PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

RESPONDENTS' POST-TRIAL REPLY BRIEF AND MEMORANDUM IN SUPPORT OF THEIR MOTION TO STRIKE

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INTRODUCTION

It is true as Complaint Counsel notes that "facts are stubborn things" and that a lawyer "cannot alter the state of the facts and the evidence." Yet, Complaint Counsel has done just that. Its initial post-trial brief, findings of facts and conclusions of law alter and distort the facts and the evidence. The initial brief relies upon unadmitted exhibits, mischaracterized documents, and miscited trial testimony. Moreover, it ignores relevant trial testimony. Respondents, in this Reply Brief and more particularly in their Reply Findings of Fact, will detail these deficiencies. To the extent unadmitted evidence has been cited in violation of this Court's order, Respondents incorporate herein arguments in support of their motion to strike such evidence.

In this case, Complaint Counsel bore at all times the burden of showing that the Acquisition had a "reasonable probability" of lessening competition in the relevant markets. Complaint Counsel has failed to meet its burden to prove a prima facie case because it presented arbitrarily chosen market concentration statistics in four product markets where demand is extremely thin or non-existent, and where Complaint Counsel's backward-looking statistical presentation fails to reflect today's vibrant competitive landscape. Respondents have nonetheless forcefully rebutted Complaint Counsel's best efforts to make a prima facie case in each of the product markets at issue by proving that its prima facie case is unreliable, that entry has actually occurred in the relevant markets, that entry into these markets is easy, that customers are sophisticated, and that the financial circumstances of PDM in this case are such that the Acquisition could not possibly have affected competition in the relevant markets.

Complaint Counsel's response to this evidence in its post-trial brief was astounding. It simply ignored weeks of testimony regarding the entry efforts of huge, multinational construction consortia into the LNG markets and the efforts of several well-respected domestic tank manufacturers in the LIN/LOX and LPG markets. Instead, Complaint Counsel advocates a "heads I win, tails you lose" approach (CC Br. at 58), asserting that Respondents must show evidence that entry has actually occurred in the relevant markets and that it is timely, profitable at pre-merger prices, *and* sufficient to constrain prices. Yet the law does not require such a specific, detailed showing from Respondents. Respondents need only show that Complaint Counsel's prima facie case is flawed. The burden rests with Complaint Counsel to prove that anticompetitive effects are likely to occur. The law places this burden firmly on the shoulders of Complaint Counsel, and its case collapsed under its heavy weight.

As discussed below, Complaint Counsel has not proven that entry is unlikely to be timely, profitable at pre-merger prices, and sufficient. In fact, the evidence shows just the opposite. Struggling to meet its burden, Complaint Counsel has conjured up several tales of alleged anticompetitive effects wholly unsupported by evidence. In many cases, the "stubborn facts" have been so stubborn that Complaint Counsel has been forced to rely on evidence outside the record, speculation, conjecture, and miscited and mischaracterized testimony. Because Complaint Counsel has not carried its burden of proof, this case should be dismissed with prejudice.

In addition, Complaint Counsel is not entitled to the relief it seeks because the evidence demonstrated that competition absent the Acquisition would not have included a vibrant, functioning PDM. Instead, the evidence shows that PDM would likely have been liquidated and that its assets would have exited the market. Complaint Counsel cannot skirt the irrefutable facts supported by the evidence that demonstrate PDM would have been liquidated absent the Acquisition.

Alternatively, if this Court finds that the Acquisition has violated Section 7, Complaint Counsel is not entitled to the draconian remedy it seeks. This Court is not, as Complaint Counsel would like it to believe, required to break up CB&I by ordering a divestiture of all acquired assets to remedy a Section 7 violation. The Supreme Court and the Federal Trade Commission itself have expressly rejected Complaint Counsel's "automatic remedy" argument, and have instead instructed courts to craft remedies supported by the record evidence. Further, they have made clear that complete divestiture is inappropriate in cases where the evidence does not support its implementation. Complaint Counsel has presented no credible evidence that breaking up CB&I through a complete divestiture would be workable, desirable, or effective in restoring competition. In fact, the evidence presented at trial suggests that such a remedy would actually harm competition in the relevant markets, as well as the very customers Complaint Counsel claims to protect.

Simply stated, the weight of the evidence fails to establish Complaint Counsel's burden of showing more than an ephemeral possibility that competition will be substantially curtailed in any of its purported product markets. Respondents herein address Complaint Counsel's arguments in the order in which they were presented in its initial brief. For all of the reasons fully set forth below, the Complaint as to all product markets should be dismissed with prejudice.

I. COMPLAINT COUNSEL'S PURPORTED EVIDENCE OF MARKET CONCENTRATION IS MISLEADING AND ARBITRARY.

Complaint Counsel has failed to establish a prima facie case that there is a "reasonable probability" that the Acquisition will lessen competition *substantially* in the relevant markets. Complaint Counsel has relied on market share statistics that are misleading and arbitrary because they fail to account for the extensive new entry in the relevant markets and are calculated using an inordinately lengthy historical time period. For this reason alone, the Complaint as to all four product markets should be dismissed with prejudice.

A. HHI CALCULATIONS ARE MISLEADING AND OF LITTLE USE IN MARKETS WITH THIN DEMAND.

Complaint Counsel relies on pre-Acquisition data to support its contention that "extraordinarily high concentration in each of the relevant markets . . . establishes a strong[1] presumption that the acquisition would reduce competition." (CC Br. at 12; *see also* CC Br. at 2). Complaint Counsel's reliance on 12 years of pre-Acquisition concentration data fails to satisfy its legal burden for three reasons:

First, Complaint Counsel first asserts that its statistical evidence "satisfies the required proof in this case as a matter of law." (CC Br. at 2). Although market concentration statistics are relevant in proving a prima facie case, such statistics in this case do not prove a "substantial effect" because they are misleading. When such data are misleading, they cannot be relied upon to prove a Section 7 violation. (*See* Opening Br. at 16-19) (FOF 7.78, 7.108, 7.114, 7.114, 7.116, 7.123, 7.127, 7.130, 7.235, 7.237). Courts have rejected Complaint Counsel's position that market concentration statistics establish a prima facie case "as a matter of law,"

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[1] The word "strong" is Complaint Counsel's choice of words. Its cited support for this proposition merely holds that structural evidence is sufficient to establish a prima facie case, not that it is "strong" evidence. *See Cardinal Health*, 12 F. Supp. at 54 (cited at CC Br. at 12).

instead holding that such statistics are "not conclusive indicators of anticompetitive effect" and that "[e]vidence of past production does not as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *United States v. General Dynamics Corp.*, 415 U.S. 486, 499, 501 (1974). The Supreme Court in *General Dynamics* instructed lower courts to look beyond such statistics because "only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.* at 498. Lower courts have followed *General Dynamics'* lead. For example, the D.C. Circuit recognized that heavy reliance on such statistics would "grossly inflate the role of statistics in actions brought under Section 7" and warned that "[t]he Herfindahl-Hirschman Index cannot guarantee litigation victories." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990).[2]

Second, Complaint Counsel's market concentration statistics are particularly useless in this case because they are not predictive of future competition. (*E.g.*, Harris, Tr. 7227).[3] As discussed in Respondents' Opening Brief, pre-Acquisition market concentration statistics are not predictive of future competitive harm in the relevant markets because they fail to account for: 1) the entry of several new and strong competitors in the U.S. LNG market; 2) recent changes in competitiveness of other market participants in the LIN/LOX and LPG markets; and 3) recent changes in demand for relevant products that have altered the competitive

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2 Complaint Counsel conclusorily asserts that "[o]f course, anticompetitive effects have already occurred in this case." (CC Br. at 10). As discussed in Part III, *supra*, this conclusion is wholly unsupported by any credible evidence.

3 The Merger Guidelines, oft-cited throughout Complaint Counsel's brief, state that "[m]arket shares will be calculated using the *best indicator of firms' future competitive significance*." Merger Guidelines, § 1.41 (emphasis added). By using solely historical data in calculating its concentration statistics, Complaint Counsel has failed to follow Section 1.41 of the Merger Guidelines.

landscape. (*See* Opening Br. at 16-19) (FOF 7.78, 7.108, 7.114, 7.115, 7.116, 7.123, 7.127, 7.130, 7.235, 7.237).

Third, Complaint Counsel has made a number of errors and incorrect assumptions in its presentation of market concentration statistics. For example:

- In the LNG market, Complaint Counsel argues that "[t]he only LNG project that may be awarded to another supplier . . . may go to another supplier only because CB&I refused to bid." (CC Br. at 13). Evidence does not support this false conclusion. In fact, CB&I attempted to bid on Dynegy's LNG tanks. Dynegy rejected CB&I's offer because it was "satisfied" with three existing bids that were "within the expected price range." (Puckett, Tr. 4557, 4559-60) (FOF 3.288, 3.304).

- In the LIN/LOX market, Complaint Counsel argues that "to eliminate the presumption created by these HHI results, ATV would have to be as 'equally competitive' as PDM was to "[r]eplace the 'lost competition'" and that AT&V "cannot even come close." (CC Br. at 13) (citing Merger Guidelines ¶ 2.212). This is wrong for two reasons. First, the evidence has demonstrated that AT&V can compete as effectively as PDM did in the LIN/LOX market, as it has beaten CB&I three times in a row post-Acquisition and has captured a majority of the post-Acquisition LIN/LOX market in the U.S., and has done so at prices lower than PDM's pre-Acquisition prices. (Scorsone, Tr. 5017-18; RX 208) (state of mind). Further, as Dr. Harris explained, a collection of competitors can make up for a lost competitor under the Merger Guidelines. There is no requirement that only *one* firm can take the role of replacing the competitive effect of PDM. (Harris, Tr. 7255-56).

- In the LPG market, Complaint Counsel argues that nothing has changed post-Acquisition to "even arguably" affect the HHI for LPG of 8,380 (a change of 3,910). (CC Br. at 13). Complaint Counsel's calculation of CB&I's market is inconsistent within its own brief. In one place, Complaint Counsel argues that CB&I has a 99% market share. (CC Br. at 13). In another, it argues that CB&I has 100%. Further, Complaint Counsel's statement completely ignores the vibrant competition in the LPG market post-Acquisition, including the fact that AT&V has won 50% of the LPG jobs awarded in the last four years. (FOF 5.76-5.78).[4]

[4] Complaint Counsel cites Luke Scorsone for the proposition that PDM was CB&I's only competitor on domestic LPG projects, and states that "[t]here is no evidence to the contrary." (CC Br. at 14). This is dated evidence. Since Mr. Scorsone made that statement, the evidence has shown that AT&V "beat the socks off CB&I" on a recent LPG project. Further, on another, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**. (N. Kelley, Tr. 7092, 7137; Scorsone, Tr. 5039-43) (FOF 4.56).

- In the TVC market, Complaint Counsel calculated the HHI figure as "a perfect 10,000." (CC Br. at 13). Complaint Counsel fails to note that a properly-calculated pre-Acquisition HHI is also 10,000, as PDM is the only company to have actually built a TVC since 1987. (*See* Scorsone, Tr. 5055-56; Glenn, Tr. 4089, 4160; Scully, Tr. 1187-89, 1193; Higgins, Tr. 1276-77) (FOF 6.26). Since there is zero change in a properly-calculated HHI figure, Complaint Counsel has not established a prima facie case. (Harris, Tr. 7227-28).

Aside from the deficiencies in its market concentration statistics, Complaint Counsel failed more fundamentally in its effort to carry the burden of proof in the TVC market. This so-called "market" is extremely thin. (Opening Br. at 120-21) (FOF 6.11-6.25). In the past decade, only one TVC has been constructed. There is no prospect of demand for these products in the near future. (FOF 6.12-6.15). This lack of demand fundamentally prevents Complaint Counsel from arguing that the Acquisition will have a "substantial" effect on commerce, as it must do in order to succeed on a Section 7 claim. *See* 15 U.S.C. § 18; *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 9 (D.D.C. 1990) (citing *United States v. DuPont & Co.*, 353 U.S. 586, 595 (1957)) (Opening Br. at 120-21).[5] This fact alone requires dismissal of the TVC case in its entirety.

B. USE OF HHI EVIDENCE IN THIS CASE IS ARBITRARY.

To illustrate the arbitrary nature of HHI evidence in this case, Respondents presented evidence showing that HHIs can be easily manipulated. For example, by selecting an HHI start date of 1996, as opposed to 1990, the HHI changes in three of the four relevant markets are zero. (Harris, Tr. 7222-7229). Complaint Counsel attempts to defend its use of an 12-year HHI period by arguing that the Merger Guidelines allow it to measure market shares over a longer period of time when "individual sales are large and infrequent so that annual data

[5] Complaint Counsel incorrectly argues that "it was no surprise that their only defense in TVCs was an offer of settlement." (CC Br. at 3). This more fundamental argument requires dismissal of the TVC case. Respondents'

may be unrepresentative." (CC Br. at 14-15) (citing Merger Guidelines § 1.41). This reliance is misplaced. First, there is a large middle ground between the use of annual data and 12 years of data. Nothing in the Merger Guidelines endorses going back so far. Further, a Section 7 case examines whether an acquisition *will affect competition in the future*. It defies logic to base a case regarding future competition on old and moldy data. Recognizing this fact, the Merger Guidelines do not allow Complaint Counsel to use a time period as long as it likes; they instruct that "[m]arket shares will be calculated using the *best indicator of firms' future competitive significance*." Merger Guidelines, § 1.41 (emphasis added). There is no evidence that market share data from 1990-1995 is remotely predictive of future competitive conditions. In fact, Complaint Counsel's expert witness could offer no other explanation for why he chose to use 1990 as a starting point for HHI calculations, other than that the information was available to him. Complaint Counsel's citations (CC Br. at 15) lend no support for its novel theory; none of these cases permit an HHI calculation based on 12 year-old data.[6]

As Respondents respectfully suggested in their Opening Brief, any use of HHI data in this case is unhelpful to the trier of fact. (*See* Opening Br. at 16-19).[7] To the extent this Court believes HHI data is helpful, Respondents submit that a more accurate basis for selecting a beginning point for an HHI calculation is to select a date around which significant market changes have occurred, such as rapidly rising or falling market shares. The validity of this

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offer in the TVC market was designed to be an alternative remedy for this Court in the event that it disagreed with Respondents on the issue of liability.

6 These cases used an HHI calculation period of five to seven years. *See Heinz*, 246 F.3d at 717; *Borden Inc. v. FTC*, 674 F.2d 498, 511 (6th Cir. 1982); *Greyhound Computer Corp. v. IBM*, 559 F.2d at 496-97.

7 Complaint Counsel attempts to put words in Dr. Harris' mouth, arguing that "[e]ven Dr. Harris testified that he could see no reason not to go back to 1995 or any particular year for that matter." (CC Br. at 15) (citing Harris, Tr. 7228). This is a mischaracterization of Dr. Harris' testimony. In fact, Dr. Harris testified that any use of HHIs was arbitrary, regardless of the start date.

approach has been recognized by a leading antitrust commentator relied on by Dr. Simpson in forming his expert opinions. (*See* Simpson Tr. 3044-45) (FOF 7.237). Under the less arbitrary approach suggested by Professor Areeda, 1995 or 1996 is a more appropriate measuring date because, beginning at that time, CB&I's large LNG and LPG market share fall to zero over a six-year period. (Simpson, Tr. 3744).[8]

II. CONTRARY TO COMPLAINT COUNSEL'S ASSERTIONS, RESPONDENTS HAVE FORCEFULLY REBUTTED ANY PRIMA FACIE CASE.

As discussed above, Complaint Counsel has not presented a prima facie case. Its attempt to do so was seriously hampered by the unreliability of its market share statistics. Assuming the existence of a prima facie case, it is weak at best. Accordingly, Respondents are under no obligation, as Complaint Counsel contends (CC Br. at 17-18) to rebut it with a "strong showing." Respondents need only comply with the teachings of *Baker Hughes*, which requires that Respondents present a showing commensurate with the strength of Complaint Counsel's case. 908 F.2d at 991.

Although they were not required to do so, Respondents have presented compelling evidence that is more than sufficient to rebut any prima face case Complaint Counsel may have made. Because this is a consummated merger case, two years of post-Acquisition evidence regarding the effect of the merger on competition is available. This evidence is highly relevant and probative of the ultimate issue in this case: whether the Acquisition may substantially lessen competition in the relevant markets. Respondents presented extensive evidence -- both pre-Acquisition and post-Acquisition -- regarding actual entry and ease of entry

8 The arbitrary nature of HHI data is most easily seen in the TVC market. Since CB&I has not built a TVC since 1984, the HHI change in this market is zero. (*See*, *e.g.*, Harris, Tr. 7227-29). Recognizing this fact, Complaint Counsel essentially argues that HHI statistics do not tell the full story in the TVC market. (*See* CC Br. at 15-16). Either HHI statistics are relevant or they are not relevant. One of Complaint Counsel's arguments must be wrong.

in the relevant markets. (Opening Br. at 19-118) (FOF 3.56-3.246 (LNG), 4.16-4.54 (LPG), 522-5.75 (LIN/LOX)). In addition, Respondents also presented evidence showing that Complaint Counsel's market concentration statistics are deficient (as discussed above), that customers in the relevant products are extremely sophisticated consumers, and that the financial circumstances regarding PDM were such that the Acquisition could not have substantially lessened competition in any of the relevant markets. All of these types of evidence are available to Respondents in rebutting a prima facie case. *See Baker Hughes*, 908 F.2d at 983-84. Respondents presented extensive evidence on each point.[9]

Complaint Counsel committed critical errors in attempting to overcome this entry evidence. First, it underestimated the importance of post-Acquisition evidence in this case. Second, it applied the wrong standards to Respondents' required showing under the law. Third, inexplicably, it virtually ignored weeks of entry evidence presented by Respondents in their case-in-chief. Fourth, it fails to address evidence directly contradicting its argument that entry in this case is not timely, profitable at pre-merger levels, or sufficient, an argument on which it bears the burden of proof. Fifth, and finally, Complaint Counsel grossly distorts the record evidence in a desperate attempt to prove the existence of entry barriers to the relevant markets. As discussed in detail below, facts are indeed "stubborn things."

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[9] Complaint Counsel incorrectly argues that "Respondents have offered only two arguments to attempt to rebut Complaint Counsel's prima facie case: (i) efficiencies and (ii) ease of entry." (CC Br. at 18; *see also* CC Br. at 2). In fact, Respondents have offered five different arguments. With respect to the efficiencies defense, Respondents did not present evidence regarding efficiencies. After reviewing the evidence, Respondents concluded that while the Acquisition had generated substantial efficiencies and would continue to do so in the future, it was not possible to document them in a manner that would satisfy their burden of proof.

A. POST-ACQUISITION EVIDENCE IS HIGHLY RELEVANT.

Complaint Counsel misstates the law regarding post-Acquisition evidence. (*See* CC Br. at 16-17). It cites authority holding that such evidence is suspect if it "is subject to manipulation by the party seeking to use it" and if it "may have been made to improve [defendant's] litigating position." (CC Br. at 16) (quoting *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986)). Reliance on this authority is misplaced, as Complaint Counsel has not produced a shred of evidence to support the view that Respondents have manipulated any of the evidence presented at trial or that they would be able to do so. Entry into the markets by third party firms is not subject to manipulation. For example, Respondents did not engineer (and could not have engineered) the entry of Skanska/Whessoe into the U.S. market for LNG tanks, Dynegy's refusal to allow CB&I to bid on its LNG tank project, AT&V's ability to bid on projects at lower costs relative to CB&I, and the trend from single-containment to double and full-containment LNG tanks. Simply put, competitors are not entering in and succeeding in the relevant markets because CB&I is taking "voluntary actions" (CC Br. at 16) to allow them to do so. Rather, they are using competitive advantages and market developments to score wins in the relevant product markets.[10] Complaint Counsel speciously argues that post-Acquisition evidence is suspect because it cannot answer the factual record, yet it provides no answer to the extensive post-Acquisition factual record. Complaint Counsel disregards such evidence because it does not like what that evidence shows. The facts are indeed stubborn.

