**October 21, 2002**

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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| In the Matter of | ) |
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## INTRODUCTION

On February 7, 2001, Chicago Bridge & Iron Company N.V. ("CB&I") acquired the assets of the Engineered Construction ("EC") and Water Divisions of Pitt-Des Moines, Inc. ("PDM"). Prior to the acquisition, and over a period of many years, CB&I and PDM were the leading U.S. producers of large, field-erected (i.e., constructed on-site) industrial and water storage tanks, and other specialized steel plate structures, and regularly bid against each other for new projects. By virtue of the acquisition, CB&I eliminated its primary competitor and became the dominant supplier of these products for customers in the United States. documents the two companies believed that the acquisition would be anticompetitive.

CB&I has taken advantage of its dominant position and improved its margins by imposing higher prices and less favorable terms on customers. These anticompetitive effects will be felt in each of the relevant markets as customers contract for the new projects that they expect to begin.

On October 25, 2001, the Commission issued its complaint in this matter, alleging that the acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, in six product markets for these field-erected structures: (1) liquefied natural gas ("LNG") storage tanks, (2) LNG import terminals, (3) LNG peak shaving plants, (4) liquid nitrogen, oxygen and argon ("LIN/LOX/LAR") storage tanks, (5) liquid petroleum gas ("LPG") storage tanks, and (6) thermal vacuum chambers. With the exception of thermal vacuum chambers, these products are, or include as essential components, large industrial storage tanks for storing gases in liquid form at either low or extremely low (cryogenic) temperatures.

LNG tanks are very large, field-erected storage tanks that use special designs and alloys that

allow them to store large amounts of LNG at temperatures around -260° F. LNG tanks are essential components of LNG import terminals, which receive LNG from large, ocean-going transports, and LNG peak shaving plants, which store LNG to meet seasonal, peak demand requirements for natural gas users (collectively, "LNG tanks and facilities").

LIN/LOX/LAR tanks are similar in design to LNG tanks, but are not as large. LNG and LIN/LOX/LAR tanks are collectively referred to as "cryogenic storage tanks." LPG tanks, also referred to as "low temperature" or "refrigerated tanks," store LPG at temperatures of -50° F. CB&I and PDM often refer to LNG, LIN/LOX/LAR, and LPG tanks collectively as "LTC" (low temperature and cryogenic) tanks.

Thermal vacuum chambers are large, field-erected chambers that simulate the environment of outer space (high vacuum and extreme cold and extreme heat) and are used for testing satellites and other aerospace and defense equipment. Thermal vacuum chambers, while not storage tanks, require many of the same skills associated with the design and construction of field-erected LTC tanks.

The relevant products have no economic substitutes. Once the volume that a customer requires for a storage tank reaches a certain level, field-erected vessels are the only economic alternative. Moreover, each of the relevant products is specially designed for the product it holds. The geographic market for the relevant products is the United States. Field-erected tanks and thermal vacuum chambers for use by customers in the United States must be erected at customer sites in the United States.

Prior to the acquisition, CB&I and PDM were the two leading competitors in the relevant markets, each of which was highly concentrated. No supplier other than CB&I or PDM has

the acquisition resulted in a substantial loss of competition, and therefore is likely to have anticompetitive effects. Thus, Complaint counsel's evidence establishes a strong presumption of anticompetitive effects.

The acquisition has eliminated PDM, which was the most formidable bidder against CB&I in each of the relevant markets. Consequently, the bidding processes upon which customers have relied in securing supply have become less competitive. Since the acquisition, customers have been forced either to contract with CB&I as the only alternative for the relevant products, or to try to contract with some of the fringe firms that - although they have bid on projects - have consistently been inferior competitive alternatives. Because the acquisition eliminated PDM, which had been its closest competitive constraint, CB&I will now be bidding against firms that have been uncompetitive on pricing and on other terms. As a result, CB&I will not need to be as competitive in its bid proposals. This anticompetitive effect is described in the *Merger Guidelines*:

> A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller.

*Merger Guidelines* § 2.21, n.21.[2] Thus, following the acquisition, in order to have an alternative bidder to CB&I, customers must consider the proposals from other fringe firms. Relieved of the pressure to compete against PDM, CB&I can continue to secure contracts while increasing its pricing up to the higher levels quoted by these less competitive firms. Thus, the choice that customers have

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[2] Although the *Merger Guidelines* explicitly discuss "open auction" bidding, in which the seller has perfect information, the fact that the seller in this case has imperfect information does not fundamentally alter the analysis. It simply means that the price is likely to approach the cost of the second lowest-cost seller.

been left - to deal with CB&I or with a less competitive firm - is a choice that reflects the diminished competition after the acquisition.

