of Complaint Counsel's Responses, correcting the *in camera* identification and correcting the five citations as follows: CCRF 3.101 delete reference to CX 1545; CCRF 3.532 correct typographical error reference to "CX 110" to read "CX 109"; CCRF 4.50 correct clerical error reference to "CX 689" to read "JX 27"; CCRF 6.25 delete reference to CX 105; CCRF 6.38 delete second sentence and citation to CX 943 and replace with "RFOF 6.66 and response thereto." Complaint Counsel apologizes for these errors.

None of these issues matter to this case. So it is unfortunate that the Tribunal has been diverted from the merits of this case with this meritless motion. However, Respondents' motion disingenuously asks for relief that goes far beyond the simple omission of these five exhibits and the correction of one typographical error – which is all we have here. Instead, they ask to strike dozens of key findings that are overwhelmingly supported by other substantial, admitted evidence that is cited to support these same findings. Thus, their motion should be denied.

1. <u>Findings with Exhibits "Cited" But Not Admitted Into Evidence</u>

Among the over 2,650 citations to exhibits and testimony in both the CCFFs and CC Post Trial Brief, Respondents identify 10 that they claim are not in evidence. This is not correct. CX 105 and CX 1572 were not cited by Complaint Counsel anywhere in the initial findings or brief. CX 823 is a typographical error; the proper cite is CX 832. CX 190, CX 822, and CX 1682 are single cites, which were inadvertently not admitted as evidence, but which were in a string of other citations to admitted exhibits and testimony. Disregard of these exhibits does not undermine the evidentiary foundation for any of the findings that cite to them.[2] CX 1591 was never offered for evidence in any finding; it is simply noted in CCFF 318 that Dr. Simpson cited it in his testimony. ***Only one*** statement in a finding (CCFF 416) (referring to an extremely minor point of the retirement of two employees) is supported by an exhibit that was inadvertently omitted from the record, CX 1685, and, as pointed out previously to this Tribunal should be disregarded.

[2] Table 1 attached hereto summarizes the relevant CCFFs and the citations therein.

CX 370 is the deposition transcript of Daniel Britton, an executive of Fairbanks Natural Gas. By letter dated December 1, 2002, attached hereto, Respondents agreed to the admissibility of Mr. Britton's deposition transcript (except for minor portions), and the parties understood and agreed that the deposition would be submitted in evidence. (Leon, Tr. 3112 ("the customer is **Dan Britton, whose deposition is going to be submitted**, not read, **tomorrow**. He's testified, he was deposed, and to the extent that they want to talk about what Mr. Britton has said, that's fine.") (emphasis added)). Complaint Counsel, however, inadvertently did not include CX 370 in the final joint exhibit list.

Dropping Britton's deposition cite, however, has no bearing on the issue here. The simple fact that the Fairbanks job had a higher price than another similar project (what Britton says) is documented by RX 407 and CX 791, both of which are in evidence and cited by Complaint Counsel in the related findings. (CCFF 962-964, 966-970, 972-976). RX 407 shows CB&I's $3.6 million price quote to Fairbanks and a margin of 20%, which is far higher than CB&I's pre-merger margins (CCFF 1027). This higher margin rate is one example of CB&I's post- merger market power. Moreover, comparing CB&I's $3.6 million price to Fairbanks with PDM's pre-merger $2.6 million price quote to BC Gas for a comparable sized-tank (reflected in CX 791) also shows an anticompetitive price increase. Thus, the withdrawal of CX370 (Britton Dep.) changes nothing.

In short, Complaint Counsel would gladly move to have all these five exhibits admitted, since they were inadvertently omitted from the final JX, but their omission simply does not change the substance of any issue here. Thus, not to burden the Tribunal any further, we accordingly ask that they be disregarded.

2. Findings Containing Charts or Graphs Depicting Evidence Admitted into the Record

Respondents object to certain findings that contain charts or graphs. Respondents cite no law in support of their objection and, remarkably, ignore the Commission's recent ruling in which the Commission upheld use of graphs as pedagogical devices[3] to summarize or illustrate evidence already in the record, even where such graphs are presented, for the first time, during the appeal.[4] *Schering-Plough Corporation*, F.T.C. Docket No. 9297, Order re Upsher-Smith's Motion to Strike Demonstrative Exhibits that Are Not in the Record and Motion for Leave to File Reply, at 2, September 27, 2002. The Commission explained that "the illustration of this evidence in graphic form may be an effective aid to the presentation and understanding of the evidence adduced in this case." *Id*. at 2.

One cannot read any Commission or ALJ opinion in any serious antitrust case and not find the use of tables or charts that are ***based upon admitted testimony and exhibits***, as each one of Complaint Counsel's graphical descriptions of evidence are. In cases involving economic testimony, it is often useful to display admitted evidence in graphical form to say in one chart what might otherwise take a thousand words. Clarity is simply good writing, and the use of tables or charts is common in opinions by Judges and

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[3] The Commission described a pedagogical-device summary or illustration to include "chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify, or simplify testimonial or other evidence that has been admitted in the case, but which are themselves not admitted, instead being used only as an aid to the presentation and understanding of the evidence." *Schering-Plough Corporation*, September 27, 2002 Commission Order at 2 n.1, citing *United States v. Bray*, 139 F.3d 1104 at 1112 (6th Cir. 1998).

[4] *See* Figure 1 as presented in Complaint Counsel's appeal brief in *Schering-Plough Corporation*, F.T.C. Docket No. 9297, attached.

Commission alike.[5] Respondents have raised no authority for their unusual proposition that charts and graphs cannot be used, nor is there any.