[10] For example, the *B.F. Goodrich* court recognized that post-acquisition evidence should be given little weight where the evidence is subject to manipulation by the party. *See In the Matter of B.F. Goodrich Co.*, 110 F.T.C. 207, 1988 LEXIS 13 at *129 (1988). Further, that decision recognized that post-acquisition "structural" evidence, such as reduction in market share, evidence of low entry barriers, and evidence of new entry was highly relevant. *Id.* at *129-*131.

B. COMPLAINT COUNSEL APPLIES THE WRONG LEGAL STANDARDS TO RESPONDENTS' REQUIRED SHOWING.

Complaint Counsel improperly asserts that Respondents must prove the three elements of the Merger Guidelines addressing entry, which state that entry must be timely, likely to be profitable at pre-merger prices, and sufficient to deter or counteract the possible anticompetitive effects of the Acquisition. (CC Br. at 18-19; *see also* CC Br. at 2, 3) (citing Merger Guidelines ¶¶ 3.1-3.4). This argument fails for three reasons:

First, while the Guidelines discuss the issue of entry, they do not assign Respondents the burden of providing timeliness, profitability, or sufficiency. *See* Merger Guidelines § 3.

Second, the Guidelines -- authored by the government -- are guidelines that Complaint Counsel uses in determining whether to challenge an acquisition. The Guidelines are not the law and are not binding on courts. (*See* Opening Br. at 14). As discussed herein and in Respondents' Opening Brief, *Baker Hughes* controls this case, not guidelines proffered by Complaint Counsel as binding when in fact they are not. (*See* Opening Br. at. 5-14).

Third, assuming *arguendo* that the Guidelines require Respondents to bear the burden of proof on these points, they contradict settled law. (Opening Br. at 13-14). Respondents must make a showing that "the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition." They *are not obliged* to prove that entry has been (or will be) "quick and effective," nor are they obliged to present evidence "clearly" disproving future anticompetitive effects. *Baker Hughes*, 908 F.2d. at 987, 991. As *Baker Hughes* noted, requiring Respondents to make such a showing would force them to "essentially persuade the trier of fact on the ultimate issue in the case." *Id.* at 991. Because Complaint Counsel cannot prevail in this case under *Baker Hughes*, it seeks to create its own standard based on guidelines authored by the government. This is inappropriate because the ultimate burden of persuasion in a Section 7 case "*remains with the government at all times*." *Id.* at 983 (emphasis added). This Court should reject Complaint Counsel's improper disingenuous setting of legal standards. Respondents respectfully suggest that its "heads-I-win, tails-you-lose" approach (CC Br. at 58) is flatly inconsistent with controlling precedent and should not be adopted in this case.

Examination of each entry element discussed in the Merger Guidelines is instructive. The Merger Guidelines state that entry must be timely, and suggest a two-year period as an appropriate measure of timelines. *See* Merger Guidelines § 3.2. The Guidelines do not require Respondents to carry the burden of proof on this issue. In fact, Respondents are not even required to prove that actual entry will occur. As *Baker Hughes* noted, requiring such a showing would "overlook[] the point that a firm that *never* enters a given market can nevertheless exert competitive pressure on that market. If barriers to entry are insignificant, the *threat* of entry can stimulate competition, regardless of whether entry ever occurs." 908 F.2d at 988 (emphasis in original). In short, Respondents need not show that entry is timely. To the extent that timeliness of entry is an issue, it is *Complaint Counsel's burden* to show that actual entry is needed in the relevant markets and that it will not occur in a timely manner

The Guidelines also suggest that entry should be "profitable at premerger prices." (CC Br. at 18-19) (citing Merger Guidelines ¶¶ 3.1-3.4). This is merely a rehash of the government's attempt to impose a "quick and effective standard" on respondents in *Baker Hughes*. *See* 908 F.2d at 987-88. If entry is not a required showing, a showing that entry would be profitable at pre-merger prices is certainly not required. 908 F.2d at 988. To the extent that the question of whether entry is likely to be profitable at pre-merger prices, it is *Complaint*

Counsel's burden to show that actual entry is needed, and that it is unlikely that it could be profitable at pre-merger prices.

The Guidelines also address the issue of sufficiency. (CC Br. at 18) (citing Merger Guidelines ¶¶ 3.1-3.4). Like the second prong of the Merger Guidelines test, this is another effort to resurrect the government's failed argument in *Baker Hughes*. There, the government argued that respondents needed to show that entry would be "effective." This argument was flatly rejected by *Baker Hughes*. *See* 908 F.2d at 987-88. This Court should similarly reject Complaint Counsel's attempt to foist the burden of proving "sufficiency" on Respondents. To the extent that sufficiency of entry is an issue, it is *Complaint Counsel's burden* to prove that entry is required and that it will not be sufficient. *Id.* In this case, as demonstrated in Respondents' Opening Brief and herein, Complaint Counsel has utterly failed to do so.

C. COMPLAINT COUNSEL HAS IGNORED RESPONDENTS' EVIDENCE REBUTTING ITS PRIMA FACIE CASE.

Complaint Counsel's solution for dealing with Respondents' extensive entry evidence is to simply ignore it. In its initial brief, Complaint Counsel casually asserts that "[t]he only supposed evidence of entry were several press releases about joint ventures involving TKK, Whessoe, or Technigaz desiring to enter the LNG market" and that "all that Respondents tried to prove was that Messrs. Glenn and Scorsone may think that foreign firms might enter the LNG market." (CC Br. at 2, 18-19). These statements mischaracterize several weeks of evidence. Respondents presented an array of evidence from customers and competitors describing in detail the entry efforts of several large, multinational corporations and domestic tank builders into the relevant markets. (*See* Opening Br. at 19-118; FOF 3.56-3.246 (LNG), 4.16-4.54 (LPG), 5.22-5.75 (LIN/LOX). Complaint Counsel represents that "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." (CC Br. at 2). *This statement is false*. During the trial, Respondents presented extensive evidence regarding the entry efforts of foreign companies. While Respondents did offer testimony for the limited purpose of proving CB&I's state of mind as well as the state of mind of the declarant -- in most cases, the new entrant[11] -- most of this evidence, including press releases and promotional materials, was admitted without limitation as to its use. (*See* JX 11).[12]

[13] Complaint Counsel's assertions that this evidence has "little value" ring hollow; this evidence is not only relevant, it is dispositive. The following list provides a few examples of the evidence from the LNG, LPG, and LIN/LOX markets that Complaint Counsel has apparently forgotten about:[14]

- **Dynegy (LNG)** -- Skanska/Whessoe won the EPC contract for Dynegy's Hackberry LNG import terminal. Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V are competing to build the LNG tanks for that facility. (Puckett, Tr. 4547, 4556) (FOF 3.272, 3.287).[15]

- **Freeport LNG (LNG)** -- Freeport LNG is currently planning a large LNG import terminal in Freeport, Texas. Representatives from Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V, Daewoo/S&B, and IHI have all met with Freeport LNG to discuss their capabilities and express interest in the project. (*See* Eyermann, Tr. 6981-83, 6994-96, 7000-01, 7015-16) (FOF 3.394-3.395).

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11 Pursuant to this Court's order, Respondents have identified testimony offered for this limited purpose as such in their Opening Brief.

12 JX 11 admitted RX 43, RX 44, RX 45, RX 186, RX 770, RX 772, RX 773, RX 836, RX 839, RX 870, RX 871, RX 872, and RX 908 without limitation.

13 Complaint Counsel cites to *United States v. Falstaff Brewing*, 410 U.S. 526 (1973) in arguing that entry evidence is "inherently suspect." (CC Br. at 19). This argument entirely misses the mark. Most of Respondents' entry evidence consisted of detailed testimony from customers and competitors; it did not address CB&I's state of mind. (*See* Opening Br. at 19-118; FOF 3.56-3.246 (LNG), 4.16-4.54 (LPG), 5.22-5.75 (LIN/LOX)).

14 Complaint Counsel asserts that "[s]ignally, Respondents offer no evidence of attempted entry in any other market other than LNG." (CC Br. at 2-3). As the following examples show, this is false. Respondents presented extensive evidence of entry in the LIN/LOX and LPG markets as well as compelling evidence of entry in the LNG market. (FOF 3.56-3.246 (LNG), 4.16-4.54 (LPG), 5.22-5.75 (LIN/LOX)).

15 Inexplicably, Complaint Counsel argues that "[i]t has been two years since the acquisition, and none of these foreign competitors has entered." (CC Br. at 3). Evidence regarding the Dynegy project directly contradicts this claim.

- **Yankee Gas (LNG)** -- Skanska/Whessoe and Technigaz/Zachry have submitted pricing to Yankee Gas for its peakshaving facility in Waterbury, Connecticut. (Andrukiewicz, Tr. 6445-46) (FOF 3.342).

- **ABB Lummus (LPG) -- [xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5039-43) (FOF 4.67-4.69).

- **ITC (LPG)** -- Matrix and AT&V both bid on an LPG tank for ITC immediately prior to the Acquisition. This competition to CB&I resulted in a very good price for the customer, who is satisfied with the current level of competition in this market. (*See* N. Kelley, Tr. 7030-31, 7086) (FOF 4.34, 4.38).[16] This evidence, *inter alia*, directly contradicts Complaint Counsel's argument that there are "no new competitors of any kind" in the LPG market. (CC Br. at 19).

- **BOC (LIN/LOX)** -- AT&V constructed two field-erected LIN/LOX tanks for BOC in 2001. This was AT&V's first bid on a LIN/LOX job. (Cutts, Tr. 2397-98, 2436-37, 2501) (FOF 5.31). BOC was pleased with AT&V's work, and has awarded it another LIN/LOX job as a result. (V. Kelley, Tr. 5291-92) (FOF 5.32, 5.34). In fact, AT&V has won every LIN/LOX job that it has bid on since the Acquisition. Further, Chattanooga Boiler & Tank bid on this job -- it was the first time that CB&T had bid on a LIN/LOX tank. (Stetzler, Tr. 6347) (FOF 5.69-5.70). This evidence, *inter alia*, directly contradicts Complaint Counsel's claim that "[t]here are simply no new entrants in the market for . . . LIN/LOX/LAR tanks . . . ." (CC Br. at 3).

- **Air Liquide (LIN/LOX) -- [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx]** (Kamrath, Tr. 2235) (FOF 5.122-5.124).

These examples are merely the tip of the iceberg. Respondents' Opening Brief sets forth a compelling entry case demonstrating that new entrants are qualified market participants, that they have the resources to compete, that they have bid on projects, and that they have been successful in many instances. Complaint Counsel appears to be hoisted by their own statement; "facts are stubborn things." Its way of dealing with these facts is to simply ignore them.

16 Despite the fact that ITC is the only LPG customer to testify in this case on either side, Complaint Counsel completely ignores this evidence. For example, Complaint Counsel argued that the Acquisition gave CB&I "100% of the market" in LPG tanks. (CC Br. at 5). The ITC story shows that this is false.

In a classic example of its "heads-I-win, tails-you-lose" mindset (CC Br. at 58), Complaint Counsel argues that Respondents have not presented evidence of entry in the TVC market, but neglect to mention that a TVC has not been built since the mid-1990s. The fact that entry has not occurred in the TVC market is driven by the absence of demand for the product. This is a fundamental shortcoming of Complaint Counsel's case, not Respondents'.[17]

The entry evidence presented by Respondents meets their burden of proof under *Baker Hughes*. This evidence also demonstrates that actual entry has occurred in the relevant markets in the last two years, that this entry is sufficient to constrain CB&I's behavior in the market, and that entry can be profitable at pre-merger levels. (*See* Opening Br. at 19-118) (FOF 3.56-3.246 (LNG), 4.16-4.54 (LPG), 5.22-5.75 (LIN/LOX)). In the face of this evidence, as discussed below, Complaint Counsel has not met its ultimate burden of persuasion using the factors articulated in the Guidelines, nor has it been able to produce any other credible evidence that the Acquisition may substantially lessen competition in the relevant markets.

D. COMPLAINT COUNSEL HAS NOT MET THEIR BURDENS OUTLINED IN THE MERGER GUIDELINES.

Because Respondents have made the necessary showing under *Baker Hughes*, Complaint Counsel bears the burden of showing additional evidence of anticompetitive effects. When measuring entry under the Merger Guidelines, Complaint Counsel must prove that new entrants cannot enter the markets in a timely manner, that they cannot be competitive at pre-merger prices, and that their potential entry cannot constrain CB&I's prices in the relevant products. Merger Guidelines § 3. As discussed below, not only did Complaint Counsel fail to carry its burden, the evidence actually proves the converse -- that entry *has been timely*, that it

[17] Complaint Counsel also argues that "[t]here are simply no new competitors of any kind in the markets for LPG tanks or TVCs." (CC Br. at 19). This statement is incorrect. CB&I is a new competitor in the TVC market. Since 1984, it has not built a TVC. Further, AT&V is a relatively new competitor in the LPG market.

has been profitable at pre-Acquisition levels, and that it *has been more than sufficient* to constrain CB&I's behavior in the relevant markets.

1. Extensive entry has already occurred in the relevant markets.

As discussed above, to the extent the timeliness of entry is relevant in this case, Complaint Counsel must show that entry is both needed and would not be timely. *Baker Hughes* specifically rejected the government's attempt to force respondents to show that entry would be "quick." 908 F.2d at 987-88. Complaint Counsel must prove that entry will not be quick, and it failed to meet this burden. The great weight of the evidence demonstrates that extensive entry has already occurred in the relevant markets.[18] New entrants have *already won bidding contests* in the relevant products. For example, Skanska/Whessoe has been selected as the EPC Contractor for the Dynegy LNG project, the first competitively bid post-Acquisition LNG project likely to be awarded. (*E.g.*, Puckett, Tr. 4547) (FOF 3.272). **[xxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** AT&V has won all three competitively bid LIN/LOX projects it has pursued in the U.S. since the Acquisition. (*E.g.*, Scorsone, Tr. 5017-18; V. Kelley, Tr. 4599, 5291-92; **[xxxxxxxxxxxxxxxxxxx]** (FOF 5.31, 5.76-5.78, 5.116)[19] AT&V has won half of all LPG tanks purchased in the U.S. in the past four years. (*See* N. Kelley, Tr. 7086) (FOF 4.35).[20]

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[18] Complaint Counsel misguidedly argues that no entry has occurred in the TVC market. It ignores the fact that it must show that *entry is necessary* and that it will not occur in a timely manner. *See Baker Hughes*, 908 F.2d at 987-88 (holding that Respondents need not show evidence of actual entry). Because the TVC market is virtually dormant, there is no need for new entry. (*See* Opening Br. 120-21) (FOF 6.11-6.25). Allowing Complaint Counsel to gain traction by arguing lack of entry in the TVC market would reward it for choosing to litigate over a market devoid of demand.

[19] Complaint Counsel attempts to skirt the relevance of AT&V by arguing that it has "been a competitor for years" and is "not an entrant." (CC Br. at 19). This argument lacks merit for two reasons. First, AT&V is a relatively recent entrant. Second, even if AT&V had participated in the market prior to the Acquisition, it does not eliminate it from the analysis. The law recognizes that expansion efforts by companies can "tilt the balance" against

Many other new entrants have already entered the relevant markets within the past two years. At least four major, international construction companies have formed consortia, have entered the LNG market, and are actually already bidding on LNG projects in the U.S. Other large LNG contractors have begun to pursue LNG work in the U.S. (*See* Opening Br. at 19-46; FOF 3.56-3.246). In the LIN/LOX market, in addition to AT&V, Chattanooga Boiler & Tank ("CB&T") has begun bidding on LIN/LOX tank projects, joining CB&I and Matrix as competitors in this market. Matrix has also entered the LPG market, competing against CB&I for the ITC project. (*See* N. Kelley, Tr. 7083-84) (FOF 4.34).[21]

Complaint Counsel's response to this avalanche of entry evidence has been to side-step it, and to argue that the success of the foreign entrants on the Dynegy project is irrelevant because CB&I "refused" to bid. (CC Br. at 19). Complaint Counsel has the facts wrong and has missed the significance of the Dynegy experience. For example, Complaint Counsel claims CB&I "refused" to bid on the LNG tanks, when in fact CB&I reconsidered, sought to bid on the tanks, and was rebuffed by Dynegy because it was "satisfied" with the three bids it had already received from new foreign entrants. (*See* Glenn, Tr. 4136-37, 4412; Puckett,

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the legal presumptions raised by market concentration statistics. *In re Grand Union Co*., 102 F.T.C. 812, Docket No. 9121, 1983 FTC LEXIS 61, *196 (1983); *see also International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.* 812 F.2d 786, 792-93 (2d Cir. 1987) (internal citations omitted).

[20] Inexplicably, Complaint Counsel asserts, without citation, that "[t]he simple fact is that two years after the acquisition no alleged entrant has won any bid for any of the relevant products." (CC Br. at 19). Dynegy is the only post-Acquisition LNG project in the U.S. that has reached a bid stage, and **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** FOF 3.307-3.308). Similarly, AT&V has won every LIN/LOX job that it bid for since the Acquisition. (*E.g*., Scorsone, Tr. 5017-18) (FOF 5.76-5.78).

[21] Complaint Counsel implicitly argues that entry is defined by winning a bid. There is no authority for this argument; in fact, Complaint Counsel's own case law undercuts its position. For example, in *United States v. El Paso Natural Gas* (cited in CC Br. at 16), the Supreme Court observed that "[u]nsuccessful bidders are no less competitors than the successful one." *See United States v. El Paso Natural Gas Co*., 376 U.S. 651, 661 (1964). The inquiry is not whether entrants have won. Rather, it is whether they have a price disciplining effect. *See United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991).

Tr. 4557-60, 4578) (*See also* Opening Br. at 71-74) (FOF 3.297-3.306).[22] Complaint Counsel also side-steps Dynegy's award of the EPC phase of its project to Skanska. The Dynegy example shows that CB&I has no post-Acquisition market power and that post-Acquisition pricing by new entrants is highly competitive.

2. Evidence shows that entry has been and will be profitable at pre-merger prices.

As discussed above, *Baker Hughes* does not require Respondents to make a showing of actual entry or prove that entry would be "effective." To the extent the profitability of entry is an issue in this case, Complaint Counsel bears the burden of proof. *See Baker Hughes,* 908 F.2d at 982-83. (*See also* Opening Br. at 13-14). It has failed to carry its burden on this point. The evidence strongly supports the view that new entry will be profitable at pre-merger prices. (*See* Opening Br. at 64-79, 94-97, 110-18). Customers who have received actual prices for the relevant products have confirmed this view. For example, **[xxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Similarly, ITC received a good price on a field-erected LPG tank from AT&V. According to ITC, AT&V has historically been one of ITC's low-cost suppliers, even when compared with PDM. (N. Kelley, Tr. 7088-89, 7121) (FOF 4.38, 4.130).

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22 Complaint Counsel also relies on the testimony of Brian Price, who testified as to his personal views regarding the potential differences between those foreign bids and the bid that CB&I would have submitted. (CC Br. at 19-20) (citing Price, Tr. 578, 622). This argument is specious at best. The testimony cited by Complaint Counsel does not support its conclusion. Mr. Price made no statements regarding pricing levels provided by a consortium with a U.S. presence, nor did he know whether CB&I requested permission to bid on the Dynegy project. (*See* Price, Tr. at 661). Further, Mr. Price's testimony should be given no weight since his credibility is suspect, as discussed in Section E, *infra*.