In order to conclude that the elimination of the ongoing competition between CB&I and PDM is not likely to lessen competition, it would be necessary to find that the fringe competitors - who have consistently demonstrated themselves inferior over a period of more than a decade - have in each of the relevant markets suddenly overcome all of the obstacles that made their bids inferior to PDM's in bidding for business in the U.S. However, those current fringe competitors, whether foreign or domestic companies, are unlikely, any time in the near future, to develop the capabilities they need to replace PDM as a competitor to CB&I. The presence of these firms, even if they continue to bid on new projects, will therefore not be sufficient to restore the level of competition that had existed prior to the acquisition. The fringe suppliers will tend to have higher costs than PDM had, lack the experience to compete effectively, and lack the reputation for quality and reliability that customers consider critical in selecting suppliers. As a result, it would be many years before fringe competitors would consistently be able to offer the competitive pricing that PDM had provided. For the same reasons, entry of new firms is also highly unlikely to restore the competition that had existed between CB&I and PDM.n between CB&I and ot

the relevant markets. Respondents may make that argument as a defense to the allegations of the Complaint. However, that defense is without merit. First, respondents cannot meet the burden of demonstrating that PDM, after one unprofitable year which followed several years of profitable activity, was at risk of financial failure. Furthermore, PDM made absolutely no effort to find an alternative purchaser, and in fact actively discouraged other potential bidders. The reason PDM looked for no buyers other than CB&I is precisely the same reason that Complaint counsel's underlying case is so strong: CB&I was willing to pay a premium price to eliminate its main competitor, and therefore was able to make a pre-emptive bid, which foreclosed any possibility of finding other potential buyers.

In summary, the evidence shows that CB&I's acquisition of the EC and Water Divisions of PDM violates Section 7 of the Clayton Act, and Section 5 of the FTC Act, in the relevant markets. As set out in the Commission's Notice of Contemplated Relief, CB&I must now be required to divest all of the assets it acquired from PDM, and take other steps necessary to reestablish two distinct and separate, viable and competing businesses in the relevant markets, including restoring plant and equipment, rehiring personnel, and taking other steps to reestablish the PDM EC and Water divisions as they existed prior to February 7, 2001.

## I. THE RELEVANT PRODUCT MARKETS ARE LNG TANKS, LNG IMPORT TERMINALS, LNG PEAK SHAVING PLANTS, LPG TANKS, LIN/LOX/LAR TANKS, AND THERMAL VACUUM CHAMBERS

Section 7 of the Clayton Act prohibits acquisitions "in any line of commerce or in any activity affecting commerce . . . [if] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. To establish a Section 7 violation, Complaint counsel must show that an acquisition would "create a reasonable likelihood of anticompetitive effects." *B.F.*

*Goodrich Co.*, 110 F.T.C. 207, 288-89 (1988); *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) ("Congress used the words 'may be substantially to lessen competition' . . . , to

[3] < http://www.chicagobridge.com/lotemp.html> (visited Oct. 18, 2002).

or some form of concrete containment for safety reasons.[4] An LNG tank often has a diameter of 200 feet or more, typically holds 15 million gallons or more of LNG, and may cost as much as $13 million or more.[5] LNG tanks are integral components of LNG import terminals and LNG peak shaving plants, described below.

Two basic types of LNG tanks have been used in the U.S.: structures with double steel-walls (referred to as single containment tanks), and structures with an inner steel tank partially or fully enclosed by an outer concrete shell (referred to as double containment or full containment tanks). Virtually all of the LNG tanks now in operation in the U.S. utilize the single containment design.

**2. LNG Import Terminals**

LNG import terminals are designed to unload and store LNG from LNG ocean tankers. LNG is stored in the LNG tanks, pumped out, vaporized and injected into pipelines for transmission to end users. The terminals include LNG storage tanks, fire protection systems, ship loading/unloading facilities, send-out facilities and vapor handling systems.

There are currently four LNG import terminals located in the continental U.S., the most recent of which was built in 1982, and one import terminal in Puerto Rico. Dynegy Inc. has announced plans to construct another import terminal in Hackberry, Louisiana, which would become operational by the end of 2006. Other companies have also announced plans to construct LNG terminals in the U.S. RX 40 (Cheniere Energy has plans for 3 LNG import terminals on the U.S.

