UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S CORRECTED BRIEF IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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February 25, 2003

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INTRODUCTION

It was at trial that Respondents' case came unglued. Faced with overwhelming evidence of highly concentrated markets and their own anticompetitive conduct, CB&I and PDM abandoned their "efficiencies" defense, which dominated the discovery in the case, and instead relied upon Dr. Harris' unsupported opinion that CB&I wouldn't possibly do anything anticompetitive and Mr. Glenn's assurances that they would be good and not do anything bad like raise prices.

But, as John Adams once said, "facts are stubborn things", thus, whatever Dr. Harris and Mr. Glenn may wish or postulate, "they cannot alter the state of facts and evidence."[1] In this case, Complaint Counsel offered undisputed facts to establish that this acquisition may lessen competition in the field-erected cryogenic tank and large thermal vacuum chamber markets at issue. In the end, evidence of extraordinarily high concentration, barriers to entry, and undisputed evidence of actual or attempted collusion and dramatically higher prices and margins, place this case at the extreme edge of the most egregious cases in the history of Clayton Act § 7.

Complaint Counsel has offered substantial evidence that the acquisition violates Clayton Act, Section 7[2] because it "may...lessen competition" in any or all of these lines of commerce in the United States: field-erected LNG tanks, LNG import terminals, LNG peak shaving plants, LPG tanks, LIN/LOX/LAR tanks, and large (over 20' in diameter) thermal vacuum chambers ("TVC's"). *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) ("Congress has empowered the FTC...to weed out

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[1] John Adams, *Argument in Defense of the British Soldiers in the Boston Massacre Trials* (December 1770) reprinted in the TRIAL OF THE BRITISH SOLDIERS 101 (Mnemosyne 1969).

[2] An acquisition that violates Section 7 of the Clayton Act also violates Section 5 of the FTC Act. *FTC v. PepsiCo., Inc.*, 477 F. 2d 24, 28 n.6 (2d Cir. 1973).

those mergers whose effect 'may be substantially to lessen competition'").

- **Extraordinary Post-Merger Concentrations Create A Strong Presumption That The Acquisition May Lessen Competition.**

Complaint Counsel's *prima facie* case is based on statistical evidence of concentration, which because it is unrebutted satisfies the required proof in this case as a matter of law. In this case, the concentration figures, called HHIs, of between 5,900 and 10,000, which the U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (1992, rev. 1997) call a "pure monopoly," are far above what Judge Henderson, in the recent baby foods case, said proved "by a wide margin" the likelihood of anticompetitive effects. *FTC v, H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (HHI's over 4,775); *Merger Guidelines* § 1.5 n.17.

- **Respondents Failed To Show Entry Was Easy: Timely, Likely To Achieve Pre-Merger Prices Profitably, And Sufficient To Replace PDM.**

Under the law, once Complaint Counsel offered 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). They chose to attempt an "easy entry" story. The problem with this story, however, is that they failed to address the defenses' three elements: "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. Yet, all that Respondents tried to prove was that Messrs. Glenn and Scorsone may think that foreign firms might enter the LNG market.

This Tribunal will recall that, after numerous objections by Complaint Counsel, Respondents conceded that the press releases and other so-called entry evidence would be admitted ***solely*** for proof of the state of mind of CB&I. Such evidence has little value and does not meet all the elements of their

defense.

Signally, Respondents offer no evidence of attempted entry in any market other than LNG. Their so-called evidence – press releases about joint ventures, which were never admitted to prove the truth of entry – tell us nothing. There are simply no new entrants in the market for LPG tanks, LIN/LOX/LAR tanks, or large thermal vacuum chambers ("TVC"). If Respondents fail to address even one of these markets in rebuttal, they lose this case – and they have failed to address all but the LNG market.

The TVC story is remarkable. In their opening statement, Respondents promised to show that Howard Fabrication was a competitor of CB&I in large, field erected TVCs. Then, once Mr. Gill testified that CB&I had asked him to "coordinate on making a bid or price quote to TRW" – clear evidence of collusion – CB&I ran from their story as fast as they could by attempting to prove that Howard wasn't even a competitor at all.

The result is that the parties now agree that there is no other competitor in the TVC market. Thus, Respondents' case stops dead in the water. Facing this prospect, it was no surprise that their only defense in TVCs was an offer of settlement. But even there, Mr. Glenn didn't get it. Along with a mentoring program, his offer was "not to participate in the market at all" except for certain projects that he would agree to do at "any profit that the Court would like to establish." (Glenn, Tr. 4165) Complaint Counsel respectfully asks this Tribunal to tell CB&I that the way Congress has mandated profit levels to be set is ***through competition*** – that was eliminated by the acquisition – not through CB&I's attempt to agree to price levels. They tried that before, and Complaint Counsel asserts that this behavior in the marketplace is unlawful and must be stopped.

But even in the LNG market, Respondents failed to prove all the elements of an entry defense: There is no evidence that entry will be either "timely" or "profitable at pre-merger prices." Indeed, the

evidence is to the contrary. It has been two years since the acquisition, and none of these foreign competitors has entered. Moreover, the evidence is undisputed that CB&I and PDM were the low-cost and preferred suppliers in this industry. For example, foreign companies, with previous joint ventures, tried unsuccessfully to compete in 1995 in Memphis and could not come within 20% of CB&I and PDM's prices. When a new LNG tank needed to be contracted for in Memphis, just last year, the customer ignored the foreign companies and said that CB&I was the only one qualified to do the work. [ ] reached the same conclusion. The high level of prices for other competitors is also apparent in the LIN/LOX/LAR market as well.

The principal reason why no foreign competitor can beat CB&I is that there are barriers to entry, including the fact that CB&I is the low-cost supplier. Respondents' internal documents thoroughly establish that CB&I and PDM were the low cost competitors and that their relationship before the Letter Of Intent was signed in August 2000 was, in Respondents counsel's words, "fractious competition." After the acquisition, with competition eliminated, CB&I is still the lowest cost provider. No one else comes close. As Mr. Glenn told his investors, CB&I's costs are 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) As Mr. Glenn admitted, the fact is that CB&I can "win the work" whenever they want to, unless someone bids under their cost. (Glenn, Tr. 4380; CX 1731 at 44)

What happens when the two lowest cost providers merge? As the *Merger Guidelines* explains: "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. As Judge Henderson explained in the *Heinz* case, 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. *Heinz,* 246 F.3d at 717. There the higher priced company, Gerber, who was not a participant in the merger between Heinz and Beech-Nut, actually had a 65% market share, and yet the circuit court reversed the district court and stopped the merger between the other two, finding that "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances." *Id.* Obviously, in this case, where the merger gives CB&I 100% of the market in LNG, LPG and TVCs and over [ ] of the market for LIN/LOX/LAR (provided that ATV hangs in there), if this Tribunal were to give Respondents a pass, it would be entirely unprecedented and would undermine the entire purpose of Section 7 of the Clayton Act.

! **When There Is Actual Proof of Anticompetitive Effects – *e.g.,* Actual or Attempted Collusion, Higher Prices or Margins, as There Is Here – The Merger Should Be Independently Condemned.**

When there is proof of any post-acquisition anticompetitive conduct, such as attempted collusion or higher prices, all bets are off. As a leading antitrust commentator said, such evidence "cements" Complaint Counsel's case. J. Von Kalinowski, *Antitrust Law & Trade Regulation*, § 4.03[4] (2[d] 1996) (hereinafter "Von Kalinowski") (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. For example,

! ***Spectrum Astro***: After they agreed to merge, CB&I then met and talked about the bidding, saying that the customer was now "D.O.A." CB&I discussed colluding with PDM to both [ ] to the customer. Then, for the first time they did not have "fractious competition" between them and quoted high prices, as in the original plan. That's not all. After the merger, CB&I raised the bid and the margin way above any pre-merger levels (margins increased from [ ] to [ ]). The customer, Mr. Thompson, was extremely unhappy. (Scully, Tr. 1194; Scorsone, Tr. 5112, 5114; CX 1489 at 3; CX 242 at 2, *in camera*; CX 1705)

! ***TRW***: Just weeks before this trial, CB&I met with their only claimed competitor,

Howard Fabrication, and agreed to "coordinate on making a price bid" to TRW. CB&I knew that it and Howard were bidders on this same project. As the customer, Mr. Neary, testified: TRW is now "***basically hosed***." (Gill, Tr. 247, 274; Neary, Tr. 1451) (Emphasis added)

- ***Cove Point***: Before the acquisition, CB&I competed against PDM and forced the price on an LNG tank down by about $5 million and to a margin of [ ]. That, of course is good. But, once the merger was announced, CB&I and PDM met and discussed pending bids. CB&I then dropped out of the bidding, and the price went up in what PDM called a "fat" and "rich" bid, and the margin increased *in camera*: (RX 323 at12). After the merger, CB&I moved the price and margins up again to over a 22.3% margin – which is nearly double CB&I's world-wide average margin. (CX 127 at 5; RX 323 at 12; Scorsone Tr. 5263; CX 1628 at 23)

- ***Memphis***: In 1995, with an [ ] CB&I beat PDM for an LNG tank. Both their bids were well below any other competitor's. CX 906 at 2, *in camera.* After the merger in 2002, CB&I bid more than a [ ] margin for a similar tank in Memphis. CB&I based this [ ] margin on the actual margin they had at [ ]. (CX 906 at 2, *in camera*; CX 732 at 3; Scorsone, Tr. 5324-25, *in camera*) The customer, who is obviously aware of foreign suppliers has chosen not to pursue any of them, calling CB&I the "only qualified supplier." (CX 1157)

- **[ ]** : *in camera*: [ ] the initial price was $16 million. After the merger, CB&I was asked for a firm offer, and it proposed a price of $21.6 million. (CX 1573 at 2)

- Other instances of higher prices and margins post-merger (*e.g.,* Yankee Gas, Fairbanks, Linde, Praxair, [ ], etc., discussed in Section III below) also demonstrate that CB&I has had few competitive restraints on it once PDM was eliminated.

CB&I cannot walk away from these stubborn facts. Indeed, rather than contest them, their own expert would not even admit to evaluating this evidence. (*E.g.,* Harris, Tr. 7466, 7498, 7506, 7508-09) And it wasn't as if CB&I just got lucky. This was its plan all along: get rid of their nemesis, PDM, and make higher margins. For example,

- Before the merger, PDM knew that "CBI and PDM are often the only competitors for...cryogenic" tanks, and indeed was the only competitor for large TVC's. (CX

68 at 6; CX 660 at 5; CX 94 at 27; Scorsone, Tr. 5153-5154) Moreover, it regarded CB&I as the "most aggressive competitor" that it was facing in the market. (CX 660 at 3) Thus, it was making less money due to the heavy competition. (*Id.*; CX 76 at 26 (Competition from CB&I "forced: PDM "to bid at lower margins"; Scorsone Tr. 5152))

- Thus, to solve its problem with CB&I, PDM considered buying CB&I to achieve "market dominance in Western Hemisphere." (CX 74 at 19; Scorsone, Tr. 5169)

- Once PDM decided to combine with CB&I, it also recognized that there were "antitrust issues," which were discussed by the PDM board. (CX 389 at 2)

- Before the merger, CB&I likewise didn't like the fact that competition was forcing its margins lower, and it warned investors of that issue. (CX 1716 at 8 ("competition has resulted in substantial pressure on pricing and operating margins") Once CB&I eliminated PDM as a competitor, it never again mentioned competition's effect on margins as a problem. (CX 1633; CX 1021; Glenn Tr. 4375-4377)

- Before the merger, CB&I stressed that its margins had "fallen" down to an average for cryogenic (LNG, LPG, and LIN/LOX/LAR) bids to [ ] and that their "Principal US Competitor" was PDM. (CX 227 at 16, 20, 22) As one CB&I executive reported to management, "PDM is 'eating our lunch'" at low margins. (CX 243 at 1) In one example, PDM is the lower cost producer, bidding at a [ ] margin, and winning against CB&I. (CX 764 at 9333)

- So, CB&I considered solving its competition problem by buying PDM but it recognized that they could "face anti-trust risks," "customers could get upset" and the merger "could create competition void for 1-3 years." (CX 629 at 3084, *in camera*) (CX 1627 at138) ("Antitrust Issues") Yet, CB&I decided to buy PDM anyway.