Morever, Respondents falsely represent that the graph contained in CCFF 826 "had originally been marked as CX 1761, offered as a demonstrative exhibit, and rejected by the Court." Respondents' Reply Brief at 83. Rather, CCFF 826 shows in a chart form the price information contained in CCFF 825, which shows the history of price, profit and margin of the Cove Point LNG tank together with citations to the record exhibits and testimony supporting the

figures therein. The graphic presentation is simply a pedagogical aid to understanding what is shown in CCFF 825. The graph in CCFF 826 is not the same one offered as a demonstrative as CX1761. But even CX1761, if it were used as a graph now and if each data point was based upon uncontroverted admitted evidence would be an appropriate graph for this Tribunal and the Commission to use. CCFF 826's graph is a more thorough rendition of the Cove Point pricing evidence and simply displays the data points that are supported by admitted evidence, as clearly indicated on the graph itself.

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[5] *See, e.g., R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 162 (graph),180 (tables) (1995); *id*. at 75, 98-99, 105, 109-10, 124 (Initial decision by Lewis F. Parker, ALJ); *The Coca-Cola Company*, 117 F.T.C. 795, 800-01, 804-06, 827, 848-55 (1994) (Initial decision by Lewis F. Parker, ALJ); *Adventist Health System/West*, 117 F.T.C. 224, 251, 256, 263 (1994) (Initial decision by Lewis F. Parker, ALJ); *Occidental Petroleum Corporation*, 115 F.T.C. 1010, 1058-59, 1061, 1063, 1195-96, 1198, 1199-1200 (graphs) (1992) (Initial decision by Thomas F. Howder, ALJ); *Owens-Illinois*, 115 F.T.C. 179, 324 n.33, 333-34 (1992); *id*. at 189-93, 202, 220, 230-37 (Initial decision by James P. Timony, ALJ); *Boise Cascade Corp.*, 113 F.T.C. 956, 989-90 n.59 (1990); *id*. at 1006-07 (Concurring Opinion of Commissioner Mary L. Azcuenaga); *Olin Corporation*, 113 F.T.C. 400, 422-23, 427, 484, 488, 493, 495-96, 503-04, 507, 509, 511, 526-34, 536-38, 543, 549-50, 574 (1990) (Initial decision by Montgomery K. Hyun, ALJ); *Ticor Title Insurance Company*, 112 F.T.C. 344, 398-99 (1989) (Initial decision by Morton Needelman, ALJ); *Midcon Corp.*, 112 F.T.C. 93, 156 (1989); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 563 (1988) (Initial decision by James P. Timony, ALJ); *B.F. Goodrich Company*, 110 F.T.C. 207, 307-10, 312-14, 333-34 (1988).

Respondents further argue that CCFF 882 and CCFF 913 should be stricken because they do not include Dr. Harris's comments. Respondents' Reply Brief at 83, n. 77. What Dr. Harris said is not evidence, and in our view is without any value whatsoever. Respondents are free to present Dr. Harris's unsupported commentary in their own proposed findings and cannot rightly insist that we do so.[6] It is not necessary that before we offer any proposed findings to this Tribunal that we obtain Dr. Harris' agreement. (*See* Krulla, Tr. 7977 (Stating that there wasn't enough time to even attempt to do so with CX 1761)).

3. <u>Findings that Are Undisputed or Summarize Other Findings</u>

Respondents object to 66 findings that are undisputed or summarize related but more detailed findings (which directly follow each summary sentence) because they purportedly lack "citation" to the numbers of the related findings.[7] Simply reading the findings would obviate burdening the Tribunal with this motion. In every case, either the statement is self evident (*e.g.* Respondents "failed to offer evidence" on a point) or the statement is simply a summary statement which is followed by many paragraphs of proposed detailed findings with substantial evidence in support of each and every point stated in the summary in great detail.

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[6] Respondents assert that "Dr. Harris made numerous changes" to CX 1760, which Complaint Counsel did not use here, but Harris's commentary is not relevant. However, it should be noted that the only change Dr. Harris made was to substitute "WGT" for "Whessoe" on CX 1760 because "WGT" was the abbreviation used on the underlying page of the document. (RX 157 at [ ] 02 004 *in camera*). (Harris, Tr. 8037). Dr. Harris simply stated that "my best guess, I think it's Whessoe" (Harris, Tr. 8036). CX 691 confirms that "WGT" is indeed Whessoe: [
] (CX 691 at [ ] 02 003 *in camera*).

[7] The Tribunal's Order on Post Trial Briefs, issued January 15, 2003, does not require that citations to the record appear in each finding. It is rather obvious from reading a summary finding that all the following proposed detailed findings and citations support the first summary point. It would be redundant to have to cite them all again.

For example, CCFF 265 states: "There are no PDM documents that discuss any firm as a greater competitive threat than CB&I in the relevant markets." Complaint Counsel cannot cite to a document that does not exist. But of course this is the whole point of the finding, and Respondents, rather than pointing to evidence that would refute the finding, seek to have the Tribunal ignore the facts.

In an example of a summary sentence, CCFF 50 states that "The relevant product markets in which to analyze the acquisition are field-erected LNG storage tanks (individually, or as a component of an LNG import terminal or a LNG peak shaving plant), LIN/LOX storage tanks, LPG storage tanks and TVCs." From day one, Respondents have conceded the product market definitions in this case and yet they seek to have the Tribunal not make a finding on this issue. Moreover, in each case, Complaint Counsel then cites dozens of findings with dozens of admitted evidence to support this very statement.[8]

Finally, without any evidentiary support, Respondents challenge CCFF 29, which states: "By proposing a TVC remedy to the Tribunal during the trial, Respondents have conceded that this merger will likely have anticompetitive effects in the TVC market." Respondents cannot suggest in good faith that Mr. Glenn did not make a settlement offer to the Tribunal to "address the competitive concerns that complaint counsel has in this case concerning thermal vacuum chambers..." (Glenn, Tr. 4164-65). In essence, Respondents ask the Tribunal to ignore the truth simply because of the absence of a page number.

In short, there is nothing about these findings that is improper in any way. Rather, these findings are supported by substantial evidence.