In the LNG market, Dynegy **[xxxxxxxxxxxxxxxxxxxx]** satisfied with the post-Acquisition prices they received. (*See* Puckett, Tr. 4559-60; **[xxxxxxxxxxxxxxx]** (FOF 3.304, 3.473-3.474)

In the face of this evidence, Complaint Counsel wrongly argues that CB&I and PDM were the low-cost suppliers of the relevant products. (CC Br. at 6, 20). This too is off-base. Prior to the Acquisition, Graver was the low-cost supplier in the LIN/LOX market, not CB&I or PDM. **[xxxxxxxxxxxxxxxxxxxxx]**. Post-Acquisition, AT&V has filled this role. (*See* **[xxxxxxxxxxxxxxxxxx]**; V. Kelley, Tr. 4599-4600, 5272; RX 208) (FOF 5.76-5.78). Further, AT&V has won three of the four competitively-bid LIN/LOX projects since the Acquisition. Customers have also found AT&V to be a low-cost supplier in the LPG market. (*See*, *e.g.*, V. Kelley, Tr. 4599-4600, 5272; N. Kelley, Tr. 7092; **[xxxxxxxxxxxxxxxxxxxx]** (*See also* Opening Br. at 95-97, 113-14; FOF 4.56).

With respect to the LNG market, Complaint Counsel's entry theory relies entirely on the prehistoric 1994 bidding for an LNG peakshaving plant in Memphis, Tennessee. (CC Br. at 4, 20). As discussed in Respondents' Opening Brief, reliance on the outcome of *one nine-year-old bid contest* is ridiculous. (*See* Opening Br. at 83-85). Furthermore, as the *Baker Hughes* court noted, "failed entry in the past does not necessarily imply failed entry in the future . . . ." 908 F.2d at 989 n.9. Complaint Counsel's post-trial brief blatantly misrepresents the record in its assertion -- without citation -- that "[w]hen 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." (CC Br. at 4). The truth is that MLGW last purchased an LNG tank in 1994. It has done no work to locate an LNG tank supplier since, and *does not intend to purchase an LNG tank until the year 2006*. (Hall, Tr. 1832-33, 1843-45). Clay Hall of MLGW also acknowledged that he has limited knowledge regarding the LNG market today, that he has no significant knowledge regarding LNG import terminals, and that he is not familiar with current competition in the LNG market today. (Hall, Tr. 1854-57). Further, Mr. Hall acknowledged that he was not familiar with current capabilities of foreign companies, and that he would need to do a significant amount of research as part of a bidder selection process for any future LNG tank purchase by MLGW. (*E.g.*, Hall, Tr. 1848, 1854).[23] [24]

3. Evidence shows that new entry has been and will be sufficient to constrain CB&I's prices.

It is Complaint Counsel, not Respondents, that must prove that entry is needed and that it would not be sufficient to replace PDM. *See Baker Hughes*, 908 F.2d at 987-88. As outlined in Respondents' Opening Brief, the great weight of the evidence demonstrates that CB&I is aware of new entrants, fears their ability to compete, and considers their existence in making pricing decisions. (*See* Opening Br. at. 65-71, 96-97, 115-18) (FOF 3.451-3.459 (LNG), 4.63-4.67 (LPG), 5.212-5.218 (LIN/LOX)).[25]

a. New entry has and will constrain CB&I's prices in the LNG market.

Post-Acquisition firm, fixed pricing shows that the LNG market is highly competitive and that new entry has already constrained CB&I's pricing. For example, Dynegy accepted bids from Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V and was satisfied with the bids received. (Puckett, Tr. 4556, 4587-88) (FOF 3.287, 3.309). **[xxxxxxxxxx**

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[23] Complaint Counsel also argued twice that "**[xxx]** reached the same conclusion." (CC Br. at 6, 20). This is false. **[Ixxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx]** (FOF 3.423)

[24] As discussed in Part III, *supra*, reliance on statements of CB&I executives is misplaced.

[25] Because there have been no post-Acquisition TVC jobs, there is no evidence of sufficiency in the record for this market. There is no way for Complaint Counsel to carry its burden of proof.

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It is not surprising that Complaint Counsel fails to respond to this evidence. It simply has no evidence. Instead, relying on the testimony of Brian Price, it argues that foreign entrants have not won any projects in the LNG market. (CC Br. at 21). As noted above, this is false, as Skanska has been named as the EPC contractor for the Dynegy project.[26] It also argues that Technigaz "has failed every time it tried to enter the U.S. LNG market. . . . " (CC Br. at 22). This argument ignores the fact that Technigaz is not the only new entrant in the LNG market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

[26] As explained below, Mr. Price's testimony is not credible. (*See* Page 38, *infra*.)

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Jolly, Tr. 4764-65). It has successfully entered the U.S. market, as it was pre-qualified by Dynegy and submitted a bid on the LNG tanks for that project. (Puckett, Tr. 4547, 4556). Complaint Counsel brazenly argues that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**, a fact that Complaint Counsel chooses to ignore in its spurious attempt to show that PDM is an irreplaceable cog in the U.S. LNG industry. (FOF 3.307-3.308).

In its attempt to belittle Technigaz, Complaint Counsel cites to *United States v. Franklin Electric Co., Inc.*, 130 F. Supp. 2d 1025, 1033-35 (W.D. Wis. 2000) (CC Br. at 22). *Franklin Electric* is inapposite to the instant case. That court found that entry was insufficient because of the entrant's "limited financial resources, small staff, and high priority goals." 130 F. Supp. 2d at 1033. By contrast, Technigaz is a powerful global competitor with strong financials, deep experience in LNG, and is committed to entering the U.S. market. (*See* Opening Br. at. 35-38) (FOF 3.141-3.194). Unlike the potential competitor at issue in *Franklin Electric*, there is not a shred of evidence in the record to suggest that Technigaz does not have the horsepower to compete effectively in the U.S. market. *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) (cited at CC Br. at 22) is also off-base. That court held that despite the fact that the new entrant was "actively bidding," its entry was not sufficient to rebut a prima facie case because the defendant was unable to provide an example of a competitor adjusting its price in response to the entrant's arrival on the competitive scene. 768 F. Supp. 2d at 1081-82. The evidence in this case shows that CB&I is concerned about the power of Technigaz/Zachry, and that it will take the alliance into account when pricing future LNG work. (*See* Glenn, Tr. 4224; Scorsone, Tr. 4850-52) (FOF 3.41-3.459). Further, *United Tote* implicitly rejected Complaint Counsel's proffered test for an entrant -- that it win every single bid contest that it enters. That court implicitly recognized that a new entrant could exert competitive pressure without even winning a job, provided that it had some impact on other competitors' pricing. 768 F. Supp. at 1081 (quoting *Baker Hughes*).

b. New entry has and will constrain CB&I's prices in the LPG market.

The evidence also demonstrates that new entry is sufficient in the LPG market. Norman Kelley, the only LPG customer to testify in this case, received a very good price for ITC's LPG tank and believes that there is more than enough competition in the market to ensure competitive prices. (Opening Br. at 94-97) (FOF 4.55-4.62). The evidence also shows that CB&I has been constrained in its pricing behavior in the market. In a post-Acquisition LPG bidding contest **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxx].** (*See* Opening Br. at 96-97) (FOF 4.66-4.70).

c. New entry has and will constrain CB&I's prices in the LIN/LOX market.

Finally, the evidence demonstrates that new entry in the LIN/LOX market has constrained CB&I's pricing behavior. Both **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Opening Br. at 111-13) (FOF 5.125, 5.157-5.158). **[xxxxxxxxxx]** BOC, and **[xx]**, the **[xxxxx]** customers who awarded LIN/LOX projects after the Acquisition via a competitive bidding process, were **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Opening Br. at 111-14) (FOF 5.96, 5.125, 5.157-5.158). As a result of these bid contests, CB&I

believes that this market is competitive and plans to act accordingly. In fact, over the past two years, CB&I has been forced to cut its price to LIN/LOX customers in order to win work from other competitors. (*See* Opening Br. at 115-18) (FOF 5.128-5.130, 5.151-5.152). In fact, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (RX 208) (state of mind). Other CB&I documents and the testimony of CB&I executives further reflect CB&I's concern regarding its ability to compete in this market. (FOF 5.212-5.218).

In an effort to address this compelling evidence, Complaint Counsel falsely argues that entry in the LIN/LOX market is insufficient to replace PDM, and that "[t]he high level of prices for other competitors is . . . apparent in the LIN/LOX market. . . ." (CC Br. at 4). In lieu of presenting actual evidence of price increases, Complaint Counsel chooses to rely on baseless allegations that AT&V lacks the capacity of PDM, that it has been "pricing higher," and that AT&V has been generating "poor results." (CC Br. at 21). These arguments are dead wrong. Customers receiving fixed, firm price bids from LIN/LOX tank suppliers over the last **[xxxxxx]** years have been **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* V. Kelley, Tr. 5272, 4600-01; **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**) (FOF 5.96, 5.125, 5.157-5.158). Further, Complaint Counsel assumes that a single firm must assume the role of PDM in order for entry to be sufficient. There is no support for this conclusion. Competition from a variety of firms can be amalgamated to generate a competitive effect equal to or greater than a company exiting a market, such as PDM. (*See* Harris, Tr. 7301-3) (FOF 7.123-7.135). For example, **[xx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 5.157-5.158).

Complaint Counsel also brazenly asserts that AT&V has been "pricing higher than CB&I." (CC Br. at 21). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* V. Kelley, Tr. 4599-600; **[xxxxxxxxxxxxxxxxxxxxxxxx]** N. Kelley, Tr. 7092, 7137) (FOF 4.56, 5.95-5.96, 5.124-5.125). While Complaint Counsel claims that AT&V lacks "capacity" (CC Br. at 21), AT&V's business strategy belies that claim. The evidence shows that AT&V is committed to this market and has provided firm bids and budget prices for numerous LIN/LOX projects in the U.S. (Cutts, Tr. 2452-53). Further, AT&V has won three out of four competitively bid LIN/LOX jobs since the Acquisition. (*See* Opening Br. at 98-103; FOF 5.76-5.78). In short, the evidence demonstrates that AT&V's capacity is sufficient to be a major player in this market.[27]

In attempting to belittle AT&V as a bona fide force in the relevant markets, Complaint Counsel cites to *Coca-Cola*, *Cardinal Health*, *Staples*, and *Swedish Match* (CC Br. at 21-22). This authority is off-base. As an initial matter, all of those cases involved markets that were too large to permit a smaller player to gain a majority share of the post-Acquisition market, as AT&V has been able to do in the LIN/LOX and LPG markets. Further, these courts found entry of smaller competitors was insufficient to rebut a prima facie case because of the existence of entry barriers. For example, the *Coca-Cola* court found that entry barriers such as "grow[ing]" a brand name and increased government regulation made entry difficult. *Coca-Cola*, 1994 F.T.C. LEXIS 185 at *158-59. Similarly, the *Staples* court found entry to be unlikely in the office superstore market because of extremely high sunk costs. *FTC v. Staples*, 970 F.

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[27] Complaint Counsel argues that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Opening Br. at 100-02).

Supp. 1066, 1087-88 (D.D.C. 1997). As Respondents have explained in detail, no such entry barriers exist in the relevant markets. (*See* Opening Br. at. 46-61, 90-94, 107-09) (FOF 3.509-3.564 (LNG), 4.120-4.131 (LPG), 5.129-5.223 (LIN/LOX)).[28]

E. THERE ARE NO SIGNIFICANT ENTRY BARRIERS TO THE RELEVANT MARKETS.

Complaint Counsel mistakenly argues, as if this were a preliminary injunction hearing, that entry barriers will prevent CB&I's competitors from having "much of an impact." (CC Br. at 22; *see also* CC Br. at 4). However, entry has already occurred in the relevant markets, thus disproving Complaint Counsel's theoretical claims. (Opening Br. at 20-46, 89-90, 98-107). In a failed attempt to counter this evidence, Complaint Counsel has cobbled together a collection of half-truths and mischaracterizations. While this effort is erroneous in many specific ways, as discussed below, it suffers from one fundamental problem: *it fails to differentiate between different product markets*. Because the products at issue are built differently, have different customers, and cost different amounts, an entry barrier in one product market is not necessarily an entry barrier in another. For example, a patent regarding the door seal technology for a TVC may be an entry barrier for a TVC competitor.[29] Yet, this issue would have no relevance to an LNG tank manufacturer. For this reason, Respondents addressed the issue of entry barriers on a product-by-product basis. Complaint Counsel's failure to treat this issue in a similar manner essentially robs its analysis of any value.

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[28] The *Cardinal Health* court found that entry efforts were insufficient, in part because potential new entrants had "made no plans to expand in response to any post-merger pricing practices." 12 F. Supp. 2d at 57. However, the entry efforts in the market at issue were found to be "insignificant on a national scale." *Id.* In this case, the entry efforts of AT&V, Matrix, and CB&T are far more significant on a national scale. Of the five LIN/LOX projects that have been awarded post-Acquisition in the U.S., new entrants have captured a majority of them.

[29] As discussed in Section V, *supra*, Respondents have offered to make this technology freely available.

1. Evidence from CB&I witnesses and documents do not support claims of entry barriers.

Because it has no credible evidence of entry barriers from customers or competitors, Complaint Counsel chooses to lead off its argument by using statements from CB&I personnel that are little more than commercial puffery. For example, Complaint Counsel cites statements by Gerald Glenn from an investor meeting, during which he stated that CB&I has "unequaled capability." (CC Br. at 23; *see also* CC Br. at 4). Complaint Counsel's reliance on these statements is misplaced. As Mr. Glenn explained at trial, his statements were general in nature and did not refer to any specific product market or any specific job. (Glenn, Tr. 4402). Further, while Complaint Counsel attaches a talismanic significance to Mr. Glenn's statements regarding his competitors, it failed to establish that Mr. Glenn has access to any specific information regarding his competitors' costs. (*See* Glenn, Tr. 4379-99). While Mr. Glenn has views and observations on the state of competition globally, he does not have access to information regarding the cost structures of Skanska/Whessoe, Technigaz, TKK, or any other competitor. In fact, CB&I's competitors make similar commercial puffery claims.[30] For example, AT&V claims to be able to "meet all your refrigerated storage needs on time, safely, with industry leading quality" and that the TKK/AT&V alliance is "at the forefront of the industry within the United States." (RX 936). Similarly, Technigaz claims to be a "pioneer" in the liquefied gas market. (RX 934). The fact is, other than these meaningless statements found in CB&I's documents, Complaint Counsel has not pointed to a "capability" that CB&I's LNG competitors lack.

[30] Such puffery statements are nothing new to commerce. Virtually every competitor in every market uses some form of commercial puffery. The fact that Kleenex claims it has the softest tissue does not make it true.

2. Evidence from Howard Fabrication does not support claims of entry barriers.

Complaint Counsel mistakenly relies on testimony of Howard Fabrication's John Gill to support its entry barrier argument. Mr. Gill's testimony provides virtually no support for this argument. As an initial matter, Mr. Gill's testimony is limited to the TVC market, as he has no specific knowledge regarding other product markets. Further, while Mr. Gill claims that he cannot compete in the TVC market,[31] he did not identify reasons that would prevent other companies from entering the market. For example, while Mr. Gill testified that he has two engineers on staff (CC Br. at 23), Complaint Counsel did not establish that: 1) more than one or two engineers are needed to build a TVC; or 2) even if more than two engineers were required for this purpose, whether other companies have access to those engineers. Similarly, while Mr. Gill claimed that he could not be an new entrant because of Howard Fabrication's small size, there is no evidence that other smaller companies could not be competitive in this market. In fact, some customers view smaller companies as more competitive than CB&I because of their lower overhead costs. For example, Devon Hart of Raytheon testified that smaller contractors have advantages over CB&I. For this reason, Raytheon chose XL to serve as the prime contractor for its TVC project. Raytheon saved money by using the smaller company as the prime contractor. (Hart, Tr. 413-14).

3. Evidence from AT&V does not support claims of entry barriers.

In a classic example of obfuscation by mixing together evidence from different product markets, Complaint Counsel cites testimony from W.T. Cutts of AT&V to support its

[31] As Howard Fabrication has bid against CB&I on TVC projects, Mr. Gill's statements regarding his inability to compete should be viewed with some skepticism. *See Jim Walter Corp.*, 90 F.T.C. 671, *195 (1977), *rev'd and remanded on other grounds*, 625 F.2d 676 (5th Cir. 1980); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987-88 (D.C. Cir. 1990); *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 361 (S.D.N.Y. 1995); *United States*

failed entry barrier argument. (CC Br. at 23-24). Mr. Cutts' testimony lends no support to this argument. While Complaint Counsel argues that AT&V lacks necessary bonding capacity, the evidence shows that AT&V can bond LIN/LOX jobs, as it has won three of the five available post-Acquisition projects in this market. (Cutts, Tr. 2397-98, 2436-37, 2504-06; Scorsone, Tr. 5017-18). For LNG facilities, AT&V has allied itself with TKK and has bid on several LNG projects in the U.S. and North America. (*See* Opening Br. at 28-35) (FOF 3.99-3.122). TKK's bonding capacity allows AT&V to participate in the LNG market. (*See* Cutts, Tr. 2556-57) (FOF 3.107). As for LPG tanks, the evidence is uncontradicted that AT&V can bond these jobs; it has successfully completed LPG projects in the past to the great satisfaction of its customers. (*See* N. Kelley, Tr. 7088-89; Cutts, Tr. 2334) (FOF 4.18, 4.36-4.42).

Complaint Counsel's arguments regarding AT&V's capacity are similarly off-base. AT&V is currently competing for most of the LNG, LIN/LOX, and LPG jobs available in the U.S. Since the Acquisition, AT&V has bid on at least three LNG projects in the U.S., three of the four available LIN/LOX projects, and all of the LPG projects. The fact that AT&V is competing for these jobs demonstrates that, while AT&V may not have the capacity of CB&I, it certainly has the capacity to fully compete in the relevant markets.

Complaint Counsel's citations to customers and competitors of AT&V and CB&I are misleading. For example, it cites to Hans Kistenmacher to support its criticism of AT&V, yet the evidence is uncontroverted that Dr. Kistenmacher has never seen a firm, fixed price bid from AT&V for any relevant product. Moreover, his company has not participated in any of the

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v. Calmar Inc., 612 F. Supp. 1298, 1305 (D.N.J. 1985); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 675-76 (D. Minn. 1990).

relevant product markets since 1999. (FOF 5.176).[32] Similarly, Complaint Counsel misleadingly cites to the testimony of Michael Patterson in criticizing AT&V. (CC Br. at 24). Mr. Patterson did not state, as Complaint Counsel contends, that he would not use AT&V on a future project. *To the contrary*, Mr. Patterson plans to put AT&V on the bid list for MG Industries' next LIN/LOX project. (Patterson, Tr. 493) (FOF 5.161).

In its failed argument regarding alleged entry barriers, Complaint Counsel ignores the "stubborn fact" that AT&V is the low-cost competitor in the relevant markets. Victor Kelley testified that BOC was satisfied with AT&V's "low cost" price for LIN/LOX tanks and that BOC plans to use AT&V for future projects. (V. Kelley, Tr. 4599-4600, 5272, 5282) (FOF 5.32). AT&V also beat its competition (including CB&I) by approximately **[xxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (FOF 5.124). Norman Kelley of ITC testified that AT&V "beat the socks off of CB&I" on a recent LPG project. (N. Kelley, Tr. 7092, 7137) (FOF 4.56). Further, AT&V and CB&I are both aware of this fact. AT&V knows that it has an advantage over CB&I and can sell LIN/LOX tanks at a lower price. (Cutts, Tr. 2572) (FOF 5.40).[33] **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** FOF 5.40).

[32] Complaint Counsel misleads this Court by misidentifying Dr. Kistenmacher as working for BOC. As Complaint Counsel well knows and has pointed out in other areas of its brief and findings of fact (*e.g.*, CCFF 467, 469), Dr. Kistenmacher is Vice-President of Linde BOC Process Plants. (*See* CC Br. at 24).

[33] AT&V is not the only company with these types of advantages. CB&T also has competitive advantages over CB&I. CB&T is a smaller company better able to respond to certain jobs, It has a lower overhead structure and can respond to immediate market conditions more quickly and efficiently than CB&I. In some cases, CB&T may be able to purchase materials closer to market price than CB&I. (Stetzler, Tr. 6369) (FOF 5.67).