Evidence of Respondents' implementation of the merger also reveals their anticompetitive plan. Before closing on the deal, Mr. Scorsone "brainstorm[ed]" with his staff and decided on a strategy to "create barriers to entry," "defend an expanding market share," prevent "smaller competitors to take share," and defend and "grow" markets. (CX 101 at1; Scorsone, Tr. 5204-5205) None of this anticompetitive behavior would risk lower margins. Indeed, their plan was to achieve "***premiums***" for their products and an ***increase*** in margins, which is of course what they actually did. (CX 101 at 1-2)

(Emphasis added). Respondents had no expectation of losing market share from any alleged entry. (Scorsone, Tr. 5208) Scorsone's strategic plan for the merger didn't stop at the PDM front door. He discussed these same strategic points with his competitor, CB&I. (Scorsone, Tr. 5209; CX 1544 at 7941)

In the end, Respondents created what CB&I's management called, the "900 pound gorilla." (CX1681 at 1). As Mr. Glenn put it, the merger gave CB&I "unequaled capability" and "execution capabilities unmatched by competitors." (CX 1720 at 1; CX 1532 at 1) As they boasted internally regarding the LNG market, "no other company in the world is more uniquely or strategically positioned to capitalize on that emerging market." (CX 832 at 5) There is no talk of entry or anything that might possibly disturb CB&I's vision of "margin improvement and accelerating earnings growth." (CX 1527 at 2) As Mr. Glenn admitted, the acquisition of PDM allows CB&I to expand market share in all these markets. (Glenn, Tr. 4252, 4259, 4315-16, 4321)

The bottom line is that Respondents carefully planned, executed, and now are reaping the rewards of their strategy to dominate the markets at issue in this case. [ ] have gone up from pre-merger levels of approximately 2.5% to [ ] of 22-30%. Nothing has stopped CB&I's quest for more profits at the expense of the customer – except what this Tribunal and the Commission have left to do: order divestiture.

! Respondents' "Exiting Asset" Defense Has Been Rejected By The FTC.

Finally, Respondents claim what they call an "exiting asset" defense. Their defense has been rejected by the Commission and has never been accepted by any court. *Olin*, 986 F.2d at 1307. Complaint Counsel respectfully submits that this Tribunal should not be enticed to ignore current law in an attempt to carve out a new rule that has already been rejected by the Commission.

* * * * *

In sum, the substantial evidence shows that CB&I's acquisition of the EC and Water Divisions of PDM violates Section 7 of the Clayton Act, and Section 5 of the FTC Act. Accordingly, this Tribunal should follow Congress' mandate in Section 11(b) of the Clayton Act and order CB&I to divest all of the assets it acquired from PDM, and take other steps necessary to reestablish it as a distinct and separate, viable and competing business in the relevant markets, including restoring plant and equipment and personnel, and taking other steps to reestablish the PDM EC and Water divisions as they existed prior to February 7, 2001.

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

Section 7 of the Clayton Act prohibits acquisitions "***in any line of commerce*** or in any activity affecting commerce...[if] the effect of such acquisition ***may*** be ***substantially*** to ***lessen competition, or to tend*** to create a monopoly." 15 U.S.C. § 18 (Emphasis added).

"May"

To prove a violation of Section 7, Complaint counsel "need only prove that the [acquisition's] effect '***may be*** substantially to lessen competition.'" *California v. American Stores Co.*, 495 U.S. 271, 284 (1990)(emphasis in original)(citing 15 U.S.C. § 18) The law "does not require proof that a merger or other acquisition [will] cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986). Indeed, "Congress has empowered the FTC...to weed out those mergers whose effect 'may be to substantially lessen competition.' " *Heinz,* 246 F.3d at 713, quoting H.R. Rep. No. 1142, at 18-19 (1914). Justice Brennan, in the seminal *du Pont* case, explained:

> "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition...but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition.... The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. "

U. S. v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957), citing S. Rep. No. 698, 63d Cong., 2d Sess. 1 (Clayton Act designed to stop anticompetitive effects from mergers in their "incipiency").

"Substantially"

Whether the relevant markets are "substantially" affected by the acquisition is measured by the concentration of the markets before and after the acquisition. *See, e.g., Merger Guidelines* § 1.0 (Necessary to examine whether an acquisition "significantly increases concentration"); 4 P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law* ¶ 927 (rev. ed. 2000) (hereinafter "Areeda") ("substantially" is measured by concentration in the market).

The reason that high concentration is such a good barometer of whether an acquisition "may" affect a market "substantially" is the well-established economic theory "that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding" or unilaterally raise prices. *Heinz*, 246 F.3d at 715, quoting *FTC. v. PPG Indus.*, 798 F.2d 1500, 1503 (D. C. Cir. 1986); *Merger Guidelines* §§ 2.1, 2.2. Of course, anticompetitive effects have already occurred in this case. But usually this is rare, and it is the statistical market-share analysis that creates a legal presumption that coordinated or unilateral effects may be likely. *Heinz*, 246 F.3d at 715.

Under the *Merger Guidelines*, market concentration is measured by determining the market shares using the Herfindahl-Hirschman Index ("HHI"). *PPG Indus.*, 798 F.2d at 1503; *FTC v.*

University Health, Inc., 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (HHI is the "most prominent method" of measuring market concentration); *Merger Guidelines*, § 1.5. To determine the HHI's, one first identifies the markets at issue and the market shares of the participants. Here, Respondents have conceded that field-erected LNG tanks, LNG import terminals, LNG peak shaving plants, LPG tanks, LIN/LOX/LAR tanks, and large thermal vacuum chambers built in the United States are relevant product markets. There are no economic substitutes for these products to which buyers would turn in response to a significant increase in their price. Even Respondents' expert witness, Dr. Barry Harris accepted the product markets defined in the complaint. (*See* Harris, Tr. 7192, 7280, 7300, 7324).[3]

Once the markets are established, the HHI calculation is performed by summing the squares of the market shares of all firms in the market.[4] When concentration is high and the merger causes a significant change in the shares (*e.g.,* over 1,800 HHI and a change of >100), an acquisition is "***presumed***" to be "likely to create or enhance market power." *Merger Guidelines* § 1.51 (Emphasis added); *Heinz*, 246 F.3d at 715 (explaining that high concentration "establishes a 'presumption' that the merger will substantially lessen competition"). When post-acquisition HHI measurements are in the range of 3,500 to 4,800, the FTC and courts have uniformly held that there is "by a wide margin, a presumption that the merger will lessen competition." *Heinz*, 246 F.3d at 716; *See Coca-Cola Bottling Co. of the Southwest,* 118 F.T.C. 452, 586 (1995) (holding that HHI's of over 3,570 are "far above those that the

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[3] Despite Repondents' concession on the market definitions, Complaint Counsel still presented substantial evidence on these definitions. (*See, e.g.,*Price, Tr. 450; Hall, Tr.1781, Kistenmacher, Tr. 839-840, Hilgar, Tr. 1385, Scorsone, Tr. 5170, Crider, Tr. 6179; Higgins, Tr. 1262-1263)

[4] "For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 (302 + 302 + 202 + 202 = 2600). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market)." *Merger Guidelines*, § 1.5, n.17.

courts have held to establish a legal presumption of illegality").

In other words, where Complaint Counsel shows post-acquisition HHI levels well above 1,800 (here they are far above 5,000), the ***case is over*** unless Respondents "produce evidence" to rebut this legal presumption. When the evidence demonstrates that concentration is high, the "more evidence the defendant must present to rebut it successfully." *U.S. v. Baker Hughes, Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990).

Those are the standards; here are the results:

A. The Acquisition Greatly Increased Concentration in Highly Concentrated Markets To Extraordinary Levels.

Complaint Counsel has established that the acquisition has led to extraordinarily high concentration in each of the relevant markets. This structural evidence alone establishes that the acquisition will "pose a risk to competition", and therefore establishes a strong presumption that the acquisition would reduce competition. *FTC v. Cardinal Health, Inc.,* 12 F.Supp.2d (D.D.C. 1998) at 54.

As the *Merger Guidelines* requires, Complaint Counsel has demonstrated the high market shares for each of these markets. Because sales of the relevant products are made infrequently, Complaint Counsel has examined market shares over ten years, from 1990 to the time of the acquisition in early 2001. *Merger Guidelines*, § 1.41 ("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"). In each of the relevant markets, CB&I and PDM have accounted for ***over* [ ] *of all sales made over the last 10 years***.[5] In LNG tanks and thermal vacuum chambers, these two firms have together accounted for ***all*** of the sales.

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[5] Measuring market share over a long period of time is also consistent with the importance that customers place on reputation and experience in these markets.

The results are clear. For example,

LNG: The post-acquisition HHI for LNG tanks is 10,000, with a change of [ ]. Even if post-acquisition market shares were relevant – and as explained below, they should have little or no weight – CB&I has won or is the ***only*** company being considered for five LNG projects and has been selected for another. (Glenn, Tr. 4234, 4399) The fact is that, post-acquisition, there isn't one LNG project in the United States that has actually been awarded where CB&I wasn't the ***only*** one selected. The only LNG project that may be awarded to another supplier, Dynegy – if it ever happens – may go to another supplier only because CB&I refused to bid. Nevertheless, even if one were to include this project, the HHI's would still be off the charts and above anything required by the *Merger Guidelines* or case law.

LIN/LOX/LAR: The post-acquisition HHI for LIN/LOX/LAR is [ ], with a change of [ ]. As discussed below, the recent awards to ATV, who was always in this market, does not affect this conclusion. Indeed, the *Merger Guidelines* makes it clear that to eliminate the presumption created by these HHI results, ATV would have to be as "equally competitive" as PDM to "[r]eplace" the "lost competition." *Merger Guidelines* § 2.212. The undisputed evidence is that ATV cannot even come close. (*See* Section II below.)

LPG: The post-acquisition HHI for LPG is [ ], with a change of [ ]. Nothing has changed post-acquisition to even arguably affect this result, except that CB&I has acquired the firm accounting for most of the remaining sales in the market.

TVC: The post-acquisition HHI in TVC's is a perfect 10,000 – or, as the *Merger Guidelines* calls it "a case of pure monopoly." *Merger Guidelines* § 1.5, n.17.

In addition to the pure HHI calculations, under the *Merger Guidelines*, the undisputed fact that CB&I and PDM have been customers' "first" or "second" choices for well over a decade for more than

35% of the bids awarded in the United States for each of the relevant products demonstrates, ***by itself***, that "a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Merger Guidelines* § 2.211; (Harris, Tr. 7228 (PDM and CB&I are the first and second choice of customers). The historical combined market shares of 100% for LNG, [ ] for LIN/LOX/LAR (including Graver, which has exited the market); [ ] for LPG (including Morse's share, as it is now part of CB&I); and 100% for large, field erected TVC's, demonstrates independently that this acquisition may substantially lessen competition. *Merger Guidelines* § 2.211.