4. <u>Findings Relating to Chung Fan</u>

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[8] For the convenience of the Tribunal, Table 2 attached hereto identifies the summary findings objected to by Respondents and cross references their respective underlying findings.

Finally, Respondents incorrectly assert that the findings relating to Mr. Fan's testimony about CB&I's post-merger 8.7% price increase to his company (Linde BOC Process Plant LLC) should be stricken because the Tribunal "ruled that Mr. Fan's statistical analysis of CB&I's price was not admissible for the truth of the matter asserted" – although this Tribunal never said that at all. (Motion at 2). Respondents point to one page of the transcript, but ignore what this Tribunal actually said when referring to one piece of Fan's testimony, where this Tribunal stated: "I'm allowing this because you're telling me he got these bids, he looked at this, he acted on it, I'm allowing it for that purpose only. I'm not allowing it for proof that he was right about any of this." Respondents ignore the five other times in which the Tribunal overruled their objections and permitted Mr. Fan to explain the basis for his perception that prices had risen by 8.7% since the merger. (Tr. 1004 ("Well, if I understand it right, it's part of his job. I'm going to allow him to tell me that"); Tr. 1007-08; Tr. 1010; Tr. 1014 (Tribunal: "I'm fine with what he believes and why he did what he did, and that's the way I'm accepting this testimony"); Tr. 994-95 (Tribunal: "I don't have a problem with someone telling me, as I said, what he saw, what he did, and I understand. I don't have a problem with a witness telling me this was my job, I had these bids, I looked at these bids, I didn't accept this bid, I think it was high.").

In short, this Tribunal clearly did not want Fan to speculate about the future, but allowed him to testify about what he observed and believed at the time – that the CBI price "was high." *Id*. Moreover, one of the reasons one has post-trial briefing is to argue and propose the value of certain evidence by relating to it the weight of other evidence on this same point. Often what is not clear during a particular examination becomes clear at the closing of the case. In this instance, Mr. Fan and his exhibit, which was admitted as a business record, both state that it was Fan's observation at the time that CB&I's price was

higher by 8.7%. (Tr. 975 (Tribunal: "I find [CX1584] to be reliable based on his testimony, I don't see any evidence of untrustworthiness or unreliability, therefore 1584 is admitted")).

Respondents are free to argue that this one piece of evidence might not be clear enough. But other admitted evidence corroborates Mr. Fan's precise observation. As Complaint Counsel has already pointed out in previous briefing, and at closing, CB&I's prices to PraxAir on comparable tanks at approximately the same time revealed the ***exact*** same 8.7% price increase that Mr. Fan observed. (*See* CX1584-2; CX448; DX92 at 7402, 7411; Fan, Tr. 1009-10). Thus, while Respondents' counsel likes to poke fun at Mr. Fan, his observations were dead-on accurate, as supported by substantial evidence. And from those observations, as well as multiple corroborating evidence, the ultimate issue in the case is whether the acquisition "may...lessen competition." As substantial evidence, including one piece from an actual customer, shows that it has already happened, there is simply no basis to reject Fan's direct observation here.

Conclusion

In sum, it is unfortunate that Respondents have asked this Tribunal to waste time on this issue, which diverts attention away from the undisputed evidence, which is amply set forth in the several hundred pages of briefs and findings and over 2,650 citations to admitted evidence in this voluminous record. Since Complaint Counsel had already agreed with Respondents to ask the Tribunal to disregard the five exhibits that were inadvertently omitted from the final JX, and since none of their omissions affect any of the substantive findings offered by Complaint Counsel, there is nothing for this Tribunal to do here except to disregard these five exhibits and proceed with a determination in this case. A proposed order is attached.

Dated: March 19, 2003 Respectfully submitted,

J. Robert Robertson
Chul Pak
Rhett R. Krulla
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

ORDER

On March 10, 2003, Respondents filed a Motion to Strike certain exhibits and Complaint Counsel's Findings of Facts. On March 12, 2003 Complaint Counsel filed an Opposition to Respondents' Motion to Strike. Having fully considered Respondents' Motion and Complaint Counsel's Opposition thereto, the Court finds that Complaint Counsel's proposed findings, identified in Respondents' Motion to Strike, are supported by the record. Complaint Counsel has identified the following exhibits that were not admitted into evidence but inadvertently cited in their proposed findings of fact: CX 190, CX 370, CX 822, CX 1682, and CX 1685. Complaint Counsel has withdrawn any reference to these inadvertently included exhibits. Because these exhibits were not admitted into evidence, they will be disregarded. CCFF 416, which relies on CX 1685 has been withdrawn as well

and thus both will be disregarded. All other of Complaint Counsel's findings are supported by evidence in the record and will be considered by this Tribunal in its review of the findings in this case. Accordingly,

IT IS HEREBY ORDERED that, except as stated above, Respondents' motion is denied.

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D. Michael Chappell
Administrative Law Judge

Date: March , 2003

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the public record version of Complaint Counsel's Opposition to Respondents' Motion to Strike Proposed Findings of Fact 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 first-class mail to:

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

Dated: March 19, 2003

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Rhett R. Krulla

December 1, 2002 Letter Agreement signed by Eric M. Sprague and Jeffrey A. Leon

Figure 1 as presented in Complaint Counsel's Appeal Brief in
Schering-Plough Corporation, F.T.C. Docket No. 9297