4. Evidence from [xxxxxxxxxxx] does not support claims of entry barriers.

Complaint Counsel mistakenly argues that testimony from **[xxxxxxxxxxx]** shows that AT&V cannot compete in the relevant markets. As an initial matter, the relevance of any testimony from **[xxxxxxxxxxx]** is limited to the LIN/LOX market. With respect to the LIN/LOX market, contrary to Complaint Counsel's claims, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Complaint Counsel mistakenly argues that AT&V cannot compete in the LIN/LOX market because **[xxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx[34]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Opening Br. at 9-10).[35]

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[34] In a comment unrelated to the issue of entry barriers, Complaint Counsel points out that **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Scorsone, Tr. 5036) (FOF 5.140).

[35] *E.g*., *International Distrib. Ctrs., Inc. v. Walsh Trucking*, 812 F.2d 786, 792-93 (2d Cir. 1987); *U.S. v. Waste Mgmt., Inc.*, 743 F.2d 976, 983 (2d Cir. 1984); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 854 F. Supp. 367, 375 (E.D. Pa. 1994). *United States v. Gillette Co*., 828 F. Supp. 78, 85 (D.D.C. 1993) *In re Heublein, Inc.*, 96 F.T.C. 385, 590-91 (1980).

5. The 1994 Memphis bidding process provides no support for claims of entry barriers.

While Complaint Counsel leans heavily on evidence surrounding the 1994 Memphis bidding process to support its entry barrier arguments (CC Br. at 24), this aged evidence is irrelevant to today's market. As discussed in Respondents' Opening Brief, the Memphis project involved different bidders (with different resources and relationships) far less committed to the U.S. market. Further, because of the differences in bidding tactics between the companies competing for that project, and because the bids are nearly a decade old, it is impossible to make any comparisons between that bid process and present-day competition for LNG projects in the U.S. (*See* Opening Br. at. 83-87) (FOF 3.493-3.508).

6. Testimony from Project Technical Liaison Associates provides no support for claims of entry barriers.

Complaint Counsel's reliance on the testimony of Patricia Outtrim of Project Technical Liaison Associates ("PTL") for its entry barrier argument is sorely misplaced. (CC Br. at 24). Ms. Outtrim has no knowledge regarding the issue of "entry barriers" in the LIN/LOX, LPG, and TVC markets. Further, with respect to the LNG market, **[xxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx [36]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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[36] Ms. Outtrim also acknowledged **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. (*See* Outtrim, Tr. 684, 686, 787) (FOF 3.684, 3.686).

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxx]. Finally, and perhaps more importantly, actual customers in the LNG market disagree with Ms. Outtrim's opinions. Current customers respect new entrants in the U.S. LNG market and are willing to work with them on U.S. LNG projects. (Opening Br. at 19-46) (FOF 3.56-3.246).

7. Testimony from [xxxxxxxxx] provides no support for claims of entry barriers.

In a strained attempt to support its entry barrier argument, Complaint Counsel cites testimony from **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (CC Br. at 24), **[xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Jolly, Tr. 4693-94) (FOF 3.163).

Further, Complaint Counsel implicitly acknowledges that its alleged entry barriers would not prevent foreign companies from competing for double and full-containment tanks in the U.S. (*See* CC Br. at 24). Complaint Counsel fails to mention that most of the LNG projects currently being planned in the U.S. will be full or double-containment. For example, Dynegy, Yankee Gas, BP, and Freeport LNG are all planning to build full or double-containment tanks in the U.S. during the next few years. (*See* Opening Br. at 48-50) (FOF 3.11-3.14).

8. Testimony from [xxxxxxxxx] does not support claims of entry barriers.

Complaint Counsel cites **[xxxxxxxxxxx]**, a retired employee of H.B. Zachry, to support its claims of entry barriers. (CC Br. at 24). **[xxxxxxxxxxxx]** testimony provides no assistance to Complaint Counsel's argument in the LIN/LOX, LPG, or TVC markets, as **[xx]** has no involvement in those markets. With respect to the LNG market, Complaint Counsel misrepresents **[xxxxxxxxxxxx]** testimony to this Court. For example, Complaint Counsel argues that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** William Puckett testified that Dynegy was satisfied that Technigaz/Zachry had the necessary reputation and ability to construct the LNG tanks for the Hackberry project and that it could comply with necessary codes and standards. (Puckett, Tr. 4551; *see also* Puckett, Tr. 4557-58) (FOF 3.179). For these reasons, Dynegy sought a bid from **[xxxxxxxxxxxxxxxxx]** for the Hackberry project. (Puckett, Tr. 4552-53) (FOF 3.283).

Similarly, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**. Volker Eyermann of Freeport LNG confirmed that Sam Kumar, Technigaz' U.S. representative, visited

Freeport LNG to discuss the project. (Eyermann, Tr. 6994) (FOF 3.175).[37] Mr. Kumar provided written materials to Freeport LNG regarding Technigaz and Zachry stating that Technigaz "was keenly interested" in pursuing the project. (Eyermann, Tr. 6996-98; RX 934) (FOF 3.175).

[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] Rob Bryngelson, El Paso's Rule 3.33 representative, confirmed that El Paso has already pre-qualified Technigaz for its LNG projects in Altamira and Rosarito, that Technigaz has sufficient financial stability and technical ability to satisfy its requirements, and that El Paso would pre-qualify Technigaz for LNG projects in the U.S. (Bryngelson, Tr. 6125-26, 6128, 6131-32) (FOF 3.180).

9. Testimony regarding BSL does not support claims of entry barriers.

In yet another strained attempt to support its claim of entry barriers, Complaint Counsel cites to Joseph Hilgar of Air Products and Chung Fan of Linde in arguing that a foreign firm -- BSL -- "could not compete on price." (CC Br. at 24). This evidence is not relevant to the LNG, LPG, or TVC markets, and is of questionable relevance in the LIN/LOX market. Complaint Counsel has produced no evidence regarding BSL's location, experience in the U.S. market, its access to qualified workers in the U.S., or when BSL allegedly bid on these projects. One or two bid contest losses say nothing about whether a company can compete in a given market. In fact, the evidence shows that BSL and its American partner **[xxxxxxxxxxxxxxxxxx**

[37] The Cheniere project was purchased by Freeport LNG. Mr. Eyermann was involved with this project throughout his employment with Cheniere and Freeport LNG. (Eyermann, Tr. 6961-62).

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx] Simply put, it is impossible to conclude on this record that BSL's experience can be generalized to other firms, foreign or domestic.

10. Testimony from Black & Veatch does not support claims of entry barriers.

Of the dozens of misstatements and mischaracterizations made in Complaint Counsel's initial brief, one of the most egregious examples is its use of Brian Price to support its failed entry barrier argument. (CC Br. at 38-39). Mr. Price argued that foreign competitors *may* have higher costs than CB&I in the LNG markets. This testimony is unreliable on several fronts. First, Mr. Price bases his views primarily on the irrelevant 1994 Memphis project. (Price, Tr. 644). Second, while Mr. Price professes to be part of the Dynegy project team and that he has concerns regarding competitiveness of Dynegy's foreign bid, the evidence contradicts his views. Mr. Puckett explained that Dynegy was satisfied with its choices of LNG contractors and prices provided by those contractors. (Puckett, Tr. 4587) (FOF 3.309). While Mr. Price expressed concerns before this Court, he failed to mention them to Mr. Puckett or others at Dynegy. (*See generally* Puckett, Tr. 4533-4589). In fact, at the time he claims to have had "concerns" about Skanska/Whessoe, his company was touting itself as a partner of Skanska to Freeport LNG. (Eyermann, Tr. 6992; RX 935) (state of mind) (Opening Br. at. 22; FOF 3.65). Third, Mr. Price has no foundation for his speculation regarding pricing received by Dynegy relative to pricing that CB&I could have provided. Mr. Price admitted that he had not, unlike Mr. Puckett, seen pricing provided by foreign bidders. Finally, Mr. Price and his employer -- Black & Veatch -- are "head to head" competitors of CB&I.

11. Testimony from Matrix does not support Complaint Counsel's claims regarding entry barriers.

To support its entry barrier argument, Complaint Counsel gives undue weight to the testimony of John Newmeister of Matrix. (CC Br. at 25). Mr. Newmeister simply testified that Matrix does not have in-house capability to blast and prime steel plate, and that this lack of equipment may present a cost disadvantage relative to other companies. (Newmeister, Tr. 1590-91). Mr. Newmeister did not testify that his cost structure for LIN/LOX tanks was higher than CB&I's; this is not surprising, as Mr. Newmeister does not have access to CB&I's cost information. The record evidence shows that Matrix is currently competing for LIN/LOX jobs and intends to be a "competitive force" in this market. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Evidence simply does not support the conclusion that Matrix is currently a higher-cost competitor to CB&I. If Matrix believed it was, it would certainly not compete in this market. If it were, it would certainly not be able to match CB&I's price on a job in CB&I's home state.

12. Summary: Entry barriers do not exist in the relevant markets.

There are no significant barriers to entry in the relevant markets. (FOF 3.509-3.570, 4.71-4.143, 5.219-5.223). Low entry barriers in the relevant markets have triggered new entry. New entrants have spent enormous resources to enter these markets, and have, in many instances, been successful. The fact that AT&V has beaten CB&I in three straight LIN/LOX bidding contests, and in one of two LPG bidding contests, demonstrates that AT&V's costs in the LIN/LOX market are lower than CB&I's. (*See* Opening Br. at 99-100). Skanska/Whessoe's victory over CB&I at Dynegy and TKK/AT&V's victory over CB&I in Trinidad demonstrate that CB&I has no cost advantage over these companies. (*See* Opening Br. at 31-32; FOF 3.122).

The fact that "AT&V beat the socks off of CB&I" on the ITC project shows that CB&I is not the low-cost competitor in the LPG market. (Opening Br. at 95; FOF 4.56). In short, CB&I's competitors are not "higher-priced and less experienced firms," as Complaint Counsel alleges. (CC Br. at 25). CB&I faces an array of experienced, formidable competitors in the relevant markets with demonstrated cost advantages over CB&I. They are betting the future of their companies on their ability to compete with CB&I in these market. This evidence directly contradicts Complaint Counsel's entry barrier arguments. They should be rejected out of hand.[38]

III. ALLEGATIONS REGARDING POST-ACQUISITION ANTICOMPETITIVE EFFECTS ARE FALSE.

Complaint Counsel implicitly recognizes that, in light of Respondents' extensive showing, it must produce additional evidence of anticompetitive effect. The burden of persuasion, as *Baker Hughes* noted, "remains with the government at all times." 908 F.2d at 983. It is this burden that motivates Complaint Counsel to stretch the truth to find examples of anti-competitive effect. Complaint Counsel erroneously argues "Respondents have increased price" and that this "cements" their case. (CC Br. at 26) As discussed more fully below, Complaint Counsel's attempt to prove alleged "price increases" is nothing more than a collection of misstatements, misrepresentations, and unfounded assumptions.[39]

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[38] Complaint Counsel's cite to *Eastman Kodak* provides no support for its conclusions that entry barriers exist in the relevant markets. That court noted, in the context of a market definition analysis, only that "a seller that reduced output and raised prices -- always faces a highly elastic demand; its products are so overpriced that even inferior substitutes begin to look good to customers. *United States v. Eastman Kodak*, 63 F.3d 95, 103 (2d Cir. 1995). This language is inapplicable to the case at bar, as the great weight of the evidence demonstrates that CB&I's competitors can provide good quality products at low prices in the relevant markets, and that customers are aware of this fact. (*See* Opening Br. at 20-45, 71-79, 95-96, 98-107).

[39] Complaint Counsel cites the D.C. Circuit's opinion in *Microsoft* for the proposition that if Respondents have increased price, that fact cements its case. (CC Br. at 26). Respondents were unable to locate this holding in *Microsoft*. This is not surprising, as there are many legitimate reasons for prices to go up over time. Inflation, changes in scope, and increased risk are all reasons for price increases.

Similarly, Complaint Counsel points to a few instances of alleged collusion, and jubilantly argues that "[a]ll that is required is a showing of likelihood of tacit or express collusion." (CC Br. at 28). This argument fails. As their own authority makes clear, Complaint must do more than present baseless allegations, it must present evidence of "reasonable probability of anticompetitive effect." *E.g., F.T.C. v. Warner Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984).[40] As discussed below, Complaint Counsel's allegations regarding collusion are completely baseless. Moreover, Complaint Counsel ignores the fact that the characteristics of this industry make collusion unlikely. (*See* Opening Br. at 130-31).

A. ARGUMENT THAT THE ACQUISITION HAS INCREASED MARKET POWER IS BASED ON INAPPLICABLE AUTHORITY AND MISCITED EVIDENCE.

In attempting to carry its burden under *Baker Hughes*, Complaint Counsel improperly argues that the elimination of PDM is evidence of anti-competitive conduct because CB&I and PDM were each other's closest competitors. (CC Br. at 28; *see also* CC Br. at 4). This argument is not "additional evidence," as *Baker Hughes* requires, but a rehash of Complaint Counsel's prima facie case which featured evidence of high market concentration. As discussed above, such evidence is unhelpful because it fails to account for the structural changes that have taken place in the relevant markets, including the entry evidence presented by Respondents. Authority cited by Complaint Counsel does not ameliorate this problem, as it did not address the effect of new entry in a market. For example, in *Heinz* (cited at CC Br. at 4-5), the court

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[40] Complaint Counsel's citations lend no support to its arguments. *General Dynamics* does not stand for the proposition that Complaint Counsel "could base its entire case on just one of these instances." (CC Br. at 26-27). *General Dynamics* merely holds that "post-merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit. . . ." *United States v. General Dynamics Corp*., 415 U.S. 486, 505 n.15 (1974). Similarly, *Tasty Baking Co*. holds only that "[t]he most recent evidence of defendants' monopoly power is found in defendants' post-acquisition pricing decisions." *Tasty Baking Co. v. Ralston Purina, Inc*., 653 F. Supp. 1250, 1266 (E.D. Pa. 1987). Further, the *Tasty Baking* court found that the defendants had offered "no significant evidence of limits on their market power. *Id*. at 1267. As Respondents have explained in their Opening

considered the potential effect of a merger between two low-cost sellers. However, it did not address the effect of entry or potential entry on the competitive situation at issue in that case. *See* 246 F.3d at 717-19.

B. ALLEGED EVIDENCE OF ACTUAL ANTICOMPETITIVE CONDUCT IS A COLLECTION OF FALSE STATEMENTS UNSUPPORTED BY THE EVIDENCE.

Again, Complaint Counsel ignores facts and instead uses innuendo, speculation, and inadmissible evidence to make its case.[41] Facts show that competition in the relevant markets has been unaffected by the Acquisition and that CB&I is forced to compete hard in the relevant product markets. While Complaint Counsel recklessly asserts that CB&I's post-Acquisition "plan" was to achieve premiums and increase margins in the relevant products (CC Br. at 7-8), there is no evidence that this occurred. For example, CB&I has won only two of five post-Acquisition LIN/LOX projects. (Scorsone, Tr. 5015-16). It has not been able to command premiums or raise margins in connection with these bidding contests. For example, CB&I trimmed its margin to zero percent on a recent Air Liquide project order to remain competitive, yet it still lost to AT&V. (Scorsone, Tr. 5032-35; RX 627 at 2) (FOF 5.130). Similarly, on MG Industries' New Johnsonville project, CB&I was forced to cut its margin to less than 1 percent to beat the competition. (Scorsone, Tr. 5023-24). Finally, on a LIN/LOX project for Praxair in New Mexico, CB&I earned a 4 percent margin consistent with the terms of an alliance agreement signed well before the Acquisition. (Scorsone, Tr. 5018-19; RX 87 at 4) (FOF 5.166). In sum, CB&I has won two LIN/LOX projects that have earned it a projected profit of approximately $20,000. This is not the hallmark of anticompetitive behavior. Rather, it is the

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Brief, CB&I faces significant constraints on its market power in the relevant products from new entrants. (*See* Opening Br. at 71-78, 95-97, 115-118).

[41] Respondents note that Complaint Counsel, even under its expansive view of the definition of "anticompetitive effects," has been unable to find any such effects in the LPG market.

sign of vibrant competition in a tiny market. The other markets at issue in this case having some level of demand enjoy similar levels of competition. (*See* FOF 3.451-3.459, 4.10-4.54). For example, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5079) (FOF 3.485, 3.486). Similarly, CB&I cut its price on an LPG project for **[xxxxxxxxxx]** because it felt competition from **[xxxxxx]** and **[xxxxx xxxxxxx]** (Scorsone, Tr. 5041-42) (FOF 4.66-4.70).

1. Complaint Counsel has shown no evidence of collusion.[42]

a. The Spectrum Astro project provides no evidence of collusion.

Complaint Counsel alleges that CB&I and PDM agreed to coordinate pricing to Spectrum Astro. (CC Br. at 5, 31). This allegation is false and is flatly contradicted by the evidence. Complaint Counsel first points to a handwritten internal note reflecting a conversation between a CB&I and PDM executive calling this project "D.O.A.," a comment related to Spectrum Astro's financial condition, not to project pricing.[43] The evidence shows that issues of pricing, profit margins, costs or anything else related to this project were never discussed between PDM and CB&I. (Scorsone, Tr. 4796-97, 5045-46) (FOF 6.141).[44]

While Complaint Counsel points to an internal CB&I memorandum from a low-level line salesman (Dave Lacey) to support their argument (CC Br. at 31) (citing CX 242), the evidence establishes that no plan to coordinate bidding was ever created or executed. (Scorsone,

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[42] In fact, Complaint Counsel has not shown that collusion is possible in the industrial tank industry. This industry is not susceptible to collusive behavior because of product heterogeneity, inability to access incomplete information about rivals' businesses, and differences in vertical integration. (*See* Opening Br. at 144).

[43] Complaint Counsel self-righteously asserts that "[t]he 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." (CC Br. at 32). As discussed herein, no such collusion has occurred. What is shocking is Complaint Counsel's willingness to blatantly misrepresent the record on this issue.

[44] Complaint Counsel makes much of the fact that both CB&I and PDM bid on this project. The evidence is uncontroverted that both companies did so because they were contractually bound to do so. (FOF 6.171).

Tr. 5045; Scully, Tr. 1217) (FOF 6.138-6.153). Mr. Scorsone testified that he did not collude, coordinate or do anything improper with regard to PDM's pricing to Spectrum Astro. (Scorsone, Tr. 5045-46) (FOF 6.141). In fact, PDM competed especially hard for the Spectrum Astro job because it was having a bad year and needed the business. To get this work, PDM submitted a firm, fixed price bid with a zero percent margin. (Scorsone, Tr. 5046) (FOF 6.142-6.144).[45]

The uncontradicted testimony of other bid participants establishes that CB&I and PDM did not engage in collusion. The customer testified that CB&I and PDM were fighting pretty hard to get his business and that he "thought they had a pretty good competition going." (Thompson, Tr. 2114-15). Ron Scully of XL thought that this project was "very" competitively priced, and that he saw no evidence of collusion between CB&I and PDM. (Scully, Tr. 1221-22) (FOF 6.141). In fact, Mr. Scully is familiar with Mr. Lacey, and characterized him as someone who sometimes threw extreme ideas on the table and is regularly ignored. (*See* Scully, Tr. 1218-21; CX 242) (FOF 6.151-6.152).

b. The TRW project provides no evidence of collusion.

Complaint Counsel wrongly accuses CB&I of coordinating with Howard Fabrication on a bid to TRW. (CC Br. at 5, 32-33).[46] CB&I and its employees did nothing unlawful. Mike Miles, a low-level CB&I line salesman, met with John Gill of Howard Fabrication to discuss the possibility of Howard serving as a subcontractor to CB&I on an undisclosed TVC project. (CC Br. at 32). Such an arrangement was nothing new. Pre-

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[45] To support its allegation that CB&I and PDM "quoted high prices" on this job, Complaint Counsel relies on testimony by Mr. Scully of XL suggesting that competition was not as fractious as what he had seen on a prior project. (CC Br. at 31). However, Mr. Scully did not know that PDM submitted a bid at a zero percent margin. (Scully, Tr. 1194; Scorsone, Tr. 5044) (FOF 6.144).