Respondents' own documents corroborate these conclusions.[6] For example, in early 2000, Mr. Scorsone estimated for the PDM Board that PDM and CB&I ***each*** had a [ ] and Morse a [ ] market share in domestic cryogenic tanks for a total of [ ] market share for the combined CB&I/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. 5181; CX 660 at 2, 5) He admitted that these were the "best" estimates he could "make." (Scorsone, Tr. 5181) There is no evidence to the contrary.

! There Is No Legal Basis Supporting Respondents' Claim That This Tribunal Should Shorten The Relevant Time Period or Reject Pre-Acquisition Evidence.

Respondents assert two arguments to counter these HHI's: (i) that the time period used by Complaint Counsel is too long, and if one used a shorter time line (*e.g.,* two years) either CB&I or PDM

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[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"); *Coca-Cola Co.*, 117 F.T.C 795, 945 (1994) (Using Coca-Cola's "own documents" as corroboration of market dynamics); *Heinz*, 246 F.3d at 717 ("Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it").

would not show up as a winning bid in some of the markets; (ii) that one should forget about the competitive history before the acquisition and instead examine only the post-acquisition world. Each of these arguments is flawed.

First, 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 share data for a three-year period from 1986-1988 in a market where shares were "volative and shifting, and easily skewed"). Evidence that high market shares are sustained over several years is regularly used in antitrust cases to assess market power. *See Heinz,* 246 F.3d at 717 (There "had been no significant entries in the baby food market in decades"); *Borden, Inc. v. FTC*, 674 F. 2d 498, 511 (6th Cir. 1982) (concluding that Borden's "predominant share of the market" over a five-year period was evidence of market power); *Greyhound Computer Corp. v. IBM Corp.*, 559 F. 2d 488, 496-97 (9th Cir. 1977) (concluding that IBM's market share over a seven-year period provided evidence that "IBM possessed monopoly power"). 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)

Nevertheless, even if Respondents were correct, their argument is meaningless. For example, Respondents claim that they were 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 by the merger. This argument is flawed for two reasons. ***First,*** CB&I bid and then won a TVC project just six weeks before the merger, after promising to Spectrum Astro that it could rely on CB&I as a "long-term supplier and partner" in the TVC business. (CX 1599 at 7). CB&I had also bid on another TVC project just three years before and [*in*

camera: .

] ***Second,*** the fact that CB&I 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) (Condemning merger with potential competitor because "[i]t is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market"); *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-36 (1973); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964). Thus, following these cases and *El Paso Natural Gas*, which rejected the same argument made by Respondents here and ordered "divestiture without delay," this Tribunal should reject Respondents' argument. *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 661-671 (1964) ("Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice.... If El Paso can absorb Pacific Northwest without violating § 7 of the Clayton Act, that section has no meaning in the natural gas field").

Finally, this Tribunal should reject Respondents' suggestion to ignore the pre-acquisition evidence and instead focus on post-acquisition evidence for two reasons. ***First***, every court or Commission decision that has examined this question, have all rejected this argument. "[P]ost-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp.*, 807 F.2d at 1384 ("Commission ... was not required to take account of a post-acquisition transaction that may have been made to improve [defendant's] litigating position."); *see also B.F. Goodrich Co.*, 110 F.T.C. 207 at 341 (1988) ("[T]he Commission has determined that it is inappropriate to consider 'exculpatory post-acquisition evidence of voluntary actions by the acquiring firm' in determining the legality of an acquisition'"). If "post-acquisition evidence were given conclusive weight or allowed to override all

probabilities, then acquisitions would go forward willy-nilly, the parties biding their time until reciprocity was allowed fully to bloom." *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965).

As the U.S. Supreme Court cautioned, "evidence showing that such lessening [of competition] has not, in fact, occurred cannot be accorded 'too much weight,'" but on the other hand, "post merger evidence showing a lessening competition may constitute an 'incipiency' on which to base a divestiture suit." *U.S. v. General Dynamics Corp.*, 415 U.S. 486, 505 n.13 (1974). The latter is, of course, this case: one cannot miss the multiple examples of post-acquisition anticompetitive effects. And, thus, as one commentator put it, even if there were one example of such post-acquisition anticompetitive effects, it "cements" Complaint Counsel's case. Von Kalinowski at 4.03[4] (Citations omitted).

* * * * *

In sum, the acquisition has increased the HHI substantially in each of the relevant markets at issue in this case to extreme HHI levels of [ ] to 10,000 – the level of "pure monopoly." *Merger Guidelines* § 1.5, n.17. Increases of this magnitude are far beyond the thresholds that the *Merger Guidelines* state raise competitive concerns (*i.e.,* a change of >100). *Merger Guidelines* § 1.51. The Commission has consistently found that such large increases in concentration in an already highly concentrated market create the strongest competitive concerns. *Hospital Corp. of Am.*, 106 F.T.C. 361, 488 (1985) (finding increases in concentration "in an already concentrated market to be of serious competitive concern"); *Coca-Cola Co.,* 117 F.T.C. at 943 (High HHIs create "serious competitive concerns"). Indeed, the ***lowest*** post-acquisition HHI in this case (for LIN/LOX/LAR) is [ ], and the highest (for thermal vacuum chambers) is 10,000. 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. *See, e.g., Cardinal Health,* 12 F. Supp. 2d 34, 54 (D.D.C. 1998) (2,224 HHI); *FTC v. Swedish Match,*

131 F. Supp. 2d 151, 167 (D. D.C. 2000) (4,733 HHI); *Heinz*, 246 F.3d at 716 (5,285 HHI); *FTC. v. Libbey Foods, Inc.*, 211 F. Supp. 2d 34 (D. D.C. 2002) (5,251 HHI).

Complaint counsel's structural evidence therefore establishes a *prima facie* case that warrants a strong presumption that the acquisition would lessen competition and therefore is illegal under Section 7.

II. RESPONDENTS FAILED TO REBUT THE PRESUMPTION OF ANTICOMPETITIVE EFFECTS IN ANY OF THE RELEVANT MARKETS.

Once Complaint Counsel has established a strong *prima facie* case through market share evidence, the burden shifts to Respondents to provide similarly strong evidence to rebut the presumption of anticompetitive effects. *General Dynamics Corp.*, 415 U.S. at 497-98. *See B.F. Goodrich*, 110 F.T.C. at 305; *Baker Hughes*, 908 F.2d at 991 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully"); *Coca-Cola Bottling,* 118 F.T.C. at 586 (high HHI's "create a strong presumption of possible anticompetitive effects; thus, relatively strong evidence from other factors will be necessary to rebut that presumption."); *see* Areeda at ¶ 911b ("Even relatively easy entry should not ordinarily be a defense to a merger creating a monopolist or dominant firm"). Respondents have no such evidence here.

Respondents have offered only two arguments to attempt to rebut Complaint Counsel's *prima facie* case: (i) efficiencies and (ii) ease of entry.[7] Respondents abandoned their efficiencies defense at the beginning of trial, but their attempted ease of entry defense fails.

First, under the law, it is Respondents' burden to offer evidence that highly concentrated markets do not prove a likelihood of anticompetitive effects. They chose to attempt an "entry" story. The problem with their entry story, however, is that they fail to even address any of the three elements of the defense:

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

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 (1994) (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"). Yet, all that Respondents tried to prove was that Messrs. Glenn and Scorsone may think that foreign firms may enter the LNG market.

The only supposed evidence of entry were several press releases about joint ventures involving TKK, Whessoe, or Technigaz desiring to enter the LNG market. Respondents conceded that the press releases and other so-called entry evidence would be admitted ***solely*** to prove the state of mind of CB&I. This kind of evidence is inherently suspect. *See Falstaff*, 410 U.S. at 565-8 (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").

More importantly, Respondents offer no argument of alleged entry in any market other than these press release about LNG tanks. The only alleged entry in LIN/LOX/LAR is ATV, who has been a competitor for years (not an entrant) and a relatively unsuccessful one at that. There are simply no new competitors of any kind in the markets for LPG tanks or TVCs. Thus, Respondents have failed to rebut Complaint Counsel's *prima facie* case, and the case must be decided against Respondents.

Nevertheless, let's go through each of the entry factors to show how none of Respondents' evidence fits the three entry criteria.

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

The simple fact is that two years after the acquisition ***no*** alleged entrant has won any bid for any of the relevant products. No evidence has been presented that any entrant is even likely to win anything

in competition against CB&I, because these entrants simply cannot be anywhere near as cost effective a competitor as PDM. The only project that CB&I proposes as proof of entry is the possibility that some other company may win the project at Dynegy. But CB&I refused to even bid on this project, and the company tasked with working with prospective bidders testified that the project managers for the project were concerned that once CB&I refused to bid, "the prices that the client would receive for those tanks would be higher." (Price, Tr. 578, 622) This is hardly proof of timely and sufficient entry that is profitable at pre-merger prices.[8]

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

The evidence is undisputed that CB&I 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 CB&I 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 CB&I was the only one qualified to do the work. [ ] reached the same conclusion. The high level of prices for other competitors is also apparent in the LIN/LOX/LAR market as well. As discussed below, the main problem with CB&I'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 CB&I 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.

Indeed, Gerald Glenn, CEO of CB&I, admitted that with the acquisition of PDM, CB&I "now ha[s] unequaled capability in [its] chosen field." (Glenn, Tr. 4384; CX 1720). He also told his

[8] Since ATV has been in the business for years, it makes little sense to analyze it under this factor. It is simply not a sufficient competitor to replace PDM, as discussed below.

shareholders that CB&I'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 CB&I can "win the work" whenever they want to, unless someone bids under their cost. (Glenn Tr. 4380; CX 1731 at 44) PDM and CB&I 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) Thus, no competitor will be successful in achieving profits at pre-merger prices – instead, if they try to undercut CB&I, 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, CB&I 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 CB&I ***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 CB&I had bid. (Price, Tr. 578,, 622)

CB&I'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; Patterson 466-467, 470 *in camera*; Kamrath, Tr. 2241, 2255 *in camera*) Recently, ATV did such a poor job on an Air Liquide 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)

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 to prevent a cartel from raising prices."); *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"); Areeda at ¶ 911b ("The nascent entrant into such a market ordinarily earns only competitive returns, while the dominant firm's returns are far larger").

The only other alleged competitor that Respondents called as a witness, Technigaz, [

.] (Jolly, Tr. 4706-10, 4715, 4720, 4757 *in camera*); *See U. S. v. Franklin Electric Co.*, Inc., 130 F. Supp. 2d 1025 at 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); *U. S. v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) (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 [

.] (Jolly, Tr. 4758, *in camera*)

In short, this is hardly evidence of entry sufficient to replace PDM. Moreover, when one considers how CB&I has colluded on prices and increased prices and margins (*see* Section III below), it does not appear that its behavior has been deterred by any supposed threat of entry. Thus, the evidence

demonstrates that other firms simply cannot compete at the level that PDM did against CB&I.