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[4] <http://www.chicagobridge.com/lotemp.html> (visited Oct. 18, 2002); <http://www.chicagobridge.com/lotemp_tanks.html> (visited Oct. 20, 2002).

[5]

Gulf Coast).[6] CB&I believes that the outlook in North America for new LNG tanks and import facilities is excellent due to the increased demand for LNG.

### 3. LNG Peak Shaving Plants

LNG peak shaving plants store LNG to provide a reserve of LNG for periods of peak demand to assure that gas customers do not experience a shortage of natural gas. LNG peak shaving plants consist of a liquefaction unit, where the gas is turned into liquid, LNG storage tanks, and a vaporization unit in which the liquid LNG is returned to a gaseous state before discharge to the pipeline. In LNG peak shaving facilities, natural gas from a pipeline is refrigerated in the liquefaction unit and accumulated in liquid form in an LNG tank during the warmer months when demand and prices are low. As gas demand increases in colder months, the stored LNG is heated, vaporized and put back into the supply stream to meet heating demand peaks, when prices are high.

There are about 65 LNG peak shaving plants located in the U.S., most of which were constructed in the 1970s and early 1980s. The last LNG peak shaving plant constructed in the U.S., the Pine Needle plant in Stokesdale, North Carolina, was completed in May 1999. Four LNG peak shaving plants were constructed in the U.S. from 1990-2000.[7]

### 4. LPG Tanks

LPG tanks are large, field-erected tanks that store refrigerated liquids such as propane, butane, propylene and butadiene at temperatures of around -50° F. Some LPG tanks,

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[6] In addition to new facilities, the owner of a currently idle LNG import facility located at Cove Point, Maryland plans to add a new LNG tank as part of a plan to reactivate that facility.

[7] Yankee Gas is currently considering constructing an LNG peak shaving plant in Waterbury, Connecticut.

particularly those that are part of LPG import terminals, are very large. In , PDM completed an LPG tank for LPG import terminal in . . This tank is in diameter and cost between million.

**5. LIN/LOX/LAR Tanks**

LIN/LOX/LAR tanks are large, field-erected tanks, each of which stores a specific liquid gas product, such as hydrogen, oxygen, nitrogen, argon and helium at cryogenic temperatures ranging from -260° F to -450° F. They are similar in design to LNG tanks, but smaller. LIN/LOX/LAR tanks typically hold 400,000 to 1,000,000 gallons of liquid gas products and cost $500,000 to $1 million each.[8] Over 100 of these tanks have been built since 1990.

**6. Thermal Vacuum Chambers**

Thermal vacuum chambers are large, vault-like chambers that simulate the environment of outer space and are used for testing satellites and other aerospace and defense equipment.[9] They are constructed to support vacuum conditions and withstand extreme changes in temperature ranging between approximately -320° F and +350° F.[10] Thermal vacuum chambers with diameters greater than approximately 20 feet must be field-erected because of their size.[11]

One thermal vacuum chamber has been built since 1990, by PDM for

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11 . The thermal vacuum chamber that PDM built for is , weighs more than one million pounds, and costs about million. .

. In , CB&I won the contract to construct a thermal vacuum chamber for

. This project is currently on hold, awaiting financing. Market participants expect to source new thermal vacuum chambers over the next several years.

**B. There Are No Economic Substitutes for the Relevant Products**

The relevant product market includes those products for which "sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level." *Coca-Cola Bottling Company of the Southwest*, 118 F.T.C. 452, 540 (1994), *quoting H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Market definition is an exercise to distinguish close competitive constraints from distant ones, so that the analysis can then proceed to examine whether the merger significantly reduces competition among *close* constraints. *See* 4 P. Areeda, H. Hovenkamp & J. Solow, *Antitrust Law* ¶ 929c (rev. ed. 1998). Thus, "[a] market is the set of sellers to which a set of buyers can turn for supplies *at existing or slightly higher prices*." *FTC v. Elders Grain,* 868 F.2d 901, 907 (7th Cir. 1989) (emphasis added). Therefore, the market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31, 73 S. Ct. 872, 882 n.31 (1953).