[46] Complaint Counsel recklessly asserts that the evidence "demonstrates that their strategy is to dominate the market anyway they can [sic] . . . . " (CC Br. at 33). This is false. Even market share statistics belie Complaint Counsel's assertions, as CB&I has not even built a TVC since 1984. (Scorsone, Tr. 5055-56) (FOF 6.26).

Acquisition, Howard had acted as a subcontractor to PDM on prior TVC projects. (Scorsone, Tr. 5060-61) (FOF 6.136).[47] In mid-meeting, Mr. Gill learned that Mr. Miles was discussing the TRW project. At that point, Mr. Gill told Mr. Miles that he had provided ROM pricing to TRW. (Gill, Tr. 274) (FOF 6.130). Contrary to Complaint Counsel's allegations (CC Br. at 5, 32-33), CB&I and Howard did not know they had separately provided pricing to TRW until this meeting. (Gill, Tr. 274). Additionally, Mr. Miles' actions were not authorized by Luke Scorsone (who would be responsible for deciding whether to subcontract with Howard) or anyone else at CB&I. Further, Mr. Scorsone would approach TRW for permission to subcontract to Howard before actually doing so. (Scorsone, Tr. 5060) (FOF 6.137).[48]

Complaint Counsel's accusation flies in the face of its own position. On one hand, it accuses CB&I of colluding with a "potential competitor" -- Howard Fabrication. (CC Br. at 32). On the other, it vehemently argues that Howard is not (nor could it be) a competitor to CB&I. In support, it cites Mr. Gill's admission that Howard *is not* a competitor of CB&I, and that this fact is known by CB&I and throughout the industry. (Gill, Tr. 195).[49] Complaint Counsel disingenuously tries to have it both ways.

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[47] All witnesses involved in this project acknowledged that such an arrangement could result in lower prices to TRW. (Gill, Tr. 254-55; Neary, Tr. 1480) (FOF 6.134-6.136).

[48] Ironically, Complaint Counsel argued that Respondents, in their opening statement, promised to show that Howard Fabrication was a competitor and that CB&I later "ran from their story as fast as they could by attempting to prove that Howard wasn't even a competitor at all." (CC Br. at 3). The fact of the matter is that Mr. Gill of Howard Fabrication testified on direct examination that he was not a competitor of CB&I in the TVC market. In the face of this evidence, Respondents dropped its argument that Howard Fabrication was a competitor in this market. There is nothing wrong with tailoring legal arguments to the evidence, yet Complaint Counsel refuses to recognize this fact. As is apparent from their opening brief, it continues to pursue unsupported legal theories by continually misciting and mischaracterizing the evidence.

[49] Complaint Counsel misrepresents the testimony of Mr. Neary. (CC Br. at 5-6). Mr. Neary testified in response to a hypothetical question on direct examination. He did not comment on the facts at issue in this case. (Neary, Tr. 1451).

2. Complaint Counsel has not shown any evidence of price increases.

Complaint Counsel has attempted to show that CB&I has raised its prices on relevant products since the Acquisition. This effort relies chiefly on "budget pricing" submitted to customers by CB&I in the past two years. As discussed extensively in Respondents' Opening Brief, use of budget pricing for this purpose is analytically improper, as budget pricing is often rough in nature. It is not an offer to sell, nor do customers interpret it as such. (*See* Opening Br. at 126-29) (FOF 7.1-7.38). In addition to its reliance on budget pricing, Complaint Counsel depends on miscited evidence and carefully selected testimony that ignores the weight of the evidence. Each such effort is discussed below.

a. The Spectrum Astro project presents no evidence of price increases.

Complaint Counsel argues that "[a]fter the merger, CB&I raised the bid and the margin way above any pre-merger levels (margins increased from **[xxxxxxxxxxxxxxxx]**," and that increase stemmed from PDM's exit from the TVC market. (CC Br. at 5, 31-32) (citing CX 1489). This is a conclusion that ignores the facts, which are as follows:

CB&I's post-Acquisition pricing to Spectrum Astro was not, as Complaint Counsel called it, a "bid." CB&I originally won the Spectrum Astro job in December of 2000 -- two months *before* the Acquisition. (Thompson, Tr. 2061-62; Scorsone, Tr. 5115-16) (FOF 6.169-6.170). CB&I submitted new pricing to Spectrum Astro after the Acquisition because, as is typical in this industry, CB&I's pricing was valid for only 90 days (because costs are expected to escalate or fluctuate beyond the 90-day period.) (Scorsone, Tr. 5047) (FOF 6.176). After the pricing expired, Spectrum Astro did not rebid the job. Rather, it asked CB&I to update its price in November 2001, approximately one year after receiving the original price. (Thompson, Tr.

2069; Scorsone, Tr. 5047) (FOF 6.176). In response to this request, CB&I submitted a price that was higher than its winning bid price. (Thompson, Tr. 2074; Scorsone, Tr. 5116) (FOF 6.179).[50]

The fact that the project has already been awarded is significant because Spectrum Astro would have had to re-bid the job if it was unhappy with CB&I's new price. In other words, this was a business dispute. (Scorsone, Tr. 4834-37, 5048-49; Thompson, Tr. 2117; Scully, Tr. 1223-24) (FOF 6.188, 6.193-6.194). Both parties knew that such an outcome was unlikely because of the time and expense associated with such a process. For this reason, change orders in the construction industry are frequently priced with a higher profit margin than the originally bid job. (Scorsone, Tr. 5116-17) (FOF 6.182, 6.194). CB&I's business strategies implemented on a project after it was awarded provides no information about the state of competition post-Acquisition.

Further, testimony from Complaint Counsel's witnesses undercuts its argument. The customer did not testify that he believed CB&I raised its price because of the Acquisition and instead viewed the revised pricing as a "pretty common business dispute." (Thompson, Tr. 2117) (FOF 6.193). CB&I viewed the submission of new pricing long after the expiration of the original pricing as a chance to negotiate. (Scorsone, Tr. 4836) (FOF 6.178, 6.193-6.194). No witness tied the repricing to the Acquisition.

b. The Cove Point project presents no evidence of price increases.

Complaint Counsel argues, without evidentiary support, that PDM increased its price on the Cove Point expansion in November 2000 in anticipation of the Acquisition. (*E.g.*, CC Br. at 33-34). Complaint Counsel bases its theory entirely on CX 1160, the so-called "fat

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50 The evidence is uncontradicted that CB&I raised its price for three reasons: to recover pre-contract costs that were not originally included in the initial bid, to account for increased risk, and to address changes in scope made by Spectrum Astro. (Scorsone, Tr. 5049, 5117, 5235; Scully, Tr. 1172-73, 1222; Thompson, Tr. 2071, 2121-

estimate" document, which shows an "as reviewed" price on November 1, 2000, and a slightly higher "as submitted" price on November 2, 2000. (*See* CC Br. at 33-34). The undisputed evidence shows that this document was created for purposes of evaluating an estimate from the estimating department in a formal bid review meeting. (Scorsone, Tr. 4971) (FOF 3.626). Representatives from each relevant department attended this meeting to review each line item and reach consensus as to whether the estimating department's number should be adjusted. (Scorsone, Tr. 4968-72) (FOF 3.622-3.624). Decisions made at the meeting resulted in the November 2, 2000 "as submitted" price. (CX 1160; Scorsone, Tr. 4971) (FOF 3.626). The fact that CX 1160 shows a different price on November 2 as compared to the estimated price on November 1 is irrelevant to this litigation.

Complaint Counsel relies extensively on comments of Jeff Steimer, a CB&I salesperson, who complained that several line items in the November 2 estimate were too high or "fat." (CX 1160). However, Mr. Steimer was the dissenting voice at the bid review meeting; his views were almost always overruled by group consensus. (Scorsone, Tr. 4976-80) (FOF 3.630).[51]

Complaint Counsel also points to CB&I's actual post-Acquisition profit margin for performing the Cove Point project. (*E.g.*, CC Br. at 34). The evidence is undisputed that CB&I will earn a greater than expected margin not because of market power, but instead because **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

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22) (FOF 6.180-6.184). CB&I also had valid reasons for its November 2001 repricing. Complaint Counsel presents no evidence that this repricing was not justified by these expenses.

[51] The uncontradicted evidence shows that Mr. Steimer is a salesperson and lacked foundation as to whether the numbers reached by group consensus in the bid review meeting were too high or too low. (Scorsone, Tr. 4974). Further, evidence indicates that sales persons always believe that pricing is too high at bid review meetings because their focus is entirely sales oriented and not focused on executing and implementing the project. (Scorsone, Tr. 4973) (FOF 3.628).

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (Scorsone, Tr. 5336) (FOF 3.635). **[xxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxx]** (Scorsone, Tr. 5336) (FOF 3.635).[52]

c. MLGW budget pricing does not present evidence of price increases.

One of the most egregious misstatements made by Complaint Counsel involves recent pricing provided to Memphis Light, Water, and Gas ("MLGW") for an LNG planning exercise in 2002. Complaint Counsel attempts to compare the competitively bid and negotiated 8 percent margin projected by CB&I on the 1994 MLGW project to a 30 percent margin included as part of a budget price given to MLGW in 2002. (CC Br. at 6, 35). This argument is misleading, because it is based entirely on a comparison of apples and oranges. It is undisputed that the 1994 price was a fixed, firm price bid that was competitively bid and negotiated, while the 2002 number was a budget price. As discussed extensively in Respondents' Opening Brief, this comparison is inappropriate because budget prices are preliminary in nature and are often based on broad assumptions of many unknown variables. (*See* Opening Br. at 126-29) (FOF 7.1-7.38).

Testimony from Complaint Counsel's own witness confirms that such a comparison is improper. With respect to the 2002 budget price, Clay Hall of MLGW testified that he was seeking a budgetary estimate for a tank that might not be constructed for ten to fifty years, that there was "no work at stake," and that CB&I provided this estimate out of courtesy in

52 Complaint Counsel notes that CB&I "increased the price of the Cove Point tank to **[xxxxxxxxxxxx]**" without noting why. (CC Br. at 34). The undisputed evidence indicates the price was increased because **[xxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5334). There is no evidence associating the increased price with the Acquisition.

an effort to assist MLGW. (Hall, Tr. 1864-65) (FOF 3.608). Consistent with the inaccurate nature of budget pricing, Mr. Hall provided CB&I very little information regarding the proposed project. In fact, Mr. Hall would have needed to give CB&I "volumes more" information for it to provide an accurate price. (Hall, Tr. 1866-67) (FOF 3.609). Importantly, Mr. Hall expected that CB&I's budget price was higher than the pricing he would receive during a bidding process:

> The reason we were expecting [the CBI budget price] to be higher was for several reasons. We would assume it to be higher because we would assume that CBI might assume that we were making our budget based on the numbers, number one. Number two, we would assume that in that essentially we're not in a really competitive-type situation. It's really the same reason.

(Hall, Tr. 1869) (FOF 3.610). All of this uncertainty led Mr. Hall to characterize the 2002 budget price as a "scientific wild assed guess." (Hall, Tr. 1865-66) (FOF 3.609). CB&I's own witnesses corroborate Mr. Hall; Luke Scorsone testified that CB&I provided a budget estimate with a 30 percent margin because the project involved enormous contingencies, including a ten to fifty-year time horizon. (Scorsone, Tr. 5251) (FOF 3.611).[53]

Ignoring the evidence, Complaint Counsel speciously argues that "the customer believes that it is stuck and cannot get a better deal from any of the alleged foreign competitors" and that "[t]he customer, who is obviously aware of foreign suppliers, has chosen not to pursue any of them, calling CB&I the 'only qualified supplier.'" (CC Br. at 34-35). Remarkably, Complaint Counsel failed to cite Mr. Hall's extensive trial testimony rejecting this argument. Instead, it chose instead to cite an e-mail (never discussed during trial) that provides virtually no information regarding its subject matter or its context. (*See* CC Br. at 6, 34-35) (citing CX 1157). Doubtless, this is because Mr. Hall's testimony flatly contradicts this argument. Mr. Hall

[53] To the extent Complaint Counsel is interested in analyzing margins, they would be better served to review margins on firm, fixed pricing submitted by CB&I post-Acquisition. *See* Part II, *supra*.

acknowledged that, apart from his 1994 experience, he was *not familiar* with the current capabilities of Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V, or any other foreign tank builder. (Hall, Tr. 1843-54) (FOF 3.653-3.657). He also acknowledged that he had made no effort to search for an LNG tank builder since 1994, that competition in the LNG market could have increased since that time, and that he had no idea whether he could get a better deal from a foreign tank supplier than he could from CB&I. (*See* Hall, Tr. 1843-57) (FOF 3.653).

d. Budget pricing provided to Linde does not present evidence of price increases.

In a similarly strained attempt to find anticompetitive effects, Complaint Counsel argues that "CB&I has raised prices approximately 8.7% to both Linde and for two different tanks for Praxair." (CC Br. at 35; *see also* CC Br. at 6). This argument relies primarily on Chung Fan's economic analysis of budget pricing and firm, fixed price bids received from CB&I and/or PDM over the past three years. This argument ignores the fact that this Court admitted Mr. Fan's testimony for a limited purpose; to show that Linde acted based on Mr. Fan's analysis. It did not, as Complaint Counsel implies, permit Mr. Fan to offer lay expert opinions:

> He's not going to provide statistical analysis opinion because he was not designated expert. I'm allow this because you're telling me he got these bids, he looked at this, he acted on it. I'm allowing it for *that purpose only*. I am not allowing it for proof that he was right about any of this. That's the only way it's coming in.

(Court, Tr. 1012) (emphasis added).[54] Further, Mr. Fan's actual observations regarding CB&I's pricing directly contradicts Complaint Counsel's argument. He acknowledged that CB&I's "price has been consistent and *has not changed*" since prior to the Acquisition. (Fan, Tr. 1006)

[54] This Court correctly refused to permit Mr. Fan to testify as an expert. As the Court observed, Complaint Counsel did not designate Mr. Fan as an expert. Further, unlike a true expert witness testifying under the procedural safeguards of *Daubert* and its progeny, Mr. Fan himself is not confident enough in his analysis to offer it to this Court. He acknowledges that he is "not sure" regarding his conclusions and that his "personal opinion" does not have "much value." (*E.g.*, Fan, Tr. 1004) (FOF 5.185).

(emphasis added) (FOF 5.185). Accordingly, any argument attempting to use Mr. Fan's statistical analysis as evidence of price increases should be stricken.

e. Pricing provided to [xxxxxx] does not present evidence of price increases driven by anticompetitive conduct.

Complaint Counsel points to recent rough order of magnitude ("ROM") pricing given to **[xxxxxx]** by CB&I as evidence of anticompetitive effects. (CC Br. at 35). Specifically, it points out that PDM provided a **[xxxxxxxxxxx]** price to **[xxxxxx]** for a TVC **[xxxxxxxxxxxxxx xxxxxxxxxx]** in 1999, and that CB&I provided a **[xxxxxxxxxxx]** for this project after the Acquisition. It essentially argues that this increase in price is an anticompetitive effect stemming from the Acquisition. (CC Br. at 36; *see also* CC Br. at 6). This argument is specious, as it is based on yet another improper comparison between a firm, fixed price bid and a budget price. The $15,955,069 figure provided by PDM pre-Acquisition was a firm, fixed price. (Scorsone, Tr. 5082-82) (FOF 6.154). By contrast, CB&I's price was an ROM price. These prices were provided three years apart. **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxx]** CB&I needed this information to produce a firm, fixed price bid. (*See* Scorsone, Tr. 5000-20) (FOF 6.159). Because it lacked this information, CB&I did not want to expend necessary resources to create a firm price. (Scorsone, Tr. 5084) (FOF 6.159). CB&I made this clear to **[xxxxxx]** in its transmittal letter, in which it explained that "[t]he ROM pricing accuracy can be improved with a more detailed assessment of your needs and resulting work scope." (CX 1573) (FOF 6.160). Further, Complaint Counsel neglects to mention that **[xxxxxx]** never paid the ROM price quoted by CB&I, as it subsequently cancelled the project. In fact, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxx]**

f. Budget pricing provided to Fairbanks Natural Gas does not present evidence of price increases.

Complaint Counsel contends that budget pricing provided to Fairbanks Natural Gas in 2002 is evidence of the Acquisition's anticompetitive effects. (CC Br. at 36; *see also* CC Br. at 6). This argument lacks evidentiary support, as it is based primarily on the deposition of Dan Britton, which is not in evidence.[55] Even worse, the consultant to which it refers is Zoher Meratla. Complaint Counsel unsuccessfully attempted to introduce Dr. Meratla's affidavit three separate times. (Tr. 3039-40, 3112-12, 5348-52). Complaint Counsel is attempting to skirt that ruling by citing to another inadmissible document. For this reason alone, Complaint Counsel's arguments regarding the Fairbanks project should be stricken *in toto.*

Other evidence cited by Complaint Counsel does not assist its argument Pricing provided to Fairbanks in 2002 was a rough budget price. (*See* FOF 3.615). In this case, the budget price provided contained a very high margin figure to account for lack of information and contingencies associated with an Alaska project, such as a cold climate, a short construction seasons, and burdensome labor regulations. (*See* Scorsone, Tr. 5004-06; RX 626) (FOF 3.615).

Complaint Counsel improperly attempts to compare the Fairbanks budget price to six-year-old budget pricing for BC Gas. Yet, the two estimates had different histories and derivations. The BC Gas budget estimate was prepared in 1996 by Jeff Steimer, a PDM salesman without training in estimating; Mr. Steimer derived this estimate by extrapolating from a prior estimate to a different client. (*See* CX 791). By contrast, CB&I derived the Fairbanks estimate in 2002 using a formal budgetary exercise. (*Compare* RX 626 to CX 791). Further, Complaint Counsel has not shown that the costs for the BC Gas job (such as material or shipping

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55 Via a letter agreement, the parties agreed that Complaint Counsel could introduce certain portions of Mr. Britton's deposition into evidence. However, Complaint Counsel never moved those portions into evidence.

costs) would be the same as those on the Fairbanks job located deep in interior Alaska. In fact, Dr. Simpson -- acknowledged that these factors would be relevant in any comparison of the two projects. (Simpson, Tr. 5385). Yet, Complaint Counsel failed to discuss them in its allegations regarding anticompetitive effects. (CC Br. at 36).

3. Complaint Counsel's other attempts to show anticompetitive conduct have failed.

Other than its failed evidence regarding collusion and price increases, Complaint Counsel relies on a collection of cavalier assertions, liberally sprinkled with misstatements and unsupported accusations. In fact, Complaint Counsel's attempts in this regard contain some of the most egregious examples of such argument. Each attempt is discussed below.

a. Negotiations between CB&I and [xxxxxxxxxxxxxx] do not present evidence of anticompetitive effect.

In a throwaway sentence devoid of explanation, Complaint Counsel asserts that customers are unable to force CB&I to negotiate lower prices post-Acquisition. (CC Br. at 35). As sole support for this statement, Complaint Counsel cites the testimony of **[xxxxxxxxxxxxxx xxxxxxxxxx]** As an initial matter, this argument is wrong. As discussed extensively in Respondents' Opening Brief, customers in the relevant markets, **[xxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx]** have been able to force CB&I to lower its prices. (*See* Opening Br. at 74-76, 78; 113; FOF 3.468-3.486, 5.122-5.130). Further, Complaint Counsel's cite to **[xxxxxxxxxxxxx]** testimony is simply wrong, as the evidence shows that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx**

Further, the document cited by Complaint Counsel -- CX 370 - does not comport with the terms of the letter agreement.

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Notably, Complaint Counsel's own witness squarely contradicts Complaint Counsel's argument. The only post-Acquisition project that CB&I bid to **[xxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx]** To classify this as an "anti-competitive" effect strains the outer bounds of reason and common sense.

b. CB&I's negotiating efforts regarding the Yankee Gas job present no evidence of anticompetitive effects.