D. *Barriers to Entry* Prevent Potential Competitors From Replacing PDM As A Major Supplier To Force Prices Back Down To Pre-Merger 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. Barriers to entry are "additional long-run costs that must be incurred by an entrant relative to the long-run costs faced by incumbent firms." *Coca-Cola,* 117 F.T.C. at 485 (citing *Echlin Mfg. Co.*, 105 F.T.C. 410, 485 (1985) (citing G. Stigler, *The Organization of Industry* 67 (1968)). Existence of barriers reduces the effect of potential entry. Many witnesses, including those of Respondents, testified that to be successful in these markets, a company has to be large, have know-how, local manufacturing plants, etc. CB&I explained to its shareholders that "price, quality, reputation, safety record and timeliness are the principal competitive factors" in these markets. (Glenn, Tr. 4375; CX 1061 at 10) In short, not any company can do this work; there are barriers to entry. For example, ***CB&I has lower costs and distinct size, quality and fabrication advantages over the alleged competitors:***

! Gerald Glenn, CEO of CB&I, admitted that with the acquisition of PDM, CB&I "now ha[s] unequaled capability." (Glenn, Tr. 4384; CX 1720) He also admitted that CB&I has lower costs than its competitors. (Glenn Tr. 4381; CX 1731 at 42) The fact is that CB&I can "win the work" whenever they want to, unless someone bids under their cost. (Glenn, Tr. 4380; CX 1731 at 44) PDM and CB&I 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)

! Glenn also admitted that reputation and quality work were advantages that CB&I had that were not held by its potential competition. Indeed, CB&I's competitors include those that have financial difficulties, do "shoddy" work, and even if they try to outbid CB&I, he expects them to eventually "go out of business." (Glenn, Tr. 4380; CX 1731 at 44)

! CB&I's own documents show that they believe they have a local "competitive advantage," "unequaled capability," and "execution capabilities unmatched by

competitors." (CX 1061 at 10; CX 1720; CX 1719)

- Gill – Howard Construction – testified that foreigners cannot compete in the TVC market due to government requirements; small companies such as his cannot compete due to large bonding requirements; large companies have an advantage in engineers (CB&I having over 1,000 and Howard having only 2). (Gill, Tr. 185, 200-201; *see* Glenn, Tr. 4356) Thus, Howard does not see it becoming as strong as PDM was. (Gill, Tr. 201) Chart Industry agreed. (Higgins, Tr. 1272-73)

- Cutts – ATV – testified that his company is too small to be as competitive as PDM; 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 CB&I)). ATV's woes were also corroborated by Kistenmacher – BOC – 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 the price of the conventional vendors." (Kistenmacher, Tr. 862, 870) [
.] (Patterson, Tr. 466-67, 470, *in camera* (wouldn't use ATV because of lack of experience and bad reputation))

- [*in camera*] Kamrath – Air Liquide – [
.] (Kamrath, Tr. 2241, 2255, *in camera*) When Air Liquide tried to get CB&I to step in and take over the project, CB&I refused. (Scorsone, Tr. 5036)

- Kistenmacher also testified that when Whessoe attempted to enter the U.S. in 1995 in Memphis, its bid was $15 million, while CB&I's was $10.5, thus showing that its costs were higher. (Kistenmacher, Tr. 898-899)

- *in camera* [
] Tr. 703, 716, *in camera*)

- *in camera*
. (Jolly, Tr. 4708-10, 4715, 4725, 4757 *in camera*)

! [*in camera*]

] (Fahel, Tr.1635-1634, 1654, *in camera*) [

] (Fahel, Tr. 1632, *in camera*) [

] (Fahel, Tr. 1654, 1656, *in camera*)

! 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 (off by 20-30%); Fan, Tr. 955)

- Price – Black & Veatch – testified that foreign firms bid much higher than CB&I and PDM on the Memphis LNG project in 1995 and that TKK couldn't bid any lower without losing money. (Price, Tr. 552) He explained that it was a business risk to hire a foreign tank supplier without U.S. experience and that even recently on the Dynegy project the managers of the project were concerned that once CB&I refused to bid, "the prices that the client would receive for those tanks would be higher." (Price, Tr. 578, 622)

- Newmeister – Matrix – testified that it has barriers to competing at the same level as CB&I, such as lack of equipment (worth $2-5 million). (Newmeister, Tr. 1590-91)

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 CB&I's ability to raise prices. Both Drs. Simpson and Harris agreed that the knowledge and experience of CB&I versus the competition could be a barrier to entry. (Simpson, Tr. 3214; Harris, Tr. 7440) Even Dr. Harris agreed that entry would not be sufficient under the *Merger Guidelines* if CB&I had lower costs than its potential competition. (Harris, Tr. 7438; *see also* Simpson, Tr. 3151) As Glenn admitted, that is indeed the case here. This is classic footnote 21 *Merger Guidelines* material: two competitors, CB&I and PDM were the lowest cost suppliers; they merged, and now prices are free to rise to the next lowest price. *Merger Guidelines*, n. 21; *see Coca-Cola Bottling*, 118 F.T.C. at 609.[9]

While other firms in the past have been uncompetitive, any success that CB&I's competitors may have in the current environment (the prospect of which remains highly speculative) demonstrates that since CB&I has eliminated PDM, which had been its closest competitor, *the only* remaining alternatives are

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[9] As the Commission described in the analogous situation in the *Coca-Cola Bottling* case, where the acquisition led to the elimination of one of the two soft-drink brands that had competed most directly because they were most alike in flavor and marketplace position, the consumers who had preferred those two brands to all other brands were made "less well off." 118 F.T.C. at 609.

higher-priced and less experienced firms. *See, e.g.*, *U. S. v. Eastman Kodak Co.*, 63 F.3d 95, 103 (2d Cir. 1995) ("[A] monopolist ... always faces a highly elastic demand; its products are so overpriced that even inferior substitutes begin to look good to consumers"); *PepsiCo, Inc. v. The Coca-Cola Co.*, 114 F. Supp. 2d 243, 257 (S.D.N.Y. 2000) ("[the] existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power'") (Citation omitted).

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.

Complaint counsel is not required to demonstrate that the acquisition has led to actual anticompetitive conduct or post-acquisition price increases. Rather, the Commission and courts are cautious in evaluating post-acquisition pricing evidence because Respondents can, during the pendency of this proceeding too easily manipulate prices to avoid the appearance of the exercise of market power. "Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp.*, 807 F.2d at 1384.[10] However, where there is such evidence that Respondents have increased price, "the existence of monopoly power is clear" and "cements" Complaint Counsel's case. *U.S. v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001); Von Kalinowski at § 4.03[4]

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[10] Accordingly, the "Commission . . . was not required to take account of a post-acquisition transaction that may have been made to improve Hospital Corporation's litigating position." 807 F.2d at 1384; *see also Goodrich*, 110 F.T.C. at 340-41.

(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: CB&I 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").

Many witnesses, including admissions from Mr. Scorsone, and dozens of documents proved that prices and margins indeed went up and that Respondents had discussed at least one bid with a competitor. When faced with these facts, Dr. Harris claimed a lack of any knowledge of them. (*E.g.* Harris, Tr. 7498 (regarding price increase at Cove Point: "I don't remember every little price, . . . I don't remember the details"); Harris, Tr. 7506 (Doesn't remember [ ] price increase); Harris, Tr. 7508-9 (Doesn't "remember one way or the other" [ ] price increase); Harris, Tr. 7466 ("unaware" of change in competition for [ ] higher bid)).

Even more striking, however, are the examples of actual or attempted collusive behavior just before and after the acquisition. *Merger Guidelines* § 2.1 (Lessening of competition includes "tacit or express collusion," which "may or may not be lawful in of itself"); Areeda at ¶ 944b (Presumption of illegality if either one of the "merging firms had been a participant in such collusion or attempts"); *Crouse-Hinds Co. v. Internorth, Inc.*, 518 F. Supp. 416, 422 n.10 (N.D.N.Y. 1980) ("pre-acquisition

anticompetitive conduct of a firm is probative of similar conduct being repeated in the future").[11]

Regarding "collusion," two points should be noted. ***First***, for a collusion incident to be an indicator of anticompetitive effects, Complaint Counsel has a burden of proffering "far less than a showing of collusion." *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (Reversing district court's holding that FTC had to prove actual collusion). All that is required is a showing of a likelihood of tacit or express collusion. *Id.* The evidence can even be of collusion involving persons in related markets other than the respondents. *See Coca-Cola*, 117 F.T.C. at 960 (a history of price fixing in bottling market indicates that this kind of market "has not always been protected by competitive market forces"). The evidence here is far more direct.

Second, what Complaint Counsel presented during this trial was evidence of actual collusion that, under current law, would entitle any prosecutor or plaintiff to take this case to a jury. Under current law, collusion may be established by circumstantial evidence of price movements and another "plus" factor, such as evidence of a meeting, information exchanges, etc. *See Todd v. Exxon*, 275 F.3d 191, 198 (2d Cir. 2001) (Defendants' use of facilitating practices" like information exchanges); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.,* 826 F.2d 1335, 1338 (3d Cir. 1987) (Internal memo documenting a meeting with alleged co-conspirators was sufficient).

C. By Eliminating its Only Significant Competitor, the Acquisition Increases CB&I's Market Power

As discussed in the introduction above, CB&I and PDM were each other's closest competitor,

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[11] *Cardinal Health*, 12 F. Supp. 2d at 63 (Evidence of pre-acquisition competition, intent to stabilize pricing, and pricing coordination). The evidence introduced by Complaint counsel is precisely the type of evidence that was lacking in *Baker Hughes*. *See Olin*, 986 F. 2d at 1305 ("The clearest reason why *Baker Hughes* does not control here is that the Commission responded to the Company's rebuttal, whereas in *Baker Hughes*, the government did not").

driving each other's prices and margins down. Each independently determined that it would be better off if it eliminated the other as a competitor.[12] The resulting elimination of PDM as a "substantial independent competitor" is evidence of anticompetitive effect that warrants judgment against Respondents here. *Heinz*, 246 F.3d at 716 (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); *Swedish Match*, 131 F. Supp. 2d at 169 (A "unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match's primary direct competitors."); *Staples*, 970 F. Supp. at 1083 ("The merger would eliminate significant head-to-head competition between the two lowest cost and lowest priced firms in the superstore market").

The *Merger Guidelines* recognizes that anticompetitive effects may be likely when a "significant share of sales" in the market are made to buyers who "regard the products of the merging firms as their first and second choices." The *Merger Guidelines* § 2.21; *R.R. Donnelly & Sons Co., et. al.*, 120 F.T.C. 36, 193-201 (1995) (discussing the unilateral exercise of market power through a combination of the two closest substitutes and citing to *Merger Guidelines* § 2.21). The *Guidelines* also presumes that if the combined market shares of the merging firms reaches 35%, that "a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Merger Guidelines*, § 2.211. Thus, by any standard, the fact that CB&I eliminated its closest competitor and achieved more than double the 35% safe harbor level of the *Merger Guidelines* is independent evidence of anticompetitive effect that warrants a finding against Respondents.

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[12] CB&I's pre-acquisition intent is highly probative of the likely effects of the acquisition. *See U.S. v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1287-88 ("evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effect of the merger"), *quoting Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 38 S.Ct. 242 (1918).

This finding is, as the *Merger Guidelines* explains, especially appropriate where a merger involving the first and second lowest-lowest cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller. (*Id.* at n.21) This theory of unilateral anticompetitive harm through a merger of the two lowest-cost sellers has support in the economic literature. *See, e.g.,* Tschantz, Crooke, and Froeb, *Mergers in Sealed versus Oral Auctions*, 7 INT'L J. OF THE ECON. OF BUSINESS 202 (2000) ("A merger, or bidding coalition, has the potential to change the identity of the second-place bidder, and thus change the winning price," when "the merged coalition includes both the winning bidder and the second-place bidder"); Jonathan Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, 11 ANTITRUST 21 (Spring 1997). This effect is exactly what the evidence demonstrates (*see* discussion of "effects" below).

In recent years, the FTC has brought numerous cases in which an acquisition involved the elimination of either the closest, or a significant competitor of the acquiring firm. *See, e.g., Heinz Co.*, 246 F.3d at 711-12, 725 (The merger of the two low cost providers may likely "increase prices"); *Swedish Match,* 131 F. Supp. 2d at 169 (Merger of two closest competitors made it "likely" that prices would "increase"); *Staples,* 970 F. Supp. at 1082 (Merger of two low cost providers of office suppliers would allow the resulting company 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), vacated as moot, 829 F.2d 191 (D.C. Cir. 1987) ("The stark, unvarnished truth is that the Dr. Pepper brand has been a staunch effective competitor in the market, that Coca-Cola Company has tried to stifle...and that it has failed. It is now seeking to buy out its competitor").