The *Merger Guidelines* approximate the ultimate question of constraint by seeking to identify alternatives to which consumers likely would turn in the event of a small price increase. The *Merger Guidelines* take the smallest possible group of competing products and ask whether a "hypothetical monopolist over that group of products would profitably impose at least a 'small but significant and nontransitory' [price] increase." *Merger Guidelines* §1.11. If customers of the relevant products

would not reduce consumption of the relevant products by an amount sufficient to make the price increase unprofitable, the market is established. *Merger Guidelines* § 1.11.

In his expert report, respondents' expert witness, Dr. Barry Harris, "accepted the product markets defined in the complaint." Harris Report ¶ 16. Thus, there appears to be no dispute between Complaint counsel and respondents that LNG tanks, LNG import terminals, LNG peak shaving plants, LPG tanks, LIN/LOX/LAR tanks, and thermal vacuum chambers are relevant product markets.

There are no economic substitutes for these products.

Consequently, buyers would not turn to substitutes in response to a significant increase in their price. Smaller, less-expensive, shop-manufactured versions of LNG tanks, LPG tanks, LIN/LOX/LAR tanks, and thermal vacuum chambers do not provide a competitive constraint. These shop-manufactured structures are assembled within a fabrication facility and shipped to the customer. Even witnesses for respondents concede that these small tanks are not economic substitutes for the large, field-erected versions of the relevant products manufactured by CB&I.

Shop-manufactured tanks are more economical than field-erected tanks only if the required storage volume is small. LIN/LOX/LAR customers such as have found that for storage above approximately 50,000 to 100,000 gallons, field-erected cryogenic tanks are much more economical than shop-fabricated tanks for storing liquid air elements.

A one million-gallon field-erected cryogenic storage tank, for example, would require twelve 80,000-gallon shop-fabricated tanks. Using multiple, shop-manufactured tanks instead of one

large, field-erected tank would impose large costs.[12]

new LPG storage facility for

may most economically employ several large field-erected spheres, rather than tens of small shop-built pressure vessels. ); (shop-manufactured tanks preferred for smaller volume projects and field-erected tanks generally not cost-effective at volumes less than 150,000 gallons). Industry participants believe that the price of field-erected tanks would need to increase by a very large amount before shop-erected tanks could be considered an economic substitute.

In LNG tanks, one customer, stated that it has considered offloading LNG tankers directly into natural gas pipelines, bypassing storage in the LNG tank. However, this method of operation would have substantial volume limitations and operating cost penalties compared to maintaining tank storage. It is not an economic substitute for LNG import terminals in areas that have large volume requirements. Similarly, building more pipeline capacity is not an economic alternative to building LNG tanks or peak shaving plants.

Because there are no economic alternatives to the relevant products, there is little doubt that CB&I could profitably impose on its customers a significant increase in price. In other words, such a price increase would not cause a substantial amount of substitution by customers to alternatives other than field-erected tanks.

## II. THE RELEVANT GEOGRAPHIC MARKET IS THE UNITED STATES

The relevant geographic market is "the smallest region within which a hypothetical monopolist

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[12] Multiple piping and metering systems would render the shop-manufactured alternative uneconomical for projects with large volume storage requirements.

could 'profitably impose at least a 'small but significant and nontransitory' increase in price.'" *Coca-Cola Bottling*, 118 F.T.C. at 575*, quoting Merger Guidelines* § 1.21. The *Merger Guidelines* define the relevant geographic market as:

> a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a "small but significant and nontransitory" increase in price, holding constant the terms of sale for all products produced elsewhere.

*Merger Guidelines* § 1.21. In this case, the products are by definition erected on the ground at customers' locations within the United States, so the competition must occur among suppliers present in the United States. The companies themselves recognize that the competition occurs on a regional basis.[13]

As a result of these factors, the relevant geographic market is the United States. Respondents' economic expert, Dr. Harris, accepts the geographic market of sales to customers in the United States. Harris Report ¶ 17.

## III. THE EVIDENCE OF MARKET SHARES, CONCENTRATION AND DIRECT COMPETITION ESTABLISH A STRONG PRESUMPTION OF ANTICOMPETITIVE EFFECTS

In order to establish a violation of Section 7, Complaint counsel is required to show that anticompetitive effects are "probable," even if not a "certainty." *R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 150 (1995), *citing California v. American Stores*, 495 U.S. 271, 284, 110 S. Ct. 1853, 1861 (1990) ("[P]laintiff need only prove that the [acquisition's] effect *may be* substantially to lessen

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[13] PDM differentiate between the domestic and international LNG markets and identify separate competitors for each market. CBI is PDM EC's domestic competition for LNG tanks.

competition.") (emphasis in original). "Section 7 does not require proof that a merger or other acquisition [will] cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986).