In connection with the Yankee Gas peakshaving job, Complaint Counsel accuses CB&I of using "strong arm" tactics to limit competition. (CC Br. at 37; *see also* CC Br. at 6). There is *zero* evidence that CB&I used "strong arm" tactics of any type with Yankee Gas. Marc Andrukiewicz, of Yankee Gas, testified in *Respondents' case*. He did not testify to any such tactics, nor did he suggest that CB&I made any effort to "limit its choice of potential builders of the project." (CC Br. at 37). In fact, he testified that Yankee Gas was considering Skanska/Whessoe and Technigaz as alternatives to CB&I for this project. (Andrukiewicz, Tr. 6445; *see also* [**xxxxxxxxxxxxxx]**) (FOF 3.69, 3.177).

Further, Complaint Counsel asserted that "Yankee Gas had its contractor, CHI, solicit bids for the LNG tank alone." (CC Br. at 37) (citing CX 1507). This is false. According to Mr. Andrukiewicz, Yankee Gas has not yet begun its pre-qualification process.

(Andrukiewicz, Tr. 6451-52). It plans to pre-qualify firms in January of 2003 and receive bids in spring of 2003. (Scorsone, Tr. 4989). As Complaint Counsel's own cited exhibit notes, CHI has solicited *budget prices* from CB&I, Skanska/Whessoe, and Technigaz. (CX 1507 at CBI 0590483).[56]

Complaint Counsel also falsely argues that CB&I "refused to bid on the LNG tank alone," and that "CB&I then agreed to offer a bid if it did not have to go through the contractor." (CC Br. at 37). As noted above, neither Yankee Gas nor CHI has solicited bids to this point. Further, even if the terms "budget price" and "bid" were synonymous, Complaint Counsel's argument would still fail. Contrary to Complaint Counsel's argument, CB&I provided pricing to CHI at Yankee Gas's request. (Andrukiewicz, Tr. 6445-46) (FOF 3.34-3.342). CB&I believed that CHI was a potential EPC competitor for the Yankee Gas job -- a fear confirmed by Yankee Gas itself. (Andrukiewicz, Tr. 6450) (FOF 3.354-3.355). **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]**

Finally, any suggestion that CB&I has the ability to "strong arm" Yankee Gas is ludicrous. CHI has recommended to Yankee Gas that it build an all concrete, double-containment LNG tank for its peakshaving facility. (*See* Andrukiewicz, Tr. 6447) (FOF 3.344). The evidence has shown that CB&I would be at a tremendous disadvantage if Yankee Gas selects this option. In fact, there is some doubt as to whether CB&I would be able to compete for this project if it is, in fact, an all concrete LNG tank. (*See* Glenn, Tr. 4141; Scorsone, Tr. 4989) (FOF 3.346).

[56] As set forth in Respondents' Opening Brief, a budget price is completely different than a firm, fixed price bid. (*See* Opening Br. at 126-29; FOF 7.1-7.38).

c. CB&I's relationship with [xxxx] presents no evidence of anticompetitive effects.

In a further failed attempt to eke out a story of anticompetitive effects, Complaint Counsel points to the business relationship between CB&I and **[xxx]** arguing that **[xx]** "has no choice but to acquiesce to CBI's demand that **[xx]** work exclusively with CBI" and that "[w]ithout PDM to turn to, **[xx]** could encourage competition only by turning to untested, higher-priced alternatives." (CC Br. at 37; *see also* CC Br. at 6). This argument is specious at best. Complaint Counsel relies heavily on a **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** The document contains no evidence regarding whether this pricing was provided in the U.S. or overseas, when the pricing was received,[57] what assumptions were given to the vendors for purposes of making their estimates, or for what purpose the estimates were submitted. Undaunted, Complaint Counsel forges ahead with conclusions regarding the document, devoid of evidentiary support.[58]

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[57] Complaint Counsel has presented no evidence that **[xx]** was considering LNG tanks in the U.S. in 1998.

[58] Rather than relying upon this dated, unexplained, document, one need not go very far to look at how Whessoe's ability to price tanks looks today. For example, after the date of the estimates contained in RX 157, Whessoe beat CB&I and PDM on a firm, final price bid (as opposed to the budgetary estimates involved in RX 157) and projects in Dabhol, India and in Trinidad. Whessoe has also won the Dynegy project, providing a price that "satisfied" the customer. (Puckett, Tr. 4557) (FOF 3.288). Further accuracy of Whessoe's pricing is demonstrated by **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxx]**

Further, Complaint Counsel's allegations should be seriously questioned because they are devoid of evidence from **[xx]** witnesses. If **[xx]** truly believed that its only alternative to CB&I was an inferior, higher-priced contractor, it would be reasonable to expect **[xx]** to testify on behalf of Complaint Counsel. It did not do so. To the contrary, **[xxxxxxxxxxxxxxxxxxxxxxx xx]** testified in Respondents' case. His testimony directly contradicts Complaint Counsel's unfounded allegations; he testified that **[xx]** believes it has several options available to it for LNG tank contractors and that **[xx]** is not concerned that the Acquisition has affected its ability to obtain LNG tanks in the U.S. **[xxxxxxxxxxxxxxxxxx]** (FOF 3.427).

d. The Dynegy project presents no evidence of anticompetitive effects.

The Dynegy bidding process is the keystone of this case. It conclusively shows that foreign competitors can enter the U.S. market and provide *pricing and quality* that satisfy customers. Complaint Counsel devotes less than a page to argue that the Dynegy project constitutes evidence of anticompetitive effect. (CC Br. at 37). There is no rational reading of the facts that could support such an argument. Complaint Counsel argues that CB&I initially refused to bid on the Dynegy LNG tanks because they were competitively bid. (CC Br. at 37). This is a false statement. As discussed extensively in Respondents' Opening Brief, CB&I initially refused to bid on this project because its bid was to go to Black & Veatch -- a competitor of CB&I's on peakshaving facilities. Further, Black & Veatch was *Skanska/Whessoe's partner* in the Dynegy bidding process. (Price, Tr. 600; (Opening Br. at 86; FOF 3.273). CB&I's refusal was designed to protect its proprietary information from strong competitors, not to exercise "market power" that it did not have.

Perhaps the most misleading sentence in Complaint Counsel's entire brief is "the customer is still concerned that the remaining foreign competitors cannot give it a 'competitive price.'" (CC Br. at 38) (citing Price, Tr. 635). Brian Price is an employee of Black & Veatch which is, as discussed above, an alliance partner of Skanska, the winning EPC contractor on the project. In fact, Black & Veatch has touted this alliance to its U.S. LNG customers. (*See* Eyermann, Tr. 6986-87; RX 935) (FOF 3.65). Mr. Price is not an employee of Dynegy. William Puckett is an employee of Dynegy who was directly involved in this project. Further, Mr. Puckett testified in this case. Complaint Counsel fails to cite his testimony because it directly contradicts the claim that foreign competitors cannot provide competitive pricing. Specifically, Mr. Puckett explained that all three foreign bidders provided firm, fixed price bids that were "in the expected price range," and that Dynegy was "satisfied" with the bids. (Puckett, Tr. 4540, 4557, 4587-88) (FOF 3.248, 3.288). In fact, Dynegy was so satisfied with the bids that it rejected CB&I's subsequent attempt to bid on the LNG tanks. (Puckett, Tr. 4559-60; Glenn, Tr. 4137) (FOF 3.304). Further, during Complaint Counsel's cross-examination of Mr. Puckett, he never voiced any "concerns" regarding the ability of foreign bidders to compete in the U.S. (*See* Puckett, Tr. 4561-89). With respect to Mr. Price's testimony, Respondents submit that it lacks any credibility for the reasons stated in Part II, *supra*.

IV. THE EXITING ASSETS DEFENSE IS APPLICABLE, AND UNDISPUTED EVIDENCE SUPPORTS IT.

Respondents have shown that the exiting assets defense is applicable here. (*See* Opening Br. at 138-58). In response, Complaint Counsel tries to fit this square evidence into the round holes of a test developed to assess mergers involving failing firms, and a test suggested by two academics to address assets that would have exited the market absent the Acquisition. This approach simply ignores the evidence and the inevitable fact that PDM would have been liquidated absent the Acquisition. Under such circumstances, it follows logically that competition has not been substantially lessened by the Acquisition.

A. THE EXITING ASSETS DEFENSE EXISTS IN THIS CASE.

Complaint Counsel attacks the evidence that PDM EC would have exited the market by asserting that the evidence could not be considered because it is "not based on any accepted law" and that the evidence of the liquidation of PDM EC does not meet the requirements of something called "the failing firm" defense. (CC Br. at 39). Complaint Counsel ignores the evidence of the likely liquidation of PDM EC because it does not fit neatly within a pre-packaged defense. Respondents have already addressed the legal issues associated with this defense. (Opening Br. at 152-55; FOF 7.255, 8.20, 8.38, 8.55, 8.106). It is critical to note that the basis for considering whether PDM EC would be liquidated comes not from law but from evidence in this case. It is undisputed that in order to determine whether competition has been substantially lessened, one must compare competition as it exists today to competition as it *would have* existed absent the acquisition. (Simpson, Tr. 5677; Harris, Tr. 7186-87) (FOF 7.255). The overwhelming evidence reveals a very high likelihood that liquidation of PDM EC would have occurred absent the Acquisition. (Opening Br. at 138-152; FOF 8.115-8.126).

At least one court, in the context of applying the failing firm defense, has held that "we reject rigid obeisance to technical labels and look to the substance of a given transaction." *U.S. v. M.P.M., Inc.*, 397 F. Supp. 78, 98 (D. Colo. 1975). It is the substance of evidence, rather than technical labels, that is relevant in this unique case. The evidence shows that PDM was not casually considering the idea of liquidation. Rather, PDM went to the marketplace, announced its intention to liquidate the entire company for cash, and gave itself a time limit dictated by market conditions. (Opening Br. at 141-43) (FOF 8.47-8.55). To ignore these facts would be to ignore reality, and would result in a comparison of competition as it exists today to a fantasy -- a post-acquisition world in which PDM EC would have been sold to and operated by someone else.

B. THERE IS A SUBSTANTIAL PROBABILITY THAT PDM EC WOULD HAVE BEEN LIQUIDATED ABSENT THE ACQUISITION.

Complaint Counsel argues that Respondents have not shown that the "assets are actually exiting the market," and attempts to persuade this Court that PDM might not have exited the market absent the Acquisition. (CC Br. at 42). This argument ignores the evidence. PDM was prepared to liquidate the PDM EC and Water Divisions if the CB&I deal fell through. This is based on the uncontradicted testimony of PDM's CFO -- Rich Byers. (Opening Br. at 138-39; FOF 8.115-8.126). Complaint Counsel suggests that Mr. Byers' testimony is “pure speculation." (CC Br. at 43). Yet, the evidence shows that Mr. Byers' testimony was far from pure speculation. He had, in December 2000, *already reached* the decision to recommend liquidation *after* reviewing Tanner & Co's actual liquidation analysis, *after* consulting with Mr. Scheman, and *after* vetting the idea with PDM's CEO -- Bill McKee. (Opening Br. at 143-45)[59] [60]

Complaint Counsel also argues that "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." (CC Br. 43) This statement is blatantly false. Mr. Byers simply testified that he would try to assign the ongoing contracts to third parties who would finish the work that PDM was

[59] Complaint Counsel incorrectly claims that "PDM promised the board that they would contact other purchasers if the CB&I deal fell through." (CC Br. at 42). First, Mr. McKee never promised to undertake such a search. (*See* Opening Br. at 143-45). Second, Mr. McKee made the statement quoted by Complaint Counsel in a November 29, 2000 board meeting. This was before he met with Tanner & Co. in December of 2000, at which point Tanner informed Messrs. Byers and McKee that there were no other purchasers and put together a liquidation plan for the EC division. (Opening Br. at 144) (FOF 8.118-8.119). After the December meetings with Tanner, Mr. McKee told the board on December 19, 2000 that there were likely no other purchasers for the EC division. (Opening Br. at 144-45; FOF 8.122)

[60] Complaint Counsel argues that Gerald Glenn "admitted that PDM could have sold the EC and Water divisions to 'any number of competitors.'" (CC Br. at 40). This is simply wrong and takes his testimony out of context. Further, Mr. Glenn had no knowledge as to which companies PDM was talking to, the financial abilities of those companies, or any of the other factors that were taken into account by Mr. Scheman and PDM executives. (Glenn, Tr. 4262).

contractually obligated to perform at their own facilities. (Byers, Tr. 6803-05). Complaint Counsel is adding words to Mr. Byers testimony that simply are not present.

C. PDM CONDUCTED A GOOD FAITH EFFORT TO SEEK OFFERS FROM OTHER POTENTIAL PURCHASERS.

While Complaint Counsel argues that PDM did not engage in a sufficiently detailed search for alternative buyers, its argument is inconsistent with the uncontradicted testimony of PDM's professional investment banker. (Opening Br. at 138-44; FOF 8.45-8.82). Further, contrary to Complaint Counsel's assertion that an "exhaustive marketing effort" must occur, this is not the applicable standard. The selling company need only make a "*good faith* effort to seek offers from other potential purchasers." *California v. Sutter Health Sys.*, 130 F. Supp.2d 1109, 1136 (N.D. Cal. 2001)(emphasis added). *See also Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859, 865 (D.C. Cir. 1993) ("the proponent of the acquisition must demonstrate that it has made a reasonable, good faith attempt to locate an alternative buyer"). PDM's effort more than met the good faith requirement. PDM relied on a well-established investment banking strategy for the sale of EC and Water divisions which involved wide dissemination of a press release which led to a large list of interested purchasers contacting PDM and/or Tanner & Co. (Opening Br. at 141-42; FOF 8.49-8.54). Peter Scheman used his experience to analyze the list of interested purchasers to determine whether they could consummate a transaction.[61] (Opening Br. at 142; FOF 8.48). PDM did not ignore other interested purchasers; it simply evaluated their

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[61] Complaint Counsel also distorts the record by claiming that "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." (CC Br. at 42). In reality, Mr. Byers testified that Tanner was the party tasked with contacting purchasers and that PDM was to refer any contacts made to PDM to Tanner. (Byers, Tr. 6758-59; FOF 8.40). Mr. Byers also testified that PDM relied on Tanner's assessment that there were no other viable purchasers. (*See* Byers, Tr. 6880). The law does not require Mr. Byers to second guess his investment banker and to conduct his own search for purchasers. Investment bankers are hired to do that very task for a selling company. The record pages cited by Complaint Counsel simply do not support their rhetorical assertion.

financial abilities. Such an evaluation is essential, as it can be quite damaging to proceed with a buyer that turns out to be incapable of consummating a deal. (Opening Br. 151; FOF 8.54).[62]

PDM used a method that its experienced investment banker believed was most likely to turn up interested purchasers. This meets Respondents' burden to show that a good faith effort was made to sell these assets.[63] The fact that Tanner spoke with many purchasers and analyzed their suitability as purchasers further establishes that PDM made reasonable efforts to sell the EC and Water divisions. It is not necessary that every potential lead be tracked down, especially when a "reasonable attempt to find an alternative purchaser . . . [was made] but that despite it being well known in the industry and investment circles that [the company] was available for purchase, no other offer was forthcoming." *U.S. v. Culbro Corp.*, 504 F. Supp. 661, 669 (S.D.N.Y. 1981).[64] The EC division's availability was well-known in the industry, and no other offer was made in the nearly eight months that passed between the announcement of the

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62 Complaint Counsel argues that CB&I paid a premium for the EC division. This argument is inconsistent with the record evidence. While CB&I's initial purchase offer of $93 million was a "premium" price in Tanner's estimation, the final purchase price was $72 million based entirely on the EC division's poor performance. (Opening Br. at 142-45) (FOF 8.112-8.114). In the end, CB&I purchased the EC division within the liquidation value, not at a premium price. (RX 163 at 7, 28).

63 Complaint Counsel notes that Tanner contacted directly 25 potential purchasers for the PDM Bridge division. (CC Br. at 42) This is irrelevant. Tanner spoke with nearly that many potential purchasers for the EC and Water divisions, although it determined that none of these purchasers were suitable. (Scheman, Tr. 2922, 6911; RX 164-166) (FOF 8.53).

64 Complaint Counsel's authority is inapposite. *FTC v. Warner Communications*, 742 F.2d 1156 (9th Cir. 1984) evaluated a mere intention to exit the market based on an assertion of "economic necessity" that did not rise to the level of a failing firm. *Id.* at 1164. In *Citizen Publishing v. U.S.*, 394 U.S. 131 (1989), no effort had been made to sell the company to another purchaser. In *FTC v. Harbour Group Invest L.P.*, No, 90-2525, 1990 WL 198819 (D.D.C. Nov. 19, 1990), the investment banker deviated substantially from its normal business operations when selling a company, and thus made a minimal effort with minimal dissemination of the asset's availability. Further, the FTC had identified three alternative purchasers that the seller had not proven to be not viable, as well as a document from the purchaser's files indicating a concern that if it did not buy the challenged assets, another purchaser would. *Id.* In *U.S. v. Greater Buffalo Press*, 902 U.S. 549 (1971) the court rejected the failing firm defense where the seller was actually pursuing expansion plans at the time of the acquisition. *Id.* at 554. In *U.S. v. Phillips Petroleum*, 367 F. Supp. 1226 (C.D. Cal. 1973) the court evaluated a mere stated intention to leave the business without any other supporting evidence.

EC division's availability and the closing of the Acquisition. (Scheman, Tr. 2921-22, 6910-11, 6945-46; Byers, Tr. 6776-78, 6884-85) (FOF 8.50-8.52, 8.55). Complaint Counsel has put forward no witness other than Matrix[65] who even expressed an interest in buying the EC division, no witness who suggested another purchaser could have consummated a cash transaction above liquidation value, and no witness who testified that PDM's marketing approach was unreasonable or less than exhaustive. Respondents' evidence is unrebutted and compelling. Complaint Counsel's argument, on the other hand, is devoid of support and should be rejected.

V. EVEN IF THIS COURT FINDS THAT THE ACQUISITION VIOLATED SECTION 7, A BREAKUP OF CB&I VIA DIVESTITURE IS NOT AN APPROPRIATE REMEDY IN THIS CASE.

Alternatively, if this Court finds a Section 7 violation, the record evidence indicates Complaint Counsel's proposed remedy will actually hurt the very customers it purports to protect. A remedy must not be punitive. A breakup by divestiture is not mandatory. Relief should be fashioned consistent with the evidence, and the evidence in this case does not support a breakup of CB&I. Respondents respectfully submit that this Court should, if at all, impose remedies aimed at fine-tuning the existing competitive process in the markets.

A. A PUNITIVE REMEDY IS NOT APPROPRIATE.

Complaint Counsel reveals its punitive intentions by arguing that its proposed remedy must be imposed because "[a]bsent divestiture, any lesser relief would be a slap on the wrist." (CC Br. at 48). Punitive remedies are not appropriate in this case. As the Supreme Court noted long ago in *DuPont*, "[c]ourts are not authorized in civil proceedings to punish antitrust violators, and relief *must not be punitive*." 366 U.S. at 326 (emphasis added).

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65 Matrix's tepid interest was extensively debunked in Respondents' Opening Brief (*see* Opening Br. at 147-51) and is even less suitable than the proffered prospective purchaser in *California v. Sutter Health Systems*, 130 F. Supp. 2d 1109, 1137 (N.D. Cal. 2001).

B. A BREAKUP BY DIVESTITURE IS NOT A MANDATORY REMEDY FOR A SECTION 7 VIOLATION.

Complaint Counsel argues that this Court has no discretion whatsoever to craft an appropriate remedy in this case, and that unnamed individuals in a "compliance division" -- individuals who were not present for a single day of the trial of this case and have no known expertise in this industry -- are the only ones able to craft an appropriate remedy. Complaint Counsel urges this Court to abandon its responsibility to create an equitable remedy based on record evidence, and to instead pass it to a group of government lawyers accountable to no one.