Because there are no other established competitors besides CB&I and PDM in any of the relevant markets, the loss of competition between CB&I and PDM creates a particularly strong potential for

anticompetitive effects. *See* Areeda at ¶ 911a ("No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized"). Indeed, Respondents themselves planned to use the acquisition as a means to increase pricing and profit margins.

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

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. For example,

Spectrum Astro: In the late 1990's, CB&I and PDM engaged in what Respondents' counsel called "fractious competition" on a TVC deal for [ ] (discussed below). (Scully, Tr. 1193-94) But by August 2000, CB&I and PDM had agreed tentatively to a deal. And, we now know that they met and discussed the pending bidding for Spectrum Astro, which had asked each of them for firm offers (not budget prices). Mr. Scorsone (at the time, PDM's President of EC Division) admitted that Mr. Jordan (Vice President of CB&I) discussed with him that Spectrum Astro was now "D.O.A." (CX 1705; Scorsone, Tr. 5112, 5114) Obviously, the meaning was that Spectrum Astro wouldn't see the type of fractious competition he was expecting and was simply dead meat. (*See* CX 242 at 2, 3, [

] *in camera*) Mr. Jordan could not have possibly meant that the deal was off – both parties actually bid on the deal shortly thereafter. Nor was the discussion unimportant: Indeed, Mr. Scorsone instantly briefed the Vice President of LNG/Aerospace, Jeff Steimer, and the note appears in the Spectrum Astro contract file. (Scorsone, Tr. 5114; CX 1705)

Once the two companies decided that Spectrum Astro was toast, they needed to decide how to raise price. And indeed, a memo was circulated at CB&I suggesting that both PDM and CBI [

] or submit [.] (CX 242 at 2 *in camera*) Then, for the first time CB&I and PDM did not have "fractious competition" between them and quoted high prices, as suggested in CBI's plan.[13] (Scully, TR. 1194) That's not all. After the merger, CB&I raised the bid and the margin way above any pre-merger levels (margins increased from [ ] to [ ]). (CX1489 at 3) The customer, Mr. Thompson, was extremely unhappy. (Thompson, Tr. 2111, 2057; CX 566 at 2)

There is simply no lawful reason why these two competitors were discussing a pending bid. The fact that they saw nothing wrong with it, and indeed laughed about the fact that the customer was going to suffer as a result of their collusion is shocking. Moreover, the undisputed fact that Mr. Scorsone then authorized a significant increase in both price and margin after the merger demonstrates independently the exercise of market power by CB&I. This evidence together with the admitted testimony from Mr. Scorsone that CB&I ***lied*** to Mr. Thompson about the cost increases (Scorsone, Tr. 5123-25) show the inclination of CB&I to be anticompetitive. Respondents' counsel made the same point himself when he asked Mr. Thompson, "And if you have an opportunity later...to stuff some extra profit into the work, don't you try to take it?" (Scorsone, Tr. 2119) Of course, Mr. Thompson's and this Tribunal's answer to CB&I must be a resounding, "***no***."

TRW: In 2002, during the pendency of this litigation, CB&I pulled the same kind of illegal

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[13] A plan to merge in the future does not justify CB&I and PDM fixing prices, allocating customers or otherwise combining their businesses, while the antitrust authority is investigating the competitive effects of the transaction. *See United States v. Computer Assoc., Inc.*, Civ. No. 01-02062 (GK) (D.D.C. 2002) (Competitive Impact Statement filed April 23, 2002) ("The pendency of a proposed merger does not excuse the merging parties of their obligations to compete independently. Thus, pending consummation, activities by one party to control or affect decisions of another with regard to price, output or other competitively significant matter may violate Section 1."); *United States v. Gemstar-TV Guide International, Inc.*, Civ. No. 1:03CV00198 (D.D.C. 2003) (complaint and proposed consent order filed February 6, 2003); Justice Department Reaches Settlement with Gemstar-TV Guide for Illegal Pre-Merger Coordination (http://www.usdoj.gov/atr/public/press_releases/2003/200740.htm).

stunt with another customer and potential competitor. In the Fall of 2002, TRW requested rough order magnitude pricing from the only two possible remaining sources for thermal vacuum chambers, Chicago Bridge and Iron and Howard Fabrication. After CB&I made its presentation to TRW, CB&I's salesman, Mike Miles went directly to the offices of John Gill from Howard. During the meeting the TRW job was discussed and CB&I's Mike Miles asked Gill whether Howard Fabrication to agree to "coordinate on making a price bid" to TRW. (Gill, Tr. 247) CB&I knew that Howard was also a bidder on the project before Miles made this offer to coordinate on prices. (Gill, Tr. 274)

As explained above in Section I, this kind of conduct is flatly illegal. At worst, like the conduct with PDM in the Spectrum Astro bid, it is a violation of Section 1 of the Sherman Act. At best, it is a clear attempt to take out the only other competitive influence in the market, which is hardly consistent with CB&I's claim during their opening brief and argument that Howard's competition would restrain CB&I from raising prices. In the end, this conduct by the same people at CB&I who sell both TVC's and LNG tanks demonstrates that their strategy is to dominate the market anyway they can, and the customer, as Mr. Neary of TRW testified is "***basically hosed.***" (Neary, Tr. 1451)

The Cove Point, Maryland Project: In early 2002, PDM was asked to bid on a 750,000 barrel LNG tank for Columbia LNG to be built at Cove Point. (CX 293 at 1). PDM recognized that it was bidding against CB&I and, therefore, had to provide a "very competitive price to be successful." (CX 293 at 1). [ ] (CX 226 at 1, *in camera*). CB&I initially bid approximately [ ]. (RX 127 at CBI-H008204). The customer was able to leverage CB&I's lower price to force PDM to lower its price by $5 million at margin levels in the range of [ ] (CX 127 at 5; CX 226 at 1, *in camera*). The threat of losing Cove Point to PDM prompted CB&I to lower its price even further to [ ]. (CX 226 at 2, *in camera*); (CX 863).

Columbia sold Cove Point to Williams in June of 2000, and Williams increased the size of the LNG tank proposal from 750,000 to 850,000 barrels. (CX 863; Harris, Tr. 7724-7725, 8061-8062; Scorsone, Tr. 4964-4966). On August 29, 2000, CB&I and PDM agreed to merge, and as we now know, the parties met and discussed at least one pending bid. Then, in contrast to its pre-merger eagerness to beat PDM, CB&I chose not to rebid on Cove Point. (Scorsone, Tr. 4965).

PDM then took advantage of CB&I's withdrawal to implement a series of price increases on Cove Point. By November 1, 2000, PDM decided to increase its September bid from [ ] to [ ]. (CX 1388 at 2; CX 1160 at 2, *in camera*). The next day, November 2, PDM submitted an even higher bid to Williams of [ ] raising the margin to [ ] (Scorsone, Tr. 4985; CX 1160 at 1-2, *in camera*; RX 323 at 12). A senior member of PDM's Cove Point team wrote that the November 2 bid was [ ] in part because the higher price came on top of prior estimates that had already been [.] (CX 1160 at 2-3, *in camera*).

After the acquisition, CB&I has increased the price of the Cove Point LNG tank to $34 million. (Scorsone, Tr. 5263). CB&I projects that it will earn a whopping margin of approximately $7.6 million or 22.35% on Cove Point. (*Id.*)[14] This price is approximately [ ] *times* the projected margin that CB&I was willing to accept in March of 2000 when, before the merger, CB&I was trying to beat PDM on Cove Point, and the percentage margin is nearly [ ] times greater than before. (RX 127 at 5; Scorsone, Tr. 5263).

These undisputed facts demonstrate CB&I management's inclination to coordinate on prices (by withdrawing, when it thought PDM would bid higher and as a consequence give CB&I the resulting higher

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[14] It is also clear that if CB&I had bid, it would have saved the customer at least $4.7 million. (*Cf.* CX906-4, *in camera* ([ ])).

margin after the merger) and to raise prices and margins (from a low of [ ]to 22.35%) as if no real competitive pressures impacted them at all. This evidence independently warrants a finding against Respondents.

The Memphis LNG Projects: In 1995, with an [ ], CB&I beat PDM for an LNG tank in Memphis. Both their bids were well below any other competitor's. (CX 906 at 2, *in camera*) For example, Whessoe was nearly 50% higher than CBI on its bid. (Kistenmacher, Tr. 898-899) After the merger in 2002, CB&I bid more than a [ ] margin for a similar tank in Memphis. CB&I based this [ ] on the actual margin they had at Cove Point. (CX 732 at 3; Scorsone Tr. 5324-25, *in camera*) Even though CB&I has now been able to increase its proposed margin by [ ], the customer believes that it is stuck and cannot get a better deal from any of the alleged foreign competitors. (CX 1157 at 1)

Linde/Praxair/MG*:* In the LIN/LOX/LAR tank market, after the acquisition, CB&I has raised prices approximately 8.7% to both Linde and for two different tanks to Praxair. (CX 1584 at 2; CX 448; RX 92 at 7402, 7411; Fan, Tr. 1009-10). The fact that all these prices had increased exactly 8.7% from pre-merger prices confirms Mr. Fan's detailed conclusions that his price from CB&I had indeed increased the same exact amount. These price increases were not the result of changes in cost, which had actually decreased. (CX 1605 at 2) Prior to the merger, PDM's margins were approximately [ ], and CB&I's were even lower than that. (CX 243; CX 764 at 37) [

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: 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. In [ ], [ ], which is now owned by [ ], procured a large, field-erected, mailbox-shaped thermal vacuum chamber that [ ] now calls the [ ]. ([ ] Tr. 1740, [ ], *in camera*). [ ] used a competitive bidding process to procure the [ ]. ([ ], *in camera*). [ ] testified that his responsibility was to complete the project below cost and that the competitive bidding process would provide [ ] with the lowest cost possible. ([ ], *in camera*). Faced with competition from CB&I, [ ] during the last bid and approximately [ ] million less than its original bid. ([ ], *in camera*; *see* Scully, Tr. 1166 (after the bid was awarded, CB&I learned that, at the last opportunity in the bidding process, PDM had further lowered its price by "something in the order of as much as [ ]million."); CX 261 at CBI-H004029 ([

]); [ ], *in camera*) In the end, [ ] was able to use the close competition between CB&I and PDM to lower the price of a TVC from a high bid of [ ] million down to its final price of approximately [ ] million, to obtain additional items, and to benefit from CB&I and PDM's cost-saving, design innovations.

On a different project, at [ ], pre-acquisition, PDM quoted a price of [ ] in its proposal to [ ], but the customer chose to postpone the project. (CX 1573 at 6, *in camera*; [ ] , *in camera*). After the acquisition, [ ] asked CB&I for a firm fixed price renewal of PDM's earlier bid for the TVC. ([ ], 1935, *in camera*). [ ] was disappointed to receive CB&I's post-acquisition price of [ ] or an increase of 35%,or over [ ] for the project from CB&I. ([ ] , *in camera*; CX 1573 at 3, *in camera*). ([ ], *in camera*). In the absence of PDM, CB&I can now dictate its own

bidding conditions a nd victimize customers who have no other suppliers to turn to. The fact that CB&I can push around one of the largest manufacturing companies in the United States is evidence of its enormous market power achieved as a result of the acquisition.

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 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 (Britton, Dep.))