Table 1
CXs Inadvertently Cited by Complaint Counsel

Table 1 – CXs Inadvertently Cited by Complaint Counsel

CX	Finding	Response
105	Not Cited by Complaint Counsel	Complaint Counsel did not use this document in either its findings or its post-trial brief.
190	406. There are no LPG tank suppliers in the United States that can match Respondents' track record. (CX 152). (See CX 160 at CBI-PL004768; CX 171 at CBI-PL009817; CX 172 at CBI-PL009975; CX 179; **CX 190 at CBI-PL017044**; CX 207 at CBI-PL031456; CX 217 at CBI-PL 034420; CX 244 at CBI-PL4005377; CX 417 at CBI 026845-52-HOU).	Complaint Counsel respectfully requests that the Tribunal disregard the document that is not in evidence, and consider the other nine documents that support Complaint Counsel's Finding.
370	956. In 2002, Fairbanks explored the possibility of expanding its storage capacity with a field-erected LNG tank. Fairbanks considered LNG tanks capable of storing one million and five million gallons. (CX 370 at 21, 30 (Britton, Dep.); Simpson, Tr. 3107). 961. The only firm willing to submit pricing information was CBI. Having only one competitor left Fairbanks in an undesirable position because it prefers to "have more than one company to get quotes from." (CX 370 at 89 (Britton, Dep.); *see* Simpson, Tr. 3120 (Dr. Simpson concluded that foreign builders of LNG tanks were not interested in building this tank for Fairbanks)). 970. PDM's response included a budget estimate of $3.6 million Canadian dollars for a 1.2 million gallon LNG tank. (CX 791 at PDM-HOU	Dr. Simpson's testimony (Simpson, Tr. 3107) is cited as additional support for CCFF 956. In addition, CCFF 956 is supported by RX 407 at CBI 066667. Dr. Simpson's testimony (Simpson, Tr, 3120) is cited as additional support for CCFF 961. CX 791 at PDM-HOU 2015260 is cited as additional support for CCFF 970. In addition, CCFF 970 is

	2015260 (the project was calculated was a 1.38 exchange rate)). Calculating what the price would have been in U.S. dollars in 1996, PDM's price would have converted to $2.6 million. (See CX 370 at 94 ("Q: Do you know what the exchange rate was in 1996?/ A: Probably about 1.4.") (Britton, Dep.)).	supported by RX 407 at CBI 066666 and by RX 626 at CBI 063013.
	1286. Customers would benefit from the increased competition resulting from an effective divestiture. (Neary, Tr. 1502 (TVC; competition would be restored if PDM EC were returned to the marketplace); **CX 370, 89 (Britton, Dep.)** (LNG; prefers to have more than one competitor, CB&I, for a project); Patterson, Tr. 462, *in camera* ([ ]); Simpson, Tr. 3606-07, 3611 (customers would benefit by reconstituting PDM EC)).	CCFF cites as additional support the testimony of Mr. Neary (Neary, Tr. 1502), by the testimony of Mr. Patterson (Patterson, Tr. 462, *in camera*), and by the testimony of Dr. Simpson (Simpson, Tr. 3606-07, 3611). Complaint Counsel respectfully requests that the Tribunal only disregard the document that is not in evidence, and consider the other documents that support Complaint Counsel's Findings.
	The Fairbanks, Alaska Project: In 2002, Fairbanks explored the possibility of expanding its storage capacity with a field-erected LNG tank. Based on an outside consultant's analysis, Fairbanks concluded that the tank it wanted would cost approximately $2.2 million dollars. (CX 370 at 18, 19, 21 (Britton, Dep.)). But CB&I's $3.6 million price was $1.4 million higher than Fairbanks' estimate of $2.2 million based on its consultant's analysis. (RX 407 at CB&I 066666; CX 370 at 19 (Britton, Dep.)). CB&I had also included a 50% margin for the	This paragraph of Complaint Counsel's Post-Trial Brief is supported by RX 407 at CB&I 066666 and by CX 791 at 260.

	job. (RX 407 at 6666 ("includes 20% margin" plus "30%" for location). Yet, on a recent LNG tank project in nearby British Columbia before the acquisition, PDM had offered a price that was comparable to the estimated price of $2.2 million for the tank – demonstrating that if PDM had not been eliminated from competition, Fairbanks could have received a substantially lower price. (*See* CX791 at 260; CX370 at 94-97) (Complaint Counsel Corrected Post-Trial Brief at 36-7). 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"); CX 370 at 89 (Britton Dep.) (better to have competition); (Simpson, Tr. 3606-09 ("PDM EC was as strong a competitor as it was because it possessed certain tangible and intangible assets. For a reconstituted firm to be as strong a competitor, it, too, would have to possess similar assets like the fabrication plants..., its work force, its engineering staff and its intangible assets, such as its learning by doing, enabled it to compete as a very strong competitor in this marketplace.") In short, as Dr. Simpson testified, the remedy would "restore the competition that existed prior to the acquisition." (*Id.* at 3608-09) This is exactly what the law requires. *Olin*, 113 F.T.C. at 619. (Complaint Counsel's Post-Trial Brief 52).	This paragraph of Complaint Counsel's Post-Trial Brief is supported by the testimony of Mr. Neary (Neary, Tr. 1489, 1502), by the testimony of Dr. Simpson (Simpson, Tr. 3606-07, 3611), and by the Commission's decision in *Olin*.
370	957. Fairbanks retained the services of CDS Research, an LNG consulting firm, to assist in the project. CDS Research helped prepare a budget for the project. CDS Research's methodology consisted of taking the "industry standard for benchmarking at costs per gallon and then factored in an adjustment factor for size of the tank and referred back to ... recent projects to kind of do a comparison ... " (**CX 370 at 97 (Britton, Dep.**)). 958. CDS Research's analysis included a "15% adjustment factor on the	Complaint Counsel has no objection to striking these particular findings. Complaint Counsel has acknowledged its error in its Response to Respondents' Findings of Fact and apologizes for any inconvenience to the Tribunal. Complaint Counsel asks that the Tribunal note the attached agreement made by Respondents and