Complaint Counsel has not cited a *single case* holding breakup by divestiture to be an automatic remedy robbing this Court of equitable discretion. While it claims *United States v. E.I. DuPont de Nemours*, 366 U.S. 316 (1961) supports its position (CC Br. at 47), *DuPont* actually reached a different conclusion, finding that "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *DuPont* explained that courts are authorized and required to decree relief "*effective to redress the violations*," whatever that remedy may be. *Id.* at 326 (emphasis added). The Court explained that the trier of fact has "large discretion to model their judgments to fit the exigencies of the particular case," and that divestiture is appropriate "if other measures will not be effective to redress a violation." *Id.* The *DuPont* Court considered the very language in Section 11 Complaint Counsel cites as support for its automatic remedy argument and explicitly rejected such a reading, holding that "Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms or some other strong indication of intent." *Id.* at 331 n.9.

DuPont has been the undisturbed touchstone of Section 7 remedy law for over forty years. Other Supreme Court cases cited by Complaint Counsel do not abrogate *Du Pont* in any way. Complaint Counsel incorrectly argues that *Greater Buffalo Press,* 402 U.S. 549 (1971) identifies breakup by divestiture as a mandatory Section 7 remedy. (CC Br. at 46). In fact, the *Greater Buffalo Press* Court found that no violation occurred; it did not reach the question of divestiture. 402 U.S. at 556. *Ford Motor Co. v. United States*, 405 U.S. 562, 578 (1972) (CC Br. at 47) is similarly unhelpful to Complaint Counsel. In fact, *Ford Motor* reiterated *Du Pont's* holding that courts have "large discretion to fit the decree to the special needs of the individual case" in order to create a remedy that will be "effective to redress the violations and to restore competition." 405 U.S. at 573 (citing *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 607) (internal quote marks omitted). Further, *Ford Motor* explained that courts must review record evidence and "consider[] all aspects of [the] case, including the nature of relief" when fashioning a remedy. 405 U.S. at 578.[66]

Undaunted by such explicit contrary authority, Complaint Counsel seizes on language that suggests complete divestiture is a "natural remedy," and tries to equate the term to mean "mandatory remedy" -- a position roundly rejected by the courts. (*See* CC Br. at 48) (citing cases). Yet, none of the cases cited by Complaint Counsel holds or even suggests that complete divesture is mandatory, or that courts have no discretion in crafting an appropriate remedy. To the contrary, Complaint Counsel's cited authority reaffirms that trial courts have broad discretion in crafting an appropriate Section 7 remedy. While it cites to *In re Olin Corporation*, 113 F.T.C. 400 (1990) to support its claim that complete divestiture is a mandatory remedy (CC Br. at 44),

[66] Complaint Counsel's reliance on *California v. American Stores*, 495 U.S. 271 (1990) (CC Br. at 44-45) is unavailing. There, the Court reviewed Section 16 of the Clayton Act, and only tangentially discussed Section 11 in order to determine if divestiture was a remedy contemplated by Congress in the definition of "injunctive relief" contained within Section 16. *See* 495 U.S. at 295. Further, *American Stores* is consistent with *Du Pont* and its progeny. It specifically noted that while "a district court has the power to order divestiture in appropriate cases . . .[it] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief . . ." *Id*.

that court never found that Section 11 required it to order a complete divestiture. In fact, it considered less restrictive measures, including partial divestiture. *Olin Corp.*, 113 F.T.C. at 584. In the end, it held that complete divestiture was appropriate, not because it was mandated by Section 11, but because the evidence presented supported such a remedy. *See id.*

Further, *the Commission itself* has recognized that a violation of Section 7 does not automatically trigger a complete divestiture, stating, "[t]his is not to say that divestiture is an automatic sanction, mechanically invoked in merger cases." *In re Retail Credit Company,* No. 8920, 92 F.T.C. 1, 88 (July 7, 1978). The Commission has also recognized that more narrow relief is especially appropriate in cases involving multiple product markets, when no relief is necessary in some of the markets at issue. *In re The Grand Union Company,* 102 F.T.C. 812, 997 (1983) (cited in Opening Br. at 162). In *Grand Union,* the Commission explained:

> In multiple market cases, this may result in all elements being proven as to all alleged markets, as to some markets but not others, or as to none of the alleged markets. A case falling in the second category may entail more narrow relief (e.g., partial rather than complete divestiture) than a case in the first category. Cases falling in the third category obviously involve no Section 7 violation under this theory.

Id.

Far from holding itself obligated to impose complete divesture in every case in which a violation is found, the Commission has recognized that "practical difficulties" may militate against divestiture or other types of structural relief in particular cases and that a court should not "minimize the practical difficulties." *In the Matter of Ekco Prods. Co.,* 65 F.T.C. 1163, 1202 (June 30, 1964) (cited at CC Br. at 51). Because of these difficulties, the Commission recognized that "while divestiture is normally the appropriate remedy in a Section 7 proceeding, on occasion it may possibly be impracticable or inadequate, or impose unjustifiable hardship." *Id.* It also made clear that it "would not attempt to apply remedies so drastic, or inequitable, *that the cure would be worse than the disease*," and that as a result, it was important that the Commission have "a range of alternatives in its arsenal of remedies." *Id.* (emphasis added).

In short, the Supreme Court and the Commission have directly and repeatedly rejected Complaint Counsel's overreaching claim that complete divestiture is a mandatory remedy for a Section 7 violation. *DuPont* and its progeny have explicitly given this Court discretion to craft a remedy "*effective to redress the violations*," as well as the discretion to avoid remedies that have too many "practical difficulties," would impose "unjustifiable hardships," or would be a cure "worse than the disease" -- the very types of evidence this Court finds squarely before it. In their Opening Brief, Respondents have outlined in detail "important benefits to the consumer" associated with a less restrictive remedy. (*See* Opening Br. at 171-72). This Court has not only the discretion, but the equitable duty, to consider these issues in crafting a remedy as the Commission has suggested it should do.

C. ANY REMEDY IMPOSED SHOULD BE BASED ON THE WEIGHT OF THE EVIDENCE.

Since divestiture is not a mandatory remedy, it is axiomatic that the parties must present evidence on the issue. *See U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001). In *Microsoft*, the D.C. Circuit discussed the types of evidence relevant to analyzing the effectiveness of any remedy. Complaint Counsel weakly argues that *Microsoft* is entirely irrelevant because it "was not a merger case. . . . " (CC Br. at 45). This argument misses the mark. While *Microsoft* was a Sherman Act and not a Clayton Act case, this does not change the fact that the D.C. Circuit engaged in a thoughtful analysis of the types of evidence that courts should consider in crafting antitrust remedies. *See* 253 F.3d at 100-05. It relied on many cases where equitable relief is sometimes needed in ruling that the district court was required to examine "remedy evidence" in order to properly order divestiture. 253 F. 3d at 101. For example, the *Microsoft* court relied on *United States v. McGee*, 714 F. 2d 607, 613 (6th Cir. 1983) (requiring remedy evidence in a land annexation case), *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (requiring remedy evidence in a Chapter 11 bankruptcy case), and *United States v. Ward Baking Co.*, 376 U.S. 327, 330-31 (1964) (requiring remedy evidence in a Section 1 Sherman Act case). Notably, the *Microsoft* court relied on *Ford Motor Co. v. United States*, 405 U.S. 562, 578 (1972), cited by Complaint Counsel, in directing the district court to consider remedy evidence.[67]

D. THERE IS NO EVIDENCE THAT A COMPLETE DIVESTITURE IS AN APPROPRIATE REMEDY.

While Complaint Counsel argues that divestiture must be complete, it cites virtually no evidence to support its argument. (*See* CC Br. at 48-51). Instead, it relies on general statements regarding the scope of divestiture from authors of antitrust treatises, none of whom reviewed a shred of evidence in this litigation. For example, it cites a commentator in arguing that "[f]or divestiture to be successful, a complete divestiture that reestablishes the acquired firm as a viable competitor is necessary." (CC Br. at 49). Yet, it has presented no evidence on this issue other than the unsupported views of its expert economist. (*See* Opening Br. at 162-65; FOF 9.3-9.5). As Respondents have set forth in their Opening Brief, it is extremely unlikely that a complete divestiture could actually accomplish this goal. In fact, as customers have testified,

[67] Like the cases cited by Complaint Counsel, *Microsoft* recognized that divestiture was "traditionally" the remedy used for the violations of the antitrust statute at issue in that case -- the Sherman Act. 253 F.2d at 105. The fact that divestiture was a "traditional" remedy did not prevent the *Microsoft* court from requiring the trial court to consider evidence regarding a proposed divestiture. *See id.* at 105. This Court has, just as the *Microsoft* court had, the ability to hear evidence regarding remedy and use that evidence to craft a remedy that redresses whatever violation (if any) it believes needs to be redressed.

such a divestiture could actually have a negative impact on competition. (*See* Opening Br. at 165-71; FOF 9.8-9.10; 9.22-9.31).

Similarly, citing a speech by Chairman Muris, Complaint Counsel argues that the Commission "will require a divestiture that will likely create a viable business entity. . . . " (CC Br. at 49).[68] Chairman Muris was not discussing this case, and Complaint Counsel has not presented a single piece of evidence showing that complete divestiture would actually create such an entity in this case. It has not presented a single expert or fact witness, report, or document supporting their claim that a divestiture could have the effect it desires.[69]

E. RESPONDENTS' PROPOSED TVC REMEDY IS SUPPORTED BY THE EVIDENCE.

Respondents have suggested a remedy for this TVC market, should the Court find that it has been substantially affected by the Acquisition. (*See* Opening Br. at 122-25; FOF 6.91-6.121). Complaint Counsel takes aim at this proposed remedy, incorrectly stating that the "only" remedy suggested "is a mentoring program together with an agreement not to compete." (CC Br. at 50; *see also* CC Br. at 3). As Complaint Counsel well knows, and as discussed in its Opening Brief, Respondents have proposed a remedy far broader than Complaint Counsel suggests. (*See* Opening Br. at 122-25). Further, this proposal has met with approval by customers and

68 Complaint Counsel cites *Ford Motor* for a similar purpose. (CC Br. at 49-50) (citing *Ford Motor*, 405 U.S. at 574, 576). Yet, Complaint Counsel has presented no evidence establishing a "viable, independent competitor" can be created in this case, or whether doing so would restore the "pre-acquisition competitive structure of the market." (CC Br. at 50) (citing *Ford Motor*, 405 U.S. at 576). Unlike here, the *Ford Motor* court has such evidence following nine days of remedy evidence. *Id.*

69 As further support for its argument that a divestiture should create an ongoing, viable entity, Complaint Counsel -- somewhat amusingly -- cites itself. The cited website, entitled Frequently Asked Questions About Merger Consent Order Provisions, states that the materials within it "reflect the views of the staff, and not of the Commission or of any Commissioner." Further, the document itself is internally inconsistent with Complaint Counsel's insistence on a complete divestiture remedy, as it states that "[t]he Commission has issued orders that require divestiture of less than the entire business operating in, or producing for, the relevant market." *Id*.

competitors; *the evidence in this case* demonstrates that this package would stimulate competition in the TVC market. (*See* Opening Br. at 122-25; FOF 6.106-6.121).

Complaint Counsel cites *In the Matter of Diamond Alkali Co.*, 72 F.T.C. 700, 744-45) (1967) (CC Br. at 50). However, *Diamond Alkali* actually contradicts its position. There, the Commission explained that it was "necessary to inquire (1) whether divestiture is necessary as the only effective remedy . . . or (2) whether alternatively a less harsh order may not be equally effective." 72 F.T.C. at *29. The Commission reviewed the record to determine "whether some remedy can be found which will permit Diamond Alkali to retain the [assets from the] acquisition virtually intact and yet restore a measure of competition." *Id.* at *30. Only after "explor[ing] the possibility that a solution may be found whereby Diamond Alkali might retain the [assets]," did the Commission find that divestiture to be appropriate. The Commission determined that "for reasons *amply stated in the record*," the proposal offered by Respondents was inadequate. *Id.* (emphasis added).

United States v. United Tote, Inc., 768 F. Supp. 1064 (D. Del. 1991), cited by Complaint Counsel (CC Br. at 50), also helps Respondents because it holds that remedies must be supported by the record evidence. *Id.* at 1086. There, the court determined that the alternate remedy proposed by the respondents was not an alternative remedy at all, but rather a suggestion to leave the merger alone. In that case, the respondents -- like Complaint Counsel here -- offered no credible evidence in support of their proposed remedy. The court stated that "*United Tote* offers no reasonable alternative to the Court other than to allow an unlawful merger to proceed." *Id.* It arrived at its decision to impose divestiture after reviewing "the evidence offered by United Tote, consisting solely of the unsubstantiated and somewhat speculative testimony" offered by Respondents. *Id.*

The instant case presents the flip side of *Diamond Alkali* and *United Tote.* Here, there is substantial evidence showing that complete divestiture would not materially assist competition. Evidence also supports Respondents' contention that their proposed TVC remedy would be workable, desirable, and effective. (*See* Opening Br. at 122-25; FOF 6.91-6.121). By contrast, Complaint Counsel can cite no credible evidence in support of their proposed remedy; it is supported only by the "unsubstantiated and somewhat speculative testimony" of Complaint Counsel's expert -- the type of testimony rejected by the *United Tote* court. 768 F. Supp. at 1086

Complaint Counsel cites other cases, such as *Olin*, in arguing that "an effective divestiture must be sufficiently broad to ensure that an acquirer can be a viable competitor." (CC Br. at 50). This reliance is misplaced, as the *Olin* ordered divestiture *after reviewing the evidence to determine if such a remedy was supported*. 113 F.T.C. 400 (1990). Notably, the court considered less restrictive remedies, including a partial divestiture. *Id.* After reviewing the evidence, the court found that it did not support a lesser remedy. In particular, the court noted that "there is no indication in this record that a divestiture order may bring about a loss of substantial efficiencies or other important benefits to the consumer." *Id.* In contrast to the situation in *Olin*, the instant case contains a significant amount of evidence indicating that harm that would come from a breakup of CB&I. Further, the record shows that CB&I's proposed Consent Decree in the TVC market is a viable, desirable, and workable solution to any competitive problem that may exist in that market. (*See* Opening Br. at 122-25; FOF 6.91-6.121).

Respondents have presented evidence regarding potential remedies that would assist competition. By contrast, Complaint Counsel has not presented any evidence that would assist this Court in determining what assets should be divested and which products the divested company could make. Complaint Counsel is essentially asking this Court to build a new company without any blueprint, any plans, or any suggestions, other than that it must be done. This Court should reject Complaint Counsel's invitation to undertake such a task.

F. THERE IS NO CREDIBLE EVIDENCE THAT COMPLAINT COUNSEL'S PROPOSED REMEDY WILL BE WORKABLE, DESIRABLE, OR EFFECTIVE.

As discussed above, Complaint Counsel has presented no credible evidence in support of its proposed remedy. This section discusses the various facets of its proposed remedy and explains why the evidence does not support them.

1. Complaint Counsel incorrectly argues that it has presented evidence regarding its proposed remedy.

Complaint Counsel has presented no evidence showing that its remedy will be workable, desirable or effective. Yet, it falsely argues that there is ample evidence in the record to support the need for complete divestiture. (*See* CC Br. at 51-53). There is no such "ample" evidence; it cites only two witnesses in support of this argument. Complaint Counsel cites to Patrick Neary in support of "the desirability of Complaint Counsel's proposed remedy." (CC Br. at 52). Mr. Neary merely testified that he believed there was good competition in the TVC market prior to the Acquisition. (Neary, Tr. 1502). He neither testified as to whether a divestiture of CB&I would be possible, nor whether a company divested from CB&I would have the technology, experience, personnel, and equipment necessary for TRW to consider it as a viable competition. (*See generally* Neary, Tr. 1418-1503).[70] Similarly, Complaint Counsel's citation to its own expert witness lends no support to its argument. (CC Br. at 52). While Dr. Simpson testified that a reconstituted firm would "have to possess similar assets like the

[70] As further support for its conclusion, Complaint Counsel cites the deposition of Dan Britton. (CC Br. at 52). As mentioned earlier, this document is not even in evidence.

fabrication plants . . . , its work force, its engineering staff and its intangible assets," he could offer no opinions or insight as to whether a complete divestiture of CB&I could create a new entity that *actually possesses* the assets on his wish list. (*See* Simpson, Tr. 5715-18).[71]

Complaint Counsel also argues that "substantial support" for an "effective divestiture remedy" exists in the record, including evidence regarding the structure, composition, and competitive viability of PDM and CB&I pre-Acquisition, the PDM assets and personnel acquired by CB&I, and the disposition of those assets and personnel. (CC Br. at 53). This argument is absurd. Complaint Counsel offers zero guidance to the Court on *how* such evidence would aid it in crafting a divestiture order that would create two, low-cost viable entities able to compete for the relevant products. The evidence demonstrates that many employees of PDM and CB&I left the companies as part of the merger process, that much equipment was sold to eliminate redundancy, and that the markets for the relevant products have changed significantly in the past two years -- particularly in the LNG markets. Past records of PDM's business are of no probative value in developing a divestiture plan.

2. There is no evidence that CB&I could assign contracts to a divested entity.

Complaint Counsel correctly notes that, in order to create a divested entity, CB&I would need to "assign customer contracts to the divested entity" and that "CB&I's existing backlog of work at the time of the divestiture must be apportioned between CB&I and the divested entity." (CC Br. at 53-54). However, it offers no evidence or suggestions as to how this

71 Complaint Counsel argues that it has introduced substantial evidence regarding the "intense competition" that existed between CB&I and PDM and post-Acquisition anticompetitive effects. (CC Br. at 52). As discussed in Parts I-III, *supra*, Complaint Counsel has failed to carry its burden of establishing liability. Even if they had been successful, Complaint Counsel cannot merely rehash the same evidence in support of its remedy arguments. Evidence that "intense competition" between CB&I and PDM or evidence of anticompetitive effect is not evidence that a divestiture would be workable, desirable, or even possible.

would be done. Evidence shows that obtaining approval for contract assignment would be very difficult, as many customers insist on a non-assignability clause in their contracts. (*E.g.*, Glenn, Tr. 4168-69) (FOF 9.16-9.17). Evidence also shows that customers would be reluctant to assign contracts to a newly-divested company from the ribs of CB&I because it would be unknown and unproven in terms of size and experience. (*See*, *e.g.*, Izzo, Tr. 6511-12) (Opening Br. at. 165-71; FOF 9.22-9.26).

In response to this argument, Complaint Counsel noted that CB&I "was obviously successful in convincing customers to assign PDM contracts to itself. . . . " (CC Br. at 53). This argument is off-base. CB&I was able to show customers that it had experience in the relevant areas and the financial capability (which was greater as a result of the Acquisition) to handle the work. Further, customers had no choice but to accept reassignment because PDM was going out of business. In this case, absent agreement from the customer, the only way for CB&I to assign contracts to a divested entity would be to break a contractual agreement. Further, even if doing so were possible (and there is no evidence to suggest that it is), Complaint Counsel has not given this Court any guidance as to which customers will be assigned to work with the divested entity.

3. There is no evidence to support the conclusion that the divested entity could have a sufficient revenue base and scale.

Complaint Counsel correctly notes that, in order to create a workable divestiture plan, the divested company must have a "sufficient revenue base and scale of operations to compete for large projects." (CC Br. at 54). Yet, it devotes only eight lines of argument to this point, *without offering this Court any suggestions as to how this might be done*. Complaint Counsel's lack of insight on this point is not surprising, as the record evidence is damning to its proposed relief. Customers for LNG import terminals have explained that the financial size of an LNG tank maker is a critical consideration, and that CB&I is barely large enough to compete for LNG projects. (*See* Opening Br. at 57; FOF 3.230). The evidence simply does not support the notion that a divestiture could create *two* companies large enough to compete. In fact, it is much more likely that a complete divestiture could actually reduce the number of available contractors to owners such as El Paso, Calpine, and Marathon. (*See* Opening Br. at 166-68; FOF 9.24, 9.26, 9.9).