The Yankee Gas Project: After the acquisition, CBI used strong arm tactics with Yankee Gas to ensure that competition remained at a bare minimum for the construction of LNG peak shaving facilities. In 2001, Yankee Gas, a natural gas distribution company, began plans to construct a 360,000-barrel LNG peak shaving facility in Waterbury, Connecticut. (JX 21 at 17, 18 (Andrukiewicz, Dep.)). In April of 2001, Yankee Gas had its contractor, CHI, solicit bids for the LNG tank alone. (CX 1507 at CBI 059483). Yet, CB&I refused to bid on the LNG tank alone. (CX 430 at CBI 026934-HOU; CX 1507 at CBI 059483). CB&I then agreed to offer a bid if it did not have to go through the contractor. Through its hard-hitting negotiating tactics, CBI forced Yankee Gas to limit its choices of potential builders of the project. Still, CBI's budget estimate for the Yankee Gas project anticipates a

margin of [ ] well-above its pre-merger levels. (RX 54 at CBI 026812-HOU, *in camera*; CX 421 at CBI 026843-HOU; Scorsone, Tr. 5317, *in camera*).

The* [ ] *Projects: CBI's ability to secure a sole-source relationship with [

] illustrates that: Based on actual prices obtained from CBI, PDM and Whessoe, [ ] knew that CB&I and PDM had lower costs than other firms; [ ] knew that with the acquisition of PDM, CBI dominated the United States market; Without PDM to turn to, [ ] could encourage competition only by turning to untested, higher-priced alternatives; and [ ] has no choice but to acquiesce to CBI's demand that [ ] work exclusively with CBI. In 2001 [ ] analyzed the competitive environment post-acquisition, and concluded that since the acquisition of PDM, [."] (CX 693 at [ ] 01 02666-277) (emphasis supplied). Using a model that is, in Mr. Scorsone's words, "very, very accurate," [ ] determined that Whessoe's prices were nearly ***double*** that of CB&I and PDM. (RX 157 at [ ] 02 004 *in camera*; Scorsone, Tr. 4996). Now, after the acquisition, despite the fact that CB&I could raise its prices more than [ ]% before Whessoe becomes competitive, (RX 157 at [ ] 02 004 *in camera*), [ ] has decided to negotiate for sole-source agreements with CB&I for its three pending LNG import terminal projects in the United States. (Glenn, Tr. 4180). Thus, two current customers, [ ] and [ ], both of which know about the alleged entrants have chosen to stick with CB&I, despite an inevitably higher price than they would have received when PDM was around.

The Dynegy Project: The LNG project for Dynegy illustrates two important themes of this case. (1) CBI recognizes that with the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint, CBI will attempt to leverage its market power and force customers to accept CBI's terms and forego competitive bidding. (2) If a customer balks, CBI will walk away and leave the customer to deal with higher-priced competitors. The undisputed facts in this case are that in 2001, after the merger, (i) CB&I refused to bid on the Dynegy project if Dynegy "competitively bid the LNG tanks" (CX 518 at 1); and (ii) the customer

is still concerned that the remaining foreign competitors cannot give it a "competitive price." (Price, Tr. 635)

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In sum, any one of these undisputed acts of actual or attempted collusion or price/margin increases, as Von Kalinowski says, "cements" Complaint Counsel's case. 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 that what has been proven here, the answer for this Tribunal is clear: This Tribunal should order divestiture under Section 11(b) of the Clayton Act.

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

Respondents' last straw is their so-called "exiting asset" defense. They claim that absent the acquisition, PDM's EC Division may have ceased operating in the relevant markets, and thus this Tribunal should ignore all the other evidence in the case. This so-called defense is not based on any accepted law but rather upon an 1986 article: Kwoka & Warren-Boulton, *Efficiencies, Failing Firms and Alternatives to Merger: a Policy Synthesis*, 31 Antitrust Bull. 431 (1986). If there were such a defense under the law – and there is not – the "burden of proof" would be "undoubtedly on [Respondents] to establish any such defense." *Olin Corp.,* 986 F.2d at 1307.

But the Commission has rejected this defense. *Id.* Moreover, this case does not qualify even for Kwoka's proposed defense. By way of background, the only defense like this one that has been recognized by any court or the *Merger Guidelines* is the "failing firm" or "failing division" defense. That defense, clearly set forth in the *Merger Guidelines* in §§ 5.1 and 5.2 requires that the entity is (i) actually failing; (ii) cannot be reorganized in bankruptcy; (iii) the respondent has made "unsuccessful, good-faith

efforts to" find other buyers; and (iv) otherwise, the assets would actually "exit the relevant market." *Id.* § 5.1. Respondents have not attempted to meet any of these tests, nor could they. (*See* Byers, Tr. 6848, 6899; CX 522 at 3398-3399 (Division was not failing); Byers, Tr. 6799; Scheman, Tr. 2931, 2940, 2967-2968. (No one else was solicited, besides CB&I); (Assets would be sold to others ***in the market***) Byers, Tr. 6802-6805, 6829; RX 29 at 6327-6328). Instead, they claim to rely on the Kwoka Antitrust Bulletin article and simply argue that PDM had committed to selling the division, so that's enough. But it isn't as a matter of law.

First, in the only case in which the Commission addressed this proposed defense, the Commission specifically rejected it. *Olin Corporation*, 113 F.T.C. 400, 618 (1990) ("In short, 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."); *See also Warner Communications* at 1164 (The court "reject[ed] the argument" that Polygram "intends to leave the distribution market due to economic necessity"). There is no reason for this Court to depart from established precedent in this case.[15] No court has accepted the defense. It is simply, as the Commission put in *Olin*, "novel." *Olin Corp.,* 113 F.T.C. at 618.

Even if this Tribunal refused to follow the law and create a new one (which we sincerely doubt it would do), Respondents' argument must still fail, as it did in *Olin*, for the simple reason that Respondents cannot establish either of Kwoka's two proposed requirements for such a defense: (i) that the company made an exhaustive effort to sell the assets to others in the market; and (ii) absent the acquisition, the assets would actually exit the relevant market.

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[15] Although the *Merger Guidelines* have been revised three times - in 1987, 1992 and 1997 - since the "exiting assets" defense was proposed, the concept of an exiting assets defense has not been incorporated into the *Guidelines*. Instead, the *Guidelines* defense is based on the established premise that either a failing firm or a failing division be shown to be in danger of imminent failure. *Merger Guidelines*, § 5.1-5.2.

One of the key requirements of Kwoka's proposed exiting assets defense, as with the failing division defense, is that Respondents establish that CB&I is "the only available purchaser" for PDM's EC and Water Divisions and that they have conducted an "exhaustive" search for alternative buyers. *See Olin*, 986 F.2d at 1307 (FMC failed to show "evidence that FMC's management had conducted an ***exhaustive*** effort to sell" the assets) (Emphasis added); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 138 (1969). Respondents cannot meet either requirement. Glenn admitted that PDM could have sold the EC and Water divisions to "any number of competitors." (Glenn, Tr. 4262) Scheman, the Tanner employee who was tasked to sell the divisions, testified that once CB&I agreed to be a "preemptive buyer...we didn't go down the road of calling other people." (Scheman, Tr. 2931, 2939-40) The reason they only went to CB&I was, as Glenn testified, PDM was worth more to them than to anyone else. (Glenn, Tr. 4262; Scheman, Tr. 2967-68 ("It was unlikely that someone could match [CB&I's] price...because any other buyer would have to compete with CBI")).

CB&I was the first company that PDM contacted after it had made the decision to sell the divisions, and quickly made what PDM considered to be a "pre-emptive" offer so attractive that PDM had no interest in finding any other potential purchasers. (Scheman, Tr. 2931, 2939-40) Tanner & Co., PDM's investment banker, then advised PDM that no other transaction would generate this value, since alternative buyers, which would face continued tough competition from CB&I, would unlikely pay a premium price for the EC division.[16] Although PDM recognized that other companies would be interested

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[16] In fact, the fact that CB&I was willing to pay a premium is closely related to the anticompetitive effects of the acquisition. Since Respondents did not even argue that the acquisition had generated economic efficiencies, the logical conclusion is that the premium price is directly related to an increase in CB&I's market power. *See* Areeda at ¶ 954e ("The acquirer's higher offer may reflect the value to it of forestalling the competition that the preferred merger may produce"); Glenn,Tr. 4262 (Glenn admitted that PDM was worth more to CB&I than to others).

in the EC division, PDM therefore did not make an active attempt to examine the level of interest from companies other than CB&I.

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 CB&I's CEO, and they made the deal that would give both the most value. Indeed, PDM even rebuffed expressions of interest from at least one prospective purchaser, Matrix. (Vetal, Tr. 418-423) Byers admitted on cross-examination that other companies would have been interested in buying the divisions, and yet he has never seen any proof that anyone else was ever contacted. (Byers, Tr. 6799, 6858, 6806-6812; RX 29 at 5 (Even as of closing, "few potential buyers," and "some competitors might be interested" in buying the EC division). Even PDM's CEO promised the Board that he would contact other purchasers if the CB&I deal fell through. (Byers, Tr. 6864; CX 1590 at 6065) They just never did. The short answer as to why CB&I was the only one canvassed was PDM's desire to get more money; they had other options. (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. Wisc. 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").[17]

The second requirement for Kwoka's novel defense is that the assets are actually exiting the market. Courts and the Commission have made it quite clear, however, that simply wanting to exit

[17] 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); *Olin,* 986 F.2d at 1307 (Rejecting defense in part because FMC's management had not "conducted an exhaustive effort to sell" the assets").

isn't enough to trigger this requirement, and that is all Respondents really claim here. *See, e.g., U.S. 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"); *U.S. 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); *U.S. v. Blue Bell, Inc.,* 395 F. Supp. 538 (M.D. Tenn. 1975) (Company's intention to divest itself of its business is immaterial); *See Olin v. FTC*, 986 F. 2d at 1307 ("[T]he first finding - that the assets would not be exiting the relevant market...is sufficient to sustain the Commission's ruling that Olin did not establish an 'exiting assets' defense").

Respondents' argument, however, is that if the acquisition had not occurred, Byers would have recommended to his Board that they liquidate the assets. But this is irrelevant for two reasons. ***First***, Byers had no authority to make such a decision and never asked the board to consider it. (Byers, Tr. 6797-98; 6815-16) It is thus pure speculation to assume that the Board would have made such a decision. ***Second***, if Byers had convinced the Board to liquidate the EC division, his plan was to sell the current contracts, the plant, and the engineering and intellectual property assets to another competitor who would carry out the current business. (Byers, Tr. 6802-04; RX 29 at 5) In short, if CB&I had not purchased PDM, under Byers' plan, some company other than CB&I (such as 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 (Commission was correct in rejecting defense because "assets would not be exiting the relevant market").

There can be no doubt, therefore, that the sale of the of PDM's EC division, even in a "liquidation," to one or more purchasers whose ability to compete in the relevant markets would be improved would be far preferable, from a competitive standpoint, than a transaction that solidifies CB&I's market leadership

and puts them in the position to be the single dominant firm which can "win" every job it wants. (CX 1731 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, this Tribunal should reject Respondents' attempted defense, which is not supported in law.

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

During the Hearing, Complaint Counsel presented substantial evidence that the merger of PDM's Water and EC Divisions with Chicago Bridge & Iron may lessen competition in the relevant markets: *e.g.,* evidence of high concentration, attempted and actual collusion, higher post-merger prices and margins – any of which evidence independently warrants a liability finding against Respondents. Section 11(b) states:

> "If upon such hearing the Commission...shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it ***shall*** . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and ***divest*** itself of the . . . assets, held . . . in the manner and within the time fixed by said order." 15 U.S.C. § 21(b) (Emphasis added).

Administrative Law Judge Hyun explained Congress' mandate when he stated without equivocation: "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 Corp.*, 113 FTC at 584.[18] Indeed, the U.S. Supreme Court made it clear that Congress meant what it said in Section 11(b).