	industry standard for size of the facility ... the industry standard budget pricing for the size." (**CX 370 at 98 (Britton, Dep.)**). 959. Based on CDS Research's analysis, Fairbanks concluded that a one-million gallon field-erected LNG tank would cost approximately $2.2 million dollars. (**CX 370 at 18, 19, 21 (Britton, Dep.)**). Fairbanks further concluded that the total cost of the LNG tank and the necessary systems would be approximately $5 million. (**CX 370 at 46-8 (Britton, Dep.)**). 960. CDS Research contacted multiple tank suppliers in order to create a competitive bidding situation for Fairbanks. CDS Research found that suppliers were unwilling to provide budgetary pricing information. (**CX 370 at 33 (Britton, Dep.)**). 964. CBI's $3.6 million price was $1.4 million higher than Fairbanks' estimate of $2.2 million based on its consultant's analysis. (RX 407 at CBI 066666; **CX 370 at 19 (Britton, Dep.)**). 965. Fairbanks expected "margina[l]" cost increases between 1999 and 2002, but saw no reason that such increases would be "significant" enough to raise the tank price by more than 60%. (**CX 370 at 21 (Britton, Dep.)**). 971. PDM's $2.6 million price to BC Gas was only $400,000 more than the $2.2 million estimate CDS Research provided to Fairbanks, which was based on "industry standard for benchmarking at costs per gallon" and "recent projects." (**CX 370 at 97 (Britton, Dep.)**). 1286. Customers would benefit from the increased competition resulting from	Complaint Counsel regarding the Deposition of Daniel Britton.

	an effective divestiture. (Neary, Tr. 1502 (TVC; competition would be restored if PDM EC were returned to the marketplace); **CX 370, 89 (Britton, Dep.)** (LNG; prefers to have more than one competitor, CB&I, for a project); Patterson, Tr. 462, *in camera* ([ ]); Simpson, Tr. 3606-07, 3611 (customers would benefit by reconstituting PDM EC)).	
822	1356. Prior to the acquisition, PDM EC employed 231 salaried employees and 768 hourly employees. (**CX 822 at 8**; see CX 522 at 26 (in July 2000, PDM EC employed 717 hourly field personnel)). PDM EC's salaried employees included 46 engineers, 36 draftsmen, and 17 estimators. (CX 522 at 26).	Complaint Counsel respectfully requests that the Tribunal only disregard the document that is not in evidence, and consider CX 522 at 26, the other document cited in support of Complaint Counsel's Finding.
823	737. At CB&I, Glenn stated that CBI/PDM had "unequaled capability in our chosen field." (CX 1720 at CBI/PDM-H 4000784). Rich Goodrich, Executive Vice President and Chief Financial Officer, called CBI/PDM the "900 pound gorilla." (CX 1681 at CBI/PDM 4005289). Daniel Knight, the same person who anticipated that the combination of CB&I & PDM would "create barriers to entry," stated, in a post-acquisition e-mail, that "We are by far the 'big-dog' of the industry and I think we need to better educate our customers of what they gain by buying from CBI." (CX 459 at CBI-E 007218; see CX 101 at PDM-HOU002359). CB&I boasted internally regarding the LNG market that "no other company in the world is more uniquely or strategically positioned to capitalize on that emerging market." (**CX 823 at CBI-E 009355**).	Complaint Counsel inadvertently made a typographical error. CX 823 should be typed as CX 832. Complaint Counsel apologizes for the inconvenience.
1572	Not Cited by Complaint Counsel	Complaint Counsel did not use this

		document in either its findings or its post-trial brief.
1591	318. An entrant would need a large engineering staff to design LNG tanks. (Simpson, Tr. 3156 (citing CX 258 at 1794; **CX 1591 at 15262**). Dr. Harris agreed that an entrant must have engineering capability. (Harris, Tr. 7249).	The cited authority in CCFF 318 is Dr. Simpson's testimony (Simpson, Tr. 3156). CCFF 318 notes that Dr. Simpson cited CX 258 and CX 1591 as useful to forming his expert opinion. Accordingly, Complaint Counsel respectfully requests that this finding not be stricken from the record.[1]
1682	744. Shortly after the "brainstorming" session, Scorsone and other members of the integration team held an "Integration Kick-off Meeting." (CX 1544 at CBI 057915; **CX 1682 at CBI/PDM-H 4005307**).	Complaint Counsel respectfully requests that the Tribunal only disregard the document that is not in evidence, and consider CX 1544 at CBI 057915, the other document cited in support of Complaint Counsel's Finding.
1685	416. PDM gained efficiencies and reduced costs by assigning experienced employees on TVC projects. In an e-mail written relating to the Spectrum Astro TVC project, Mr. Scorsone wrote that "[t]he retirement of Fred Dilliott will hurt our ability to manage [ ]" and "Bob Watson has left the company and this will hurt our ability to manage the engineering and startup program." (**CX 1685 at CBI/PDM-H 4000903**).	Complaint Counsel has no objection to Respondents' motion to strike this particular finding. Complaint Counsel has acknowledged its error in its Response to Respondents' Findings of Fact and apologizes for any inconvenience to the Tribunal.
CCFF 177	Dr. Simpson testified that an analysis of LPG tanks and ammonia tanks sold between 1990 and early 2001 provides further evidence that CB&I and PDM	CCFF 177 discusses Dr. Simpson's testimony regarding his examination of

	were the two strongest suppliers of LPG tanks in the United States. (Simpson, Tr. 3400). Dr. Simpson testified that the skill set required to build field-erected ammonia tanks is very similar to the skill set required to build field-erected LPG tanks (Simpson, Tr. 3398 (**citing CX 1615 and interviews with industry participants**)). Nineteen projects for field-erected LPG tanks and field-erected ammonia tanks were awarded between 1990 and early 2001 in the United States. (Simpson, Tr. 3400 (referencing CX 1660 (demonstrative))). CB&I won twelve of these projects, PDM won five of these projects, Morse won one of these projects, and AT&V won one of these projects. (Simpson, Tr. 3400 (referencing CX 1661 (demonstrative))). Dr. Simpson testified that the probability of observing CB&I and PDM win seventeen of nineteen projects if some other firm competed on an equal footing with CB&I and PDM is only 2.4 percent. (Simpson, Tr. 3400 (referencing CX 1661, demonstrative)).	ammonia tank awards to test his conclusions regarding LPG tank awards. CCFF 177 notes that Dr. Simpson cited CX 1615 and, in addition, relied on his "interviews with industry participants" for his observation that the skill set required to build field-erected ammonia tanks is very similar to the skill set required to build field-erected LPG tanks. CCFF 177. Complaint Counsel has clearly indicated, in CCFF 177, that Dr. Simpson disclosed the bases for his opinion. Accordingly, Complaint Counsel respectfully submits that there is no basis to strike CCFF 177.[2]