Complaint Counsel argues that its proposed breakup will be successful because "[t]he 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." (CC Br. at 47, *see also* CC Br. at 56) (emphasis added). Yet, it has not identified a single potential purchaser for such an "acquired entity." In fact, the evidence suggests that finding such a purchaser will be extremely difficult. When PDM attempted to sell the Water and EC Divisions in 2001, its investment banker -- Peter Scheman -- could only find one company willing to purchase and capable of purchasing these assets -- CB&I. (*See* Opening Br. at 153; FOF 8.55, 8.106).[72]

4. There is no evidence that the assets of the PDM EC and Water divisions exist, or that they are sufficient to create a new company.

Complaint Counsel argues that "the divestiture order must include all the former PDM EC and Water assets and personnel." (CC Br. at 54). Yet, it offers no evidence as to whether this is possible. There is no evidence in the record regarding the extent to which CB&I still owns the PDM EC and Water Divisions' assets or whether those assets would be sufficient

[72] Complaint Counsel also ignores the question of whether the acquiring company would incur so much debt in acquiring or operating Newco PDM that it would not be accepted as a bidder on LNG or TVC projects (*See* Opening Br. at 157-58).

to create a competitively viable company. Evidence shows that CB&I sold duplicative equipment and personnel after the Acquisition. Further, there is no evidence in the record regarding the effect such a divesture would have on the Water division or its many customers.

5. There is no evidence to support the claim that divestiture of PDM's fabrication facilities would assist in creating a viable company.

Complaint Counsel argues that "[t]he divested entity must include PDM's fabrication facilities." (CC Br. at 55). There is no credible evidence in the record that addresses why the fabrication facilities must be divested, or whether anyone would be willing to purchase them. Complaint Counsel cites its own expert witness, Dr. Simpson, in arguing that "a divested entity would need the fabrication facilities in order to replace PDM." (CC Br. at 55). Yet, Dr. Simpson could not offer any ideas regarding why the divested entity would need three fabrication facilities (CB&I had only one prior to the Acquisition) and who would purchase or operate them. The record evidence shows that fabrication facilities are not necessary to build LNG tanks in the U.S., as fabrication of nine percent nickel steel takes place overseas. The record also shows that current and potential competitors in the LIN/LOX and LPG markets already own fabrication facilities. (FOF 5.22-5.78).

Complaint Counsel cites the testimony of Brad Vetal to argue that "[p]ossessing multiple fabrication facilities is advantageous because it allows a competitor to rationalize its freight costs." (CC Br. at 55). Mr. Vetal did not testify that he lacked the necessary fabrication facilities to participate in the relevant market or that an additional fabrication facility would allow him to cut manufacturing costs. Indeed, adding a fabrication facility may well raise costs by increasing overhead expenses, making the acquisition of such a facility less attractive.

6. There is no evidence showing that it is possible to provide a divested company with intangible assets that will assist in competing.

Complaint Counsel argues that Respondents must divest their intangible assets to the divested company, including "the PDM name."[73] Yet, it has presented no evidence that required intangible assets could be supplied to a divested company. In arguing that a divested company would require such intangible assets, Complaint Counsel cites W.T. Cutts of AT&V, who testified regarding his "wish list" of assets. (CC Br. at 55-56). Yet, Mr. Cutts' testimony actually contradicts Complaint Counsel's argument. He acknowledged that AT&V already had access to customer lists for the LIN/LOX market, and that CB&I's lists would not assist AT&V. (*See* Cutts, Tr. 2559-60). He also acknowledged that AT&V could market LIN/LOX products without CB&I sales personnel, and that it could hire former CB&I salespeople if it desired to obtain such an individual's services. (Cutts, Tr. 2558-61). With respect to technical expertise, Mr. Cutts acknowledged that AT&V developed technical specifications and welding procedures for LIN/LOX tanks without assistance from CB&I. (Cutts, Tr. 2563-64) (FOF 5.29). In short, there is no evidence to suggest that Complaint Counsel's proposed remedy would assist competition in any way.

7. Without evidence as a guide, the appointment of a trustee and the efforts of the Compliance Division will be wasted gestures.

Complaint Counsel argues that a divestiture "will require the appointment of a monitor trustee to oversee its effective implementation" and that the FTC's Compliance Division "will be able to work with the trustee to ensure a restoration of competition." (CC Br. at 56). Complaint Counsel is merely attempting to shift its burden to present evidence of a workable

[73] This argument borders on the absurd. It assumes that customers will blindly accept that a "new PDM" would be a viable company because of its name. As discussed in Respondents' Opening Brief, customers in the relevant markets are sophisticated consumers. (*See* Opening Br. at 109-10). It is unlikely that they could be tricked in the manner suggested by Complaint Counsel.

divestiture plan to the Compliance Division and whichever person is unlucky enough to serve as a monitor trustee. Complaint Counsel has presented no evidence and no theory regarding how a divestiture should look; it must do more than simply argue that "someone else will figure it out." A trial was held in part to figure out a remedy (if needed), and Complaint Counsel chose not to introduce any such evidence.

G. COMPLAINT COUNSEL'S PROPOSED ORDER IS COMPLETELY LACKING IN EVIDENTIARY SUPPORT.

In its brief and Proposed Order, Complaint Counsel seek a remedy devoid of evidentiary support. As discussed extensively above, Complaint Counsel had the burden of proving that its Proposed Order constituted a workable, desirable, and effective remedy. The evidence suggests that this proposed remedy would do nothing to assist competition and would, in some markets, risk reducing available competition. Complaint Counsel's Proposed Order contains literally dozens of deficiencies, several of which are discussed below.

First, the Proposed Order would threaten consumer welfare by eliminating CB&I's ability to function as a low-cost competitor. Complaint Counsel has essentially acknowledged all of the practical difficulties identified by Respondents by including them as matters that are directly addressed in their Proposed Order. Complaint Counsel's solution in every instance is to force CB&I to spend what is likely to be substantial sums of money to overcome the identified problems. The Proposed Order imposes significant costs on CB&I by forcing it to: 1) incent its customers to assign their projects to New PDM by paying their customers to do so; 2) incent current CB&I employees through cash payments to go work for New PDM; 3) pay customers in order to incent them to waive their key personnel clauses; 4) purchase substantial quantities of new equipment for New PDM; and 5) expend substantial monies for training of New PDM personnel. (Prop. Order at II.C, II.D, V.B.5, VI.C.6).[74] In short, the Proposed Order creates a substantial risk of turning CB&I from a low-cost supplier to a high-cost supplier. Under either scenario -- CB&I being compelled to pay to overcome implementation difficulties or not -- the result will not be two low-cost competitors which is required by remedy law and by economics. (*E.g.*, Harris, Tr. 7393-94). While Complaint Counsel has presented no evidence that a divested company could be such a low-cost competitor, it is apparent that its Proposed Order could create the worst of both worlds by failing to create a new low-cost competitor in the form of New PDM while at the same time substantially reducing CB&I's ability to be such a competitor.[75]

Second, the Proposed Order attempts to govern assets and contracts that are not in the United States. The Proposed Order contemplates that CB&I will divest itself of assets and contracts that are located outside the U.S. For example, it would require CB&I to "transfer and assign to [New PDM] . . . Customer Contracts . . . at least 50% of which shall be for work to be performed in the United States." (Prop. Order II.C.(b)). Yet, Complaint Counsel has no jurisdiction to effect divestiture of contracts or assets outside the U.S. Even if it did, it has not presented any evidence regarding the potential effect of such a remedy on foreign customers or CB&I's competitive abilities overseas.

Third, the Proposed Order imposed unreasonably short timelines on CB&I. It decrees that "Respondents shall divest New PDM" within 180 days from the date of a final order.

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[74] Not only does the Proposed Order force CB&I to spend all of this money, it forces it to do so in 180 days. This short time period will only exacerbate the cost disadvantage created by the Proposed Order.

[75] A brief review of the Proposed Order shows it would further weaken CB&I by permitting the potential Acquiror to review the terms of CB&I's customer contracts, and to select which customer contracts it wishes to perform. (Prop. Order II.C). This would allow a powerful international competitor, such as Skanska/Whessoe, to gain competitively sensitive information and to possibly limit CB&I's ability to compete in the LNG markets.

(Prop. Order II.A) and that CB&I shall have 60 days to develop a report that identifies the "Customer Contracts Contribution, the CB&I Assets Contribution, and the Transferred Employees." (Prop. Order II.H.). There is no evidence to suggest that either of these tasks could be completed within 180 days. PDM and its investment banker, Tanner & Co., spent months locating a potential buyer for PDM's assets. Only one suitable buyer was located. In light of the current economic situation, finding an adequate buyer could take years. (*See* Part IV, *supra*).

Fourth, in its Proposed Order, Complaint Counsel seeks to establish two companies that are roughly equal in size and market power. However, this should not be the goal of any remedy in this case. Dr. Simpson, Complaint Counsel's own expert, acknowledged that the purpose of any remedy would be to restore competition to the stage that it would have been at absent the Acquisition. (*See* Simpson, Tr. 5719). As discussed extensively in Respondents' Opening Brief, a world absent the Acquisition would not have had two equal-sized competitors battling each other. PDM would have sold its assets to another entity. The only entity advanced by Complaint Counsel that could have purchased PDM's assets was Matrix. Matrix was a smaller company with limited ability to assume such a large debt. Assuming arguendo that it had been able to do so, it certainly could not have competed on a level equal to CB&I, as the total combined company would be much smaller. (*See* Opening Br. at 166-68). In short, the Proposed Order attempts to create a Mercedes-type company, when the company that would have existed after the Acquisition would have been a Chevrolet at best.

Fifth, many of the provisions of the Proposed Order are extraordinarily vague. For example, if customers do not permit assignment of their contracts to New PDM, the Proposed Order directs CB&I to "enter into such agreements, contracts, or licenses as are necessary to realize the same effect as such transfer or assignment." (Prop. Order II.C). Yet, the

Proposed Order says nothing about how CB&I might do this. Similarly, the Proposed Order decrees that CB&I provide "sufficient" working capital to maintain its "Tank Business." (Prop. Order III.B.(4)). Yet, Complaint Counsel does not define the term "sufficient," nor is there any evidence in the record to assist this Court or the Compliance Division in determining what a sufficient level of working capital would be.

VI. COMPLAINT COUNSEL'S FINDINGS OF FACT ARE A COMPENDIUM OF FALSE STATEMENTS, MISCITED EVIDENCE, AND UNSUPPORTED CONCLUSIONS.

Complaint Counsel's findings of fact and conclusions of law are a remarkable amalgamation of incorrect statements, irrelevant evidence, mischaracterizations of testimony and documents, heavy reliance on witnesses that lack foundation, and statements lacking any evidentiary support. While Respondents have fully discussed the deficiencies in Complaint Counsel's findings in their Reply Findings of Fact, this Part addresses a few examples of the many deficiencies that exist throughout the document.

A. COMPLAINT COUNSEL RELIES ON INADMISSIBLE EVIDENCE.

Contrary to this Court's order, Complaint Counsel has cited to documents and testimony that were never admitted into evidence. As set forth in its accompanying motion to strike, such evidence should be stricken. Most notably, Complaint Counsel cited extensively to the deposition of Dan Britton of Fairbanks Natural Gas. (*E.g.*, CC Br. at 37) (citing CX 370). Complaint Counsel and Respondents conducted negotiations regarding the admissibility of Mr. Britton's deposition, and agreed that Complaint Counsel could introduce certain portions of this deposition into evidence. However, Complaint Counsel never moved this exhibit into evidence. Further, it has cited to portions of the deposition that were specifically excluded from the parties' agreement. (*See* CC Br. at 37) (citing CX 370 at 95). Similarly, Complaint Counsel cited to the following unadmitted evidence in its findings of fact and conclusions of law: CX 105; CX 190; CX 370; CX 822; CX 823; CX 1572; CX 1591; CX 1682; and CX 1685. Complaint Counsel also cited unadmitted and unidentified "interviews with industry participants." (*E.g.*, CCFF at 177). For these reasons, all argument regarding these exhibits should be disregarded and stricken from the record.[76]

Further, in several of its findings, Complaint Counsel includes various charts and graphs. A close examination of these findings reveals that they are exact duplicates of charts and graphs that Complaint Counsel attempted to introduce as demonstrative exhibits before this Court. For example, in CCFF 826, Complaint Counsel presented a chart relating to the Cove Point project. Yet, Complaint Counsel neglects to mention that this chart had originally been marked as CX 1761, offered as a demonstrative exhibit, and *rejected* by the Court. (Tr. 8106-09). The charts included in Complaint Counsel's findings were not admitted as demonstrative exhibits in the form in which they appear in the findings. Complaint Counsel attempted to introduce these exhibits during the cross-examination of Dr. Harris. Dr. Harris provided substantial written changes to these exhibits. Complaint Counsel is attempting to use these demonstrative exhibits for the truth of the matter asserted, and it is not even using the actual evidence that was admitted (that included Dr. Harris' comments). For these reasons alone, the findings encapsulating these demonstratives should be stricken.[77]

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76 During a telephone conversation on March 3, Complaint Counsel represented to Respondents that it was aware that it had cited inadmissible evidence. It also indicated that it would make this clear to the Court in its reply brief, and ask that arguments related to these exhibits be disregarded. Respondents agree that this approach is appropriate.

77 Other findings falling into this category include CCFF 882 and CCFF 913. CCFF 882 is a replica of CX 1760, which was admitted into evidence as a demonstrative exhibit only after Dr. Harris made numerous changes to it. (Tr. 8035-42). Yet, Complaint Counsel did not bother to discuss Dr. Harris's changes in CCFF 882. CCFF 913 is a reincarnation of CX 1763. Complaint Counsel questioned Dr. Harris regarding the substance of the exhibit; it did not discuss any of that testimony in CCFF 913. (Tr. 7977)

B. MANY OF COMPLAINT COUNSEL'S FINDINGS LACK ANY CITATION OR SUPPORT.

Many of Complaint Counsel's findings *lack any citations whatsoever*. Accordingly, it is very difficult to analyze the validity of these findings. To the extent possible, Respondents have attempted to analyze these findings to assist the Court in understanding whether the evidence supports them. However, Respondents respectfully submit that findings completely devoid of proper citation are improper and request that they be stricken from the record. For example, findings falling into this category include: CCFF 29; CCFF 33; CCFF 50; CCFF 78; CCFF 260; CCFF 265; CCFF 384; CCFF 421; CCFF 449; CCFF 581; CCFF 589; CCFF 615; CCFF 642; CCFF 687; CCFF 749; CCFF 750; CCFF 752; CCFF 776-77; CCFF 810; CCFF 816; CCFF 822; CCFF 831; CCFF 849; CCFF 864; CCFF 868; CCFF 883; CCFF 885; CCFF 906; CCFF 912; CCFF 928; CCFF 929; CCFF 930; CCFF 942; CCFF 954; CCFF 955; CCFF 968; CCFF 977; CCFF 978; CCFF 981; CCFF 997; CCFF 1006; CCFF 1007; CCFF 1012; CCFF 1053; CCFF 1056; CCFF 1057; CCFF 1075; CCFF 1076; CCFF 1085-1087; CCFF 1091; CCFF 1099; CCFF 1165; CCFF 1180; CCFF 1181; CCFF 1220-21; CCFF 1223; CCFF 1225; CCFF 1226; CCFF 1281; CCFF 1289; CCFF 1327; CCFF 1347; CCFF 1351.

C. COMPLAINT COUNSEL RELIES ON ITS EXPERT WITNESS TO BUTTRESS ITS FINDINGS OF FACT.

In its findings of fact and conclusions of law, Complaint Counsel improperly cites the testimony of Dr. Simpson -- its expert witness -- to create findings of fact. Expert economic witnesses provide testimony regarding economic issues, and should not be used to shovel in factual evidence that is inadmissible by other means. Complaint Counsel repeatedly attempted to do just that. For example, it submits: "Prior to the Acquisition, CB&I and PDM had a competitive advantage over other firms because they had an efficient core group of workers for projects, and other workers that repeatedly interacted with those other workers and were familiar with CB&I and PDM's procedures." (CCFF 372). The sole support for this statement is Dr. Simpson. Complaint Counsel presents no factual evidence to support this finding, yet it is a purely factual finding. Dr. Simpson is not an employee of CB&I, a customer of CB&I, or a competitor of CB&I. He is an economist who works for the FTC. He lacks the foundation necessary to address factual issues in this way. Accordingly, findings citing only to Dr. Simpson that do not set forth proper expert opinions should be rejected out of hand. Respondents have identified such findings in their Reply Findings of Fact.

D. COMPLAINT COUNSEL RELIES EXTENSIVELY ON WITNESSES LACKING FOUNDATION.

As discussed in Respondents' Opening Brief, Complaint Counsel's witnesses lacked the foundation necessary to discuss the current LNG market. In many cases, Complaint Counsel' s witnesses had not been involved in the LNG market for approximately ten years. Yet, they were permitted to testify regarding Complaint Counsel's alleged entry barriers. Complaint Counsel liberally cited from these witnesses in its findings. For example, in attempting to establish that the FERC application process is an entry barrier in the LNG market, Complaint Counsel relied heavily on the testimony of Eckhard Blaumueller, formerly of PERC. (CCFF 381). Yet, Mr. Blaumueller has not been involved in an LNG project *since the mid-1970s*. Many other witnesses, such as Clay Hall of MLGW and Robert Davis of Air Products are relying primarily on their experiences on the Memphis LNG project in 1994 and have not participated in the market since this time. Reliance on the testimony of these witnesses is unwarranted.

Complaint Counsel cannot argue that its witnesses are the best available. Customers are currently participating in the LNG market, yet Complaint Counsel refused to bring any of these witnesses to trial. By contrast, Respondents brought many current customers as witnesses in their case-in-chief. The significance of each witness' testimony is set forth in detail in Respondents' Opening Brief. Each of these witnesses is currently participating in the U.S. LNG market and has current knowledge regarding the market. The foundation for each witness' testimony is contained in Respondents' Findings of Fact. For the convenience of the Court, a list of witnesses and relevant citations are set forth below.

- **Nigel Carling (Chevron Phillips/Enron)** -- (*E.g.*, Carling, Tr. 4448, 4455, 4465, 4473-74, 4477-82; FOF 3.571-3.573).

- **Volker Eyermann (Freeport LNG) --** (*E.g.*, Eyermann, Tr. 6960, 6963-68, 6981-83, 6994-96, 6999-7001, 7008, 7015-16, 7030) (FOF 3.574-3.576).

- **Robert Bryngelson (El Paso)** -- (*E.g.*, Bryngelson, Tr. 6121, 6124, 6129-30, 6161-62) (FOF 3.577-3.579).

- **Jeffrey Sawchuck** -- (*E.g.*, Sawchuck, Tr. 6050-54, 6066) (FOF 3.580-3.582).

- **William Puckett** -- (*E.g.*, Puckett, Tr. 4539-40, 4545, 4552, 4554) (FOF 3.583-3.586).

- **Larry Izzo** -- (*E.g.*, Izzo, Tr. 6474, 6540, 6475-76, 6483) (FOF 3.587-3.589).

- **John Kelly** -- (*E.g.*, J. Kelly, Tr. 6258, 6260, 6284, 6290-91, 6296) (FOF 3.590-3.592).

- **Jean Pierre Jolly** -- (*E.g.*, Jolly, Tr. 4434, 4436-37, 4684, 4691) (FOF 3.593-3.596).

CONCLUSION

For all of the reasons fully set forth above, the Complaint as to all product markets should be dismissed with prejudice.

Dated: March 18, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Greg J. Miarecki, hereby certify that on this 18th day of March, 2003, I served a true and correct copy of Respondents' Post-Trial Reply Brief and Memorandum in Support of Their Motion to Strike -- Public Version, by hand delivery upon:

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