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[18] Even if the Commission were of the opinion that it could choose a different remedy than it has chosen under Section 11(b) for over five decades (e.g., something less than divestiture), it would seem that this case – which has facts far more egregious than dozens of prior reported cases – is not the one for which to create such an exception.

> "In § 11 of the Act, Congress directed the FTC to issue orders requiring that a violator of § 7 'cease and desist from the violation,' and, specifically, that the violator 'divest itself of the [assets] held' in violation of the Act. ... In the context of construing the FTC's authority to issue such...orders, this Court – speaking through Justice McReynolds, who had served as President Wilson's chief antitrust enforcement officer at the time the Clayton Act was framed – had no difficulty finding...: 'The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold.'"

California v. Am. Stores, 495 U.S. at 284-85, n.11, (quoting *FTC v. Western Meat Co.*, 272 U.S. 554, 559 (1926)). This "duty" to order divestiture of what CB&I had wrongfully acquired is clear. Respondents have offered ***no*** precedent for any other remedy.[19]

In their previous briefs and at closing, Respondents failed to mention any of the more than five decades of precedent under the Clayton Act, nor did they even mention the governing provision of the Clayton Act, § 11(b). Instead, Respondents claimed at closing that the *Microsoft* case governed this merger case and held that divestiture was some kind of extreme, "draconian" remedy. *U. S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). Counsel made it clear to this Tribunal that "the divestiture cases, authority relied on in the Microsoft case are [Clayton Act] Section 7 cases. It's the same." (Leon, Tr. 8314) Not true.

Microsoft ***was not a merger case,*** and yet, like Respondents here, the Antitrust Division in *Microsoft* tried to equate that monopolization case to a merger case. The D.C. Circuit rejected this

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[19] Respondents would like this Tribunal to rewrite the words "shall...divest" to "divest only if Complaint Counsel proves that it's the only remaining option." This is against the "ancient and sound rule of construction that each word in a statute should, if possible, be given effect." *Crandon v. U. S.*, 494 U.S. 152, 171(1990). The U.S. Supreme Court has cautioned that courts should not rewrite statutes. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197-201 (1976); *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."). In similar contexts, the Court has found "shall" to mean mandatory. *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772 (1984). Certainly, in the context of the legislative history of the Clayton Act, it seems illogical to assume that Congress looked upon divestiture as some kind of last resort to be used sparingly, as Respondents suggest.

analogy and chastised the plaintiffs:

> "By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture 'has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control,' and that '***complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws***.'" *Microsoft*, 253 F.3d at 105 (Emphasis added) (Citations omitted).

As the *Microsoft* Court recognized, merger cases are different. Under both the Clayton Act and Supreme Court law, divestiture is the proper remedy for illegal mergers. 15 U.S.C. § 21; *Du Pont*, 366 U.S. at 326-27; *Greater Buffalo Press,* 402 U.S. at 556; *Ford Motor Co. v. U. S.*, 405 U.S. 562, 573 (1972). The Supreme Court has noted that "[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor Co.,* 405 U.S. at 573. Moreover, as explained below (Section V.A.), Section 11(b) of the Clayton Act grants the Commission a specific mandate to order divestiture of assets when a violation of Section 7 is found. 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 market "in order to increase the likelihood of a restoration of competition." *Olin,* 113 F.T.C. at 619.

There is nothing novel in the remedy sought by Complaint Counsel. The Commission has ordered, and the Commission's Compliance Division has implemented and enforced, divestiture of integrated assets in consummated merger cases many, many times over the last five decades of the amended Clayton Act.[20]

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[20] *See, e.g, Olin,* 113 F.T.C. at 619 (Order to divest relevant product as well as a corollary one as well); *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

Contrary to Respondents' assertions, testifying customers, competitors and company documents demonstrate that divestiture is the only relief that has any chance of restoring competition to premerger levels. In short, the appropriate remedy is quite simple: what was bought from PDM, including the EC and Water Divisions, their engineers, intellectual property, fabrication plants and ongoing business must be restored and divested. The resulting company can then be sold to another company that has the capital and wherewithal to make the restored PDM the competitor it was before the merger.

A. Under Controlling Law, Divestiture Is Required If a Section 7 Violation Is Found.

Section 11(b) of the Clayton Act confers on the Commission the authority to enforce compliance with Section 7 of the Act and requires an order to "divest" once a violation is found. 15 U.S.C. § 21(b). Section 5 of the FTC Act gives the Commission additional injunctive authority and responsibility to frame additional orders to ensure that competition is restored. 15 U.S.C. § 45(b).

If this Tribunal finds that Respondents have violated Clayton Act § 7, this Tribunal must issue an order to undo the anticompetitive acquisition and require Respondents to divest the fruits of their unlawful acquisition. The U.S. Supreme Court has held that divestiture is "authorized, ***indeed required***" upon showing that a consummated acquisition violates Section 7, to ensure that "those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship and inconvenience." *Du Pont*, 366 U.S. at 348; *Greater Buffalo Press*, 402 U.S. at 556 ("Divestiture performs several functions, the foremost being the liquidation of the illegally acquired market power."); *Ford Motor Co.*, 405 U.S. at 573 ("Complete divestiture is particularly appropriate where asset

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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 Products Co.*, 65 F.T.C. 1163, 1229 (1964), *aff'd* 347 F.2d 745 (7th Cir. 1965) (Order to divest "all other assets as may be necessary to reconstitute McClintock Manufacturing Company as a going concern and effective competitor...").

or stock acquisitions violate the antitrust laws."). "Divestiture is a start towards restoring the pre-acquisition situation," *Id.* at 573, and is the only relief /in Section 7 cases that can "eliminate the anticompetitive consequences" of the acquisition. *Id.* at 574.

Following the Supreme Court, lower courts have similarly held that divestiture is the standard relief in consummated mergers under Section 7. "The very words of § 7 suggest that an undoing of the acquisition is a ***natural remedy*** . . . . It should always be in the forefront of a court's mind when a violation of § 7 has been found." *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1380 (9th Cir. 1978) (emphasis added); s*ee also Olin,* 113 F.T.C. at 584 ("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."); *Crown Zellerbach Corp.*, 54 F.T.C. at 807 (ordering divestiture, to ensure "the substantial restoration of the competitive entity destroyed"); *United Tote*, 768 F. Supp. at 1086; *see Seeburg Corp. v. FTC*, 425 F.2d 124, 129 (6th Cir. 1970); *RSR Corp.*, 88 F.T.C. 800 (1976); *American Medical Int'l*, 104 F.T.C. at 222-23 (1984); *Hosp. Corp. of Am.,* 106 F.T.C. at 513.

Absent divestiture, any lesser relief would be a slap on the wrist and is simply not countenanced by Section 11(b). By moving for lesser relief, Respondents are asking this Tribunal to disregard established precedent on both liability and relief, to limit itself in the relief that it may order, and to allow Respondents to continue to enjoy the benefits of an unlawful acquisition. Should this Tribunal find a § 7 violation, the law is clear that divestiture is warranted to undo its effects.

B. In Order to Restore Competition, Divestiture Must Be Complete.

The divestiture ordered in this case should be both complete and broad enough "to restore the competition that existed before the unlawful acquisition." *Olin*, 113 F.T.C. at 619. *See B.F. Goodrich*

Co., 110 F.T.C. at n.257 ("In Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger") (citations omitted).

In order to restore competition, an effective divestiture must be complete, that is, sufficient to create a viable entity that operates independent of Respondents. *Ford Motor Co.*, 405 U.S. at 573. Anything less is a waste of time.[21] For divestiture to be successful, a ***complete*** divestiture that reestablishes the acquired firm as a viable competitor is necessary. The Commission "will require a divestiture that will likely create a viable business entity (rather than the creation of lawyers) to resolve the competitive problems posed by the merger,"[22] where a Section 7 violation has been found. In fact, the Commission has extensively studied divestitures[23] and has determined that the most successful divestitures are those that create an ongoing, viable entity:

> "[T]he divestiture of an entire business (that is, an on-going, stand-alone, autonomous business, and which may include assets relating to operations in other markets) . . . is most likely to maintain or restore competition in the relevant market."

Frequently Asked Questions About Merger Consent Order Provisions, at 5 at Q. 16, March 15, 2002 (*available* at http://www.ftc.gov/bc/mergerfaq.htm). *See* Rogowsky at 194 ("[W]hen firms already have

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[21] *See* Elzinga, *The Antimerger Law: Pyrrhic Victories*, 12 J. Law & Econ. 43, 55 (1969) ("In practice, the results of partial divestitures have often been so defective as to indicate that this sort of relief order should be avoided whenever possible."); Robert Rogowsky, *The Economic Effectiveness of Section 7 Relief*, 31 Antitrust Bull. 187, 195 (1986) (Same).

[22] Timothy Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, Remarks at the American Bar Association, Antitrust Section Annual Meeting, at 7 (Aug. 7, 2001) (*available* at http://www.ftc.gov/speeches/muris/murisaba.htm).

[23] In 1999, the Commission released a Divestiture Study, which analyzed all Commission-ordered divestitures over a ten-year period. Based upon its study, the Commission concluded that the preferred relief is "the divestiture of an on-going business with a customer base [rather than] the divestiture of assets that facilitate entry." *A Study of the Commission's Divestiture Process*, prepared by the staff of the Bureau of Competition, at 42, (1999) (*available* at http://www.ftc.gov/os/1999/9908/divestiture.pdf).

combined, the highest probability of restoring competition comes from full divestiture"); Elzinga at 45-47 ("Whenever an anticompetitive increment in market power is attained by merger, structural relief requires the restoration of the acquired firm"); *see Ford*, 405 U.S. at 574 (Court ordered Ford to restore Autolite as a viable, independent competitor and give the new company "at least a foothold in the lucrative *aftermarket* and [to provide the new company] an incentive to compete aggressively for that market"). The point is that any order must strive "to restore the pre-acquisition competitive structure of the market." *Id*. at 576.

Respondents' only alternative remedy, and one that only relates to the TVC market, is a mentoring program together with an agreement not to compete. No Commission or court decision has allowed such a cop out that allows the offender to keep the illegal acquired assets.[24] *See In the Matter of Diamond Alkali Co.*, 72 F.T.C. 700, 744-45 (1967) (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 alternatives to the Court" other than retaining the assets from the proscribed acquisition).

Moreover, an effective divestiture must be sufficiently broad to ensure that an acquirer can be a viable competitor. "The relief which can be afforded under these statutes cannot be limited to the restoration of the status quo *ante*." *Ford Motor Co.*, 405 U.S. at 573 n.8; *accord, Hospital Corp.*, 807 F.2d at 1393 ("[T]he Commission has a broad discretion, akin to that of a court of equity, in deciding what relief is necessary to cure a violation of law and ensure against its repetition."). In prior cases, the Commission "has ordered broad divestiture in order to increase the likelihood of a restoration of

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[24] 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)).

competition." *Olin*, 113 F.T.C. at 619.

To "ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success," divestiture must be broad. *Id.* at 619 In *Olin*, the Commission ordered respondents to divest a facility that manufactured the relevant product, isocyanurate (ISOS) and a product outside the relevant market, cyanuric acid (CA). As is the case with PDM's EC and Water Divisions, the two operations in *Olin* were intertwined, thus, the Commission concluded that "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." *Olin Corp*, 986 F.2d at 1307 (emphasis added). "Anything less [would] be a divestiture in name only and would" not restore competition. *Olin*, 113 F.T.C. at 585. Similarly, the Commission in *Ekco Products* found that the elimination of an important competitor would not be cured by the divestiture of the acquired assets, and that a broader divestiture was warranted:

> "The Commission might order such divestiture of other assets as is required to recreate a viable concern having approximately the competitive strength of the acquired firm at the time of the acquisition; in addition, . . . the Commission could require that the acquired firm be recreated in such form as would reflect the firm's probable growth." *Ekco Products Co.*, 65 F.T.C. at 1217.