Table 2
Summary Findings Objected to by Respondents

Table 2 – Summary Findings Objected to by Respondents

CCFF	Findings	CCFF Reference
29	"By proposing a TVC remedy to the Tribunal during the trial, Respondents have conceded that this merger will likely have anticompetitive effects in the TVC market."	Glenn, Tr. 4164-66
33	"Complaint Counsel has demonstrated sufficiently high market shares and increases in market concentration to trigger the presumption that the CB&I/PDM merger will likely have anticompetitive effects. Complaint Counsel has also shown that the elimination of CB&I's closest competitor will likely lessen competition. Respondents have not rebutted this presumption with proof of ease of entry, cognizable efficiencies or an "exiting assets" defense. Although not required to do so, Complaint Counsel has also shown instances of actual anticompetitive effects. In other words, the evidence establishes that this merger violates Section 7 of the Clayton Act and Section 5 of the FTC Act."	99-195 (Market Concentration) 196-290 (Closest Competitors) 291-580 (Entry is Not Easy) 777-1220 (Anticompetitive Effects of the Acquisition)
50	"The relevant product markets in which to analyze the acquisition are field-erected LNG storage tanks (individually, or as a component of an LNG import terminal or a LNG peak shaving plant), LIN/LOX storage tanks, LPG storage tanks and TVCs."	51-94
78	"The evidence demonstrates that a small but significant, nontransitory increase in the price of a field-erected LPG tank would not prompt customers to switch to alternative products."	79-83
260	"No firm exerted a greater consistent competitive threat than PDM across the relevant markets."	251-259
265	"There are no PDM documents that discuss any firm as a greater competitive threat than CB&I in the relevant markets."	261-264
384	"Bidding experience is another country-specific intangible asset that gives CB&I a competitive advantage over other firms."	385
421	"Respondents[‘] ordinary course of business documents and communications to the public prior to the commencement of this proceeding uniformly characterize the competitive landscape as dominated by CB&I and unthreatened by foreign and domestic firms."	422-435

449	"AT&V faces numerous problems that make it unlikely to replace PDM as CB&I's closest competitor."	450-482
581	"Respondents contend that entry by foreign and domestic firms will erode CB&I's market share and market power. The evidence of post-merger negotiations for LNG projects in the United States that may be built in the future indicates the opposite conclusion: CB&I is likely to maintain or increase its dominant position in the United States LNG tank market."	582-591
589	"Because the LNG tank owner has not decided how to structure the bidding process for the LNG tanks, it is unclear who will win the projects."	588
615	"Additional evidence further indicates that Dr. Harris incorrectly identified some variable costs as fixed costs."	616-623
642	"In using a critical loss analysis to analyze whether CB&I has market power, Dr. Harris ignored differences between using a critical loss analysis for market definition and using a critical loss analysis for assessing market power within a market. Dr. Harris underestimated the profitability of a price increase to CB&I because he failed to take into account the sales diversion between CB&I and PDM and because he failed to take into account price reactions of other firms to a price increase by CB&I following the acquisition."	643-650
687	"Dr. Harris bases his conclusions regarding entry and competitive effects in the LNG tank market primarily on his observations regarding Dynegy's Hackberry LNG project. His testimony reveals a misunderstanding on his part regarding what happened in the Dynegy project and serious flaws in his analysis of entry and competitive effects."	688-696
749	"Complaint Counsel has established that the merger will likely have anticompetitive effects through evidence of (1) Respondents' dominant position in highly concentrated markets, (2) the elimination of PDM as CBI's closest competitor, and (3) the inability of foreign and domestic firms to replace PDM as a competitive constraint on CBI."	99-195 (Market Concentration) 196-290 (Closest Competitors) 751-1220 (Anticompetitive Effects)

752	"The evidence of actual anticompetitive effects further belies Respondents' argument that entry by foreign and domestic firms will deter or counteract any anticompetitive harm that may flow from the merger."	753-1220
776	"Respondents' argument to the Tribunal – that ["vicious"] competition from foreign and domestic firms restrains CB&I – is a claim that CB&I has chosen to share with the Tribunal but not with the SEC or the investment community."	753-775
777	"The LNG project at Cove Point, Maryland ("Cove Point") illustrates two important themes of this case. (1) Prior the merger, CB&I and PDM competed vigorously to win this project, and Cove Point benefitted in the form of lower prices. (2) Since the merger, the elimination of PDM as CB&I's closest competitor and the inability of other firms to replace PDM as a price constraint has permitted Respondents to raise prices and margins markedly. On at least four occasions, Respondents implemented price increases that raised the current price of the Cove Point tank by more than 60% from pre-merger levels, with a nearly five-fold increase in the dollar margins that the combined entity expects to earn."	778–830
810	"Steimer's prediction that the margins realized on Cove Point would greatly exceed the November estimates proved correct."	806, 811
816	"A CB&I "Tank Estimate Summary Sheet," dated February 21, 2001, immediately following the CBI/PDM merger, shows that CBI, as an independent competitor, could have significantly undercut PDM's bids on Cove Point. The estimate may have been prepared before this date."	817-821
822	"If CB&I and PDM had not merged, the customer at Cove Point could have avoided these price increase, and may have been able to reduce prices even further by leveraging CB&I and PDM against each other."	778-830

831	"CB&I's ability to convince [ ] to enter into sole-source negotiations illustrates five important themes. (1) Based on actual prices obtained from CB&I, PDM and Whessoe, [ ] knew that CB&I and PDM offered significantly lower prices than other firms. (2) [ ] knew that with the acquisition of PDM, CB&I dominated the United States market. (3) Without PDM to turn to, [ ] could encourage competition only by turning to untested, higher-priced alternatives. (4) Requiring guaranteed access to resources necessary to complete LNG projects in the United States, [ ] has no choice but to acquiesce to CB&I's demand that [ ] work exclusively with CB&I, which may increase the costs to [ ]. (5) A sole-source relationship to provide engineering, procurement and construction services and the LNG tank itself is far more lucrative for CB&I than having to competitively bid with other firms or to bid just for the LNG tank alone."	832-882
849	"CB&I and PDM were the two horses that competed most closely for LNG tanks in the United States. By acquiring PDM, CB&I turned it into a one-horse race, thereby giving CB&I an even greater leg up against other firms to secure not only the LNG tank business itself, but also the more lucrative EPC work. Without a low-cost LNG tank supplier that can compete against CB&I's prices, an EPC engineering firm will likely face the same competitive disadvantages as Lotepro and Black & Veatch did in the Memphis project. For the LNG facility owner, the race would also come down to one horse – CB&I."	847-8
864	"In July and August of 2001, [ ] further clarified why it would be prudent to turn exclusively to CB&I in the United States."	865-869
868	"[ ] possesses real data on which to base its decision that the cost-effective strategy going forward is to enter into a sole-source relationship with CBI."	869
883	"The prices quoted to [ ] by CB&I, PDM and Whessoe for various sizes of LNG tanks can be plotted to establish price curves for each firm. CB&I's and PDM's price quotes on the 2000 Cove Point project can also be plotted against the 1998 [ ] quotes. CCFF 891. After examining the data observations, a comparison can be made between the prices quoted on the Cove Point project and the prices quoted to [ ] for its tanks."	869, 886-928

885	"There are three sections of the Cove Point/[ ] comparison. Part I of the comparison demonstrates the similarities between CB&I's and PDM's bidding practices in 2000 for the Cove Point project and in 1998 for the [ ] project. Part II of the comparison details PDM and CB&I's behavior after the letter of intent was signed, and illustrates that currently, CB&I pricing deviates from any price curves that existed prior to the acquisition because, in the competitive void that exists post-acquisition, CB&I has no price constraints (other than the significantly higher prices of Whessoe). Part III examines the comparison and relevant calculations on a demonstrative aid.	886-928
906	"PDM's [ ] adjustment for the difference in tank size does not explain the movement of PDM's entire price curve after the letter of intent was signed nor other subsequent price increases post-acquisition."	903-905
912	"The following graph shows the history of PDM's and CB&I's prices for the Cove Point LNG tank, from early 2000 through December 2002, as well as the price quotations submitted to [ ] by CB&I, PDM and Whessoe for various size single containment LNG tanks. Trend lines show approximate prices for CB&I, PDM and Whessoe for intermediate tank sizes. "	886-910
913	The most important point made by the graph is that PDM and CB&I's pricing after the letter of intent was signed *does not fall within a range of any price curve.* CB&I's current pricing, reflected on the graph, shows the lack of pricing methodology in the post-acquisition period when compared with pre-acquisition levels of pricing to [ ] or Columbia Gas.	926-927
928	"Absent the acquisition, CB&I and PDM would have constrained each others' pricing to levels that are within the ranges of the two firms' price curves prior to the acquisition. Because CB&I is now unrestrained, it is now able to increase its price more than [ ] above pricing levels that existed prior to the acquisition."	948
929	"Since Cove Point, CB&I has used PDM's "fat" and "excessive" cost estimates on Cove Point as a benchmark to implement higher prices and margins to other LNG customers."	931-954

930	"The LNG projects for Memphis Light, Gas & Water ("Memphis") illustrate three important themes of this case. (1) Prior to the merger, CB&I and PDM competed vigorously to win this project, and Memphis benefitted in the form of lower prices (and CB&I suffered in the form of single-digit margins). (2) Prior to the merger, foreign firms – Whessoe and TKK – bid against CB&I and PDM but were not competitive because their costs and prices were at least 40% higher. (3) Since the merger, CB&I recognizes that with the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint, CB&I can now raise prices and earn significantly higher margins."	931-954
942	"CB&I's firm fixed price to Memphis included an [ ] profit margin."	1030
954	"In the 1995 Memphis bidding contest, CB&I had to bid at a low price that garnered it only an [ ] margin in order to beat PDM. Post-merger, unrestrained by PDM and knowing that foreign firms cannot provide an "economical" or "very competitive" price, CB&I exercised market power by offering a higher price that includes at least a [ ] margin, a nearly four-fold increase from pre-merger levels."	1030, 947
955	"The LNG project for Fairbanks Natural Gas, LLC in Alaska ("Fairbanks") illustrates that, since the merger, CB&I recognizes that the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint provide CB&I with the opportunity to raise prices and earn significantly higher margins."	962-963
968	"From Fairbanks' perspective, CBI's pricing to Fairbanks compares unfavorably with PDM's pricing on a comparable project before the merger."	969-70, 972-976
977	"Using and factoring all of the variables that should have made CB&I's Fairbanks price equal to, if not lower than, PDM's BC Gas price, PDM's pre-merger price to BC Gas of $2.6 million on a 1.2 million gallon tank as a benchmark, CBI's post-merger price to Fairbanks of $3.6 million on a 1.0 million gallon tank appears anticompetitive."	973
978	"The LNG project for Dynegy illustrates two important themes of this case. (1) CB&I recognizes that with the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint, CB&I will attempt to leverage its market power and force customers to accept CBI's terms and forego competitive bidding. (2) If a customer balks, CB&I will walk away and leave the customer to deal with higher-priced competitors."	979-1006