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, and should not be considered by this Tribunal.

C. 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 the mentoring remedy offered by Respondents would be less desirable. As explained above, and as expressed by Section 11(b) of the Clayton Act, Complaint Counsel

has no such burden. Nevertheless, Respondents are wrong on the factual record as well. There is ample evidence in the record establishing the need for complete divestiture to remedy the effects of the acquisition and how that divestiture must be implemented in order to reestablish two independent, viable and competitive entities and to assure that relief is effective in restoring competition.

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.

When asked what impact such a divestiture would have on his company, Mr. Glenn, the CB&I CEO surprisingly said very little: he stated ***only*** that he would like the Court to take into consideration the fact that many of the company's contracts have non-assignability clauses and key employee provisions, that CB&I is too small today to qualify for some unspecified projects, and that CB&I employees work on a number of projects simultaneously. (Glenn, Tr. 4168-69). None of the items noted by Mr. Glenn is an obstacle to restoring competition through a complete divestiture.

As described above in Section III, Complaint Counsel has introduced substantial evidence, both in the form of documents and witness testimony, as to (i) the intense competition that existed in the relevant markets when there was an independent PDM and (ii) actual evidence of anticompetitive effects from the

acquisition in the form of higher prices and margins, as well as evidence of actual or attempted collusion. Many witnesses testified that the elimination of PDM as an independent competitor raises concerns about competition. (*See e.g.,* Neary, Tr. 1444, 1451; Hall, Tr. 1830-31; Kistenmacher, Tr. 878). The evidence clearly supports the need for Complaint Counsel's proposed remedy to restore competition in the relevant markets.

The record in this proceeding gives substantial support for an effective divestiture remedy in this matter. There is substantial evidence in the record as to the structure, composition, and competitive viability of PDM and CB&I premerger, the precise PDM assets and personnel acquired by CB&I, and the disposition of those assets and personnel. (*See* CX 385 at 25 (listing PDM EC's salaried and hourly employee headcount); CX 385 at 21-23 (listing PDM EC's facilities and equipment); CX 134 (organization chart for PDM EC); CX 133 (organization chart for PDM Water); and CX 328-339 (Asset purchase agreement, listing all assets of the PDM EC and Water Divisions purchased by CB&I, including all owned real property, tangible personal property, inventories, contract rights, accounts receivables, and intellectual property)). This Tribunal, the Commission, and ultimately the Compliance Division can use this evidence as a guide for recreating by divestiture as closely as possible the pre-merger competitive environment.

In Order for Divestiture to Be Effective, CB&I Must Assign Contracts to the Divested Entity.

The record is clear that CB&I must be ordered to secure customer consent to assign customer contracts to the divested entity. Mr. Byers conceded that PDM was fully prepared to go out and gain consents from its customers to allow the sale of its contract backlog to third parties for completion, should PDM have decided to liquidate the EC division. (Byers, Tr. 6804-6805). CB&I was obviously successful in convincing customers to assign PDM contracts to itself, as Respondents placed no evidence in the record

of any customers going elsewhere to have their contracts completed by third parties.[25] Moreover, to make sure that the new entity has the reputation, experience and sufficient business base to be a viable competitor, CB&I's existing backlog of work at the time of the divestiture must be apportioned between CB&I and the divested entity.

Divestiture Must Assure that Both CB&I and the Acquirer of the Divested Entity Have a Sufficient Revenue Base and Scale to Compete for Large Projects.

The Commission must approve both the manner of the divestiture and the acquirer of the divested entity to assure that it will have a sufficient revenue base and scale of operations to compete for large projects. The record shows that an adequate revenue base is a critical component to competing, particularly in the LNG tank and LNG terminal markets.[26] (Izzo, Tr. 6511-12; CX 891 at 46-47 (Glenn, Dep.); Izzo, Tr. 6485-86; Bryngelson, Tr. 6154-55). A large revenue base enhances an LNG facility constructor's ability to offer the financial guarantees necessary to win LNG contracts. (CX 891 at 43, 47 (Glenn, Dep.); Izzo, Tr. 6511-12). LNG customers prefer to contract with a company that has a large asset base. (Bryngelson, Tr. 6154-55).

A Divestiture Must Include the Assets of both the PDM EC and Water Divisions.

To restore competition, the divestiture order must include all of the former PDM EC and Water assets and personnel. The same personnel, equipment, and fabrication facilities are used in the construction

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[25] Moreover, Mr. Glenn testified that his company is gaining over $ 1.5 billion per year in new business, CX 1731 at 16, and it appears that CB&I has cornered six new LNG projects. (Glenn, Tr. 4148, 4234, 4396-99). Considering that there were only nine projects during the past decade, there appears to be enough to help PDM become competitive again.

[26] Having sufficient size to provide bonding is also a factor affecting viability in the thermal vacuum chamber market. Mr. Gill testified that his company, Howard Fabrication, could not effectively compete in the thermal vacuum chamber market because it was not large enough to purchase bonds for thermal vacuum chamber projects. (Gill, Tr. 200-01, 234).

of the products of both groups. (Rano, Tr. 5894, 5898). Respondents concede that an effective divestiture would need to include assets necessary to other types of industrial storage tanks outside of the relevant market:

> "[I]f you were only to spin off some personnel and assets to make products in these markets, that company would wilt like a rose left out too long. There is not enough business. So, you would have to give it all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff. You would have to give it enough personnel so that everybody would have the expertise to do every kind of tank." (Leon,
>
> Tr. 8311-12)

We agree. There is substantial evidence in the record as to the close interrelationship between PDM EC and PDM Water, and the necessity of divesting enough assets to re-create the combined divisions for the resulting entity to be competitively viable. PDM EC and PDM Water routinely shared field erection personnel, fabrication facilities, and field erection equipment. (Scorsone, Tr. 4779-80; CX 552 at 45-48 (Braden, Dep.)); (Byers, Tr. 6780 (Because the two divisions shared human resources, services, and physical plant, "[i]t was not practical to split them); (Scheman, Tr. 6922-23; CX 525 at 0406); (Simpson, Tr. 3607 (Must retain shared operations to achieve economies of scope)).

In Order to Be Successful, a Divestiture Must Include PDM's Fabrication Facilities.

The divested entity must include PDM's fabrication facilities. In his expert testimony, Dr. Simpson testified that a divested entity would need the fabrication facilities in order to replace PDM. (Simpson, Tr. 3155-56). The former PDM EC and Water Divisions possessed three fabrication facilities located in Provo, Utah; Clive, Iowa; and Warren, Pennsylvania. Possessing multiple fabrication facilities is advantageous because it allows a competitor to rationalize its freight costs. (Vetal, Tr. 428, 432-33). All three of PDM's former fabrication facilities must be divested.

An Effective Divestiture Must Include the Merged Company's Intangible Assets Including Technology and Know-How.

In order for a divestiture order to be effective, Respondents must divest all of the intellectual property, technology and know-how and other intangible assets related to the relevant products, including the PDM name, rights to which are under the collective control of Respondents. Dr. Simpson testified that restoration of competition requires divestiture of intangible as well as tangible assets. (Simpson, Tr. 3608) (Intangible assets are required to "offer customers the best deal relating to dimensions of competition such as price, quality, timeliness of completion, reputation and safety).

Mr. Cutts, a vice president of ATV, a company repeatedly referenced by Respondents as a potential replacement for PDM in the markets at issue, testified that to compete as a major competitor, like PDM, ATV would need:

> "their customer base, a list of all their customers, all 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...., purchasing standards, design standards, calculations, drafting standards, vendor list, those – and there's other[s]...."

(Cutts, Tr. 2372-73). Mr. Cutts also testified that they would need marketing, advertising and manpower assets as well. (Cutts, Tr. 2382).

In Order to Be Effective, the Divestiture Will Need a Trustee and the Enforcement Efforts of the Compliance Division.

The divestiture will require the appointment of a monitor trustee to oversee its effective implementation. (Simpson, Tr. 5715). *See* Casey Triggs, FTC Divestiture Policy, 17 Antitrust 75, 76 (Fall 2002). The Commission's specialized Compliance Division, whose purpose is to oversee and implement Commission divestiture orders, will be able to work with the trustee to ensure a restoration of competition.

The Commission ultimately should approve any purchaser of the divested entity, ensuring that the parent will have sufficient financing to operate the divested assets and maintain their competitive viability in the markets at issue.

In sum, the Clayton Act and established Supreme Court precedent unequivocally state that divestiture is warranted and appropriate upon showing that Respondents have violated Section 7. Each one of the dozens of pieces of evidence presented by Complaint Counsel independently mandate that CB&I return what it has wrongfully acquired to restore competition.

D. 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. Within 6 months, Respondents are required to divest all tangible and intangible assets that CB&I acquired from PDM as a result of the Acquisition, as well as any additions or improvements to these assets, to an Acquirer approved by the Commission. Order, ¶ II.D. These assets include the former PDM fabrication facilities located in Clive, Iowa; Provo, Utah; and Warren, Pennsylvania. Order, ¶ I.U. These assets also include the Pitt-Des Moines name. Order, ¶ I.U.

In order to provide the acquirer with a backlog of work, the Order also requires CB&I to divest a portion of its customer contracts. Order, ¶ II.C. CB&I is proscribed from divesting only unprofitable contracts. Order, ¶ II.C.3.a. CB&I is also required to divest contracts that are equitably distributed among the various types of products that CB&I (and, prior to the acquisition, PDM) manufacture. Order, ¶ II.C.3.c. Moreover, CB&I is required to divest, to the extent possible, half of its contracts in the relevant markets alleged in the Complaint. Order, ¶ II.C.3.d. The Order addresses the dilemma surrounding the feasibility of assigning customer contracts by requiring Respondents to secure the customer approval

necessary to transfer such contracts. Order, ¶ II. C. By receiving these contracts, the acquirer will be able to build a track record immediately upon divestiture in the relevant markets, and have sufficient work in progress outside the relevant market to sustain the acquirer's operations.

Paragraph II.E. of the Order requires CB&I to license CB&I's intellectual property, that is, the combined intellectual property that resulted from the acquisition of PDM. Order, ¶ II.E. CB&I must also transfer a portion of its employees and must use whatever means are necessary to accomplish such a transfer. Order ¶ II.F.

Finally, the Order incorporates provisions relating to two types of trustees. The first trustee is the Monitor Trustee, whose responsibility is to ensure that Respondents comply with the terms of this Order. Order, ¶ V. The second trustee is the Divestiture Trustee, who shall be appointed to accomplish the divestiture, in the event that Respondents fail to divest, in the manner and time as required by the Order. Order, ¶ VI.

VI. CONCLUSION

Knowing about the antitrust risk, CB&I took a chance that, by closing its deal and telling the FTC staff later, the dominance they sought would be theirs to keep. But Congress, through the truth seeking of a trial, has given the "Government a 'heads-I-win, tails-you-lose' advantage in this case – especially when CB&I just couldn't stop itself from using their dominance to raise prices and margins while this trial progressed. *General Dynamics*, 415 U.S. at 1197, n13. Complaint Counsel respectfully suggests that, under these circumstances, the law now requires this Tribunal to order CB&I to divest all of the assets it acquired from PDM, and take other steps necessary to reestablish it as a distinct and separate, viable and competing business in the relevant markets. A Proposed Order is attached.

Dated: February 25, 2003

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the Public Version of Complaint Counsel's Corrected Brief in Support of its Proposed Findings of Fact and Conclusions of Law to be delivered by hand to

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____

April Tabor, Attorney

Dated: February 25, 2003