981	"In order to minimize competition and obtain the highest margin, CB&I attempted to force Dynegy to accept CB&I as a turnkey contractor so that it could supply the LNG tanks as well as facilitate the other portions of the project."	982, 984, 985
997	"Dynegy is likely to pay a higher price for the LNG tanks supplied by TKK, Whessoe or Technigaz than it would if CB&I had bid."	359, 979-1006
1006	"The teaching of the Dynegy project is that CB&I attempts to leverage its dominant position against customers in order to extract higher prices and margins. In order to avoid CBI's stranglehold, some customers perceive no other choice but to seek inferior alternatives. This is neither competition nor sufficient entry. It is an anticompetitive effect."	978-1006
1007	"The LNG project for Yankee Gas is similar to the themes of the Dynegy project, except that with Yankee Gas, CBI's strong-arm tactics have achieved considerable success."	1008-1026
1012	"As with the Dynegy project, CB&I did not want to deal with a middleman. CB&I wanted the owner's ear alone and refused to submit pricing information unless it was selected as the turnkey contractor."	1013-1020
1053	"Since the merger, CB&I has implemented the same 8.7% price increase on at least three different occasions: (1) to Linde BOC Process Plants LLC in April of 2002; (2) to Praxair in April of 2002; and (3) to Praxair again in June of 2002."	1058-1086
1056	"A fourth example of the anticompetitive effects of the merger involves MG Industries. This situation highlights how customers are handicapped by the absence of PDM as a leverage point against CB&I."	1078-1086
1057	"These four instances illustrate that, since the merger, CB&I recognizes that the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint provide CB&I with the opportunity to raise prices and earn significantly higher margins."	1058-1107
1075	"The difference in CBI's price to Praxair and CBI's price to Linde – for the virtually the same-sized tank and same location – is only [ ], or less than [ ]."	1072, 1074
1076	"CBI implemented the same [ ] price increase to Praxair as it did to Linde."	1070, 1072-1074

1085	"The increase in price from $850,000 to $924,000 is precisely 8.7%, the same price increase observed by Fan of Linde and Praxair on the Praxair-New Mexico Project 1."	1070, 1072-4
1086	"After years of intense head-to-head competition between CB&I and PDM, three separate instances of 8.7% price increases shortly after the merger cannot be coincidental."	1058, 1072-4
1087	"The experience of MG Industries, a subsidiary of Messer, ("MG Industries") is an example of how the elimination of PDM has reduced the ability of customers to obtain lower prices from LIN/LOX tank suppliers."	1078-1086
1091	"In most of the competitive bidding situations, PDM was either the lowest or second lowest priced bidder, followed by Graver, and finally CB&I."	1094-1097
1099	"Because PDM had merged with CB&I and Graver went out of business, MG Industries had to look for alternative suppliers besides CB&I."	1100
1165	"Having eliminated its only competitor in the TVC market, CB&I continued, following the acquisition, to attempt to coordinate on making a TVC bid or price quote with the next closest alternative available to TVC customers."	1166-1180
1180	"In the post-acquisition competitive environment, CB&I, a large, unopposed firm with low costs and efficient practices is in a position of power over other, smaller firms. These smaller firms know that they cannot compete with CB&I and will instead acquiesce to "join" CB&I. The acquisition has therefore increased the risk of collusion among suppliers of large, field-erected thermal vacuum chambers."	1166-1179
1181	"Respondents' TVC pricing to [ ] demonstrates both how competition between CB&I and PDM drove TVC prices down prior to the acquisition and how, following the acquisition, CB&I has increased price."	1182-1220
1220	"In the absence of PDM, CB&I, the only existing competitor for large, field-erected thermal vacuum chambers uses its sole position as a TVC competitor to its advantage. CB&I now dictates its own bidding conditions and victimizes customers who have no other suppliers to turn to."	1182-1219

1221	"Respondents assert an "exiting assets" defense that has never been recognized by any court as an antitrust defense, and rejected by the few courts that have addressed it. In essence, Respondents claim that had the merger not occurred, PDM would have made a business decision to liquidate the firm, thereby eliminating PDM from the competitive landscape."	1222, 1224
1223	"The defense recognized by courts and the *Merger Guidelines* which most closely resembles Respondent's asserted "exiting assets" defense is the failing firm defense."	1224
1225	"Respondents failed to prove each element of the defense."	1226-1281
1226	"Pitt-Des Moines's regular course of business documents reflect a strong and profitable firm."	1227-1237
1281	"Respondents have failed to show that PDM EC would have been an exiting asset if PDM were not acquired by CB&I."	1263-1280
1289	"As the viability of PDM EC depended upon the viability of the PDM Water division, both must be included in an order for complete divestiture."	1290-1296
1327	"An effective divestiture would need to include resources necessary to make flat bottom tanks, gravel tanks, and other tanks outside of the relevant market."	1328-1338
1347	"In order to provide New PDM with a backlog of work, CB&I will have to obtain its customers' approvals to transfer the work to the acquirer of New PDM."	1348-1349
1351	"In order to be an effective competitor, New PDM will need personnel with experience in the relevant product markets."	1352-1359

1. FRE 703: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." There is no reason why Complaint Counsel, in the interest of thoroughness, should not be permitted to disclose that Dr. Simpson used CX 1591 in forming his expert opinion. Complaint Counsel also respectfully requests that the Tribunal note that Respondents' expert is in agreement with Dr. Simpson on this particular point.

2. FRE 703: There is no reason why Complaint Counsel, in the interest of thoroughness, should not be allowed to acknowledge that Dr. Simpson relied upon his interviews with industry participants in forming his expert opinion. *See fn 1*.