CB&I's acquisition of PDM has led to very large concentration increases and has eliminated CB&I's most substantial and most successful competitor in each of the relevant markets. These factors make it highly likely that the acquisition will reduce competition.

### A. The Acquisition Greatly Increased Concentration in Highly Concentrated Markets

Because of the competitive risks they create, mergers that significantly increase market concentration to extremely high concentration levels are presumed to be unlawful. *Merger Guidelines* § 2.0. *See also Hospital Corp. of Am.*, 807 F.2d at 1389. Market concentration may be measured by determining the market shares of industry leaders or by calculating the Herfindahl-Hirschman Index ("HHI"). *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986); *FTC v. University Health, Inc.,* 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (HHI is the "most prominent method" of measuring market concentration); *Staples*, 970 F. Supp. at 1081-82; *FTC v. Cardinal Health, Inc.,* 12 F. Supp.2d 34, 53-54 (D.D.C. 1998); *Merger Guidelines* § 1.5.[14] A merger that results in an HHI over 1800 indicates a highly concentrated market; it is presumed that mergers producing an increase in the HHI of more than 100 points in such markets are likely to create or enhance market power or facilitate its exercise. *Merger Guidelines* § 1.51.

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[14] The HHI is calculated by summing the squares of the market shares of all firms in the market. *Merger Guidelines* § 1.5.

The first step in measuring market concentration is identifying the firms that participate in the relevant market. *Id*. at § 1.31. To be as inclusive as possible, Complaint counsel has included in our analysis all firms, whether foreign or domestic, that are identified by respondents as currently bidding for projects in the relevant markets. The second step is calculating market shares. *Id.* at § 1.4. Because sales of the relevant products are made infrequently, Complaint counsel has examined market shares not just for the last year, or even the last few years, but for a period of over twelve years, from 1990 to the time of the acquisition in early 2001.[15] *Accord id.* at § 1.41 ("[W]here individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time.").

Complaint counsel's approach to measuring market shares is different from that proposed by respondents' expert, who implies that even those firms which, although they have bid in the U.S., have *never* won a bid for a new contract for over ten years are equally "qualified" with CB&I to compete for new contracts, and therefore assigns to each such firm an equal market share. Harris Report ¶ 28. In the view of respondent's expert, therefore, the fact that CB&I and PDM have almost always prevailed over other bidders in seeking new contracts has virtually no relevance to analyzing market shares in this case. As we discuss in detail below, however, the only competition that CB&I now faces is from companies that have had very little success in the marketplace in securing contracts for a period of over a decade. Their failure to succeed has a great deal to do not only with how "qualified" those firms are to compete and what their market shares should therefore be, but also with the likely competitive effects of the acquisition.

[15] Firms that have had no sales over that period are accorded a 0% market share.

Even though other firms have tried to compete with CB&I and PDM for new contracts over the period covered by Complaint counsel's evidence, the fact is that in each of the relevant markets, *CB&I and PDM have each accounted for over of all sales made over the last 10 years.*[16] In LNG tanks and thermal vacuum chambers, these two firms have together accounted for all of the sales. Thus, although examining the market shares of these firms for only a short period of time would not be sufficient to take "an accurate measure of market dominance," because market shares could vary from year to year, the sustained high market shares of CB&I and PDM over such an extended period of time serves to demonstrate reliably the competitive significance of these two firms in the relevant markets.[17] *U.S. v. Baker Hughes*, 731 F. Supp. 3, 9 (D.D.C. 1990), *aff'd* 908 F.2d 981 (D.C. Cir. 1990).

**1. Concentration in LNG Tanks**

CB&I and PDM supplied all of the LNG tanks constructed in the U.S. since 1990. The acquisition increases the HHI, as measured by U.S. sales of LNG tanks, by , from to 10000.

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[16] In *Baker Hughes*, the Court of Appeals criticized the government for examining market shares only over a three-year period from 1986-1988 in a small market, where market shares were "volatile and shifting,"and easily skewed. 908 F.2d at 986. Measuring market share over a long period of time is also consistent with the importance that customers place on reputation and experience in these markets, as discussed *infra*. Competitors regularly present to customers experience lists referencing projects that were built as long as thirty years ago.

[17] Respondent's expert criticized Complaint counsel's choice of a cut-off date for market shares, claiming that if Complaint counsel had chosen as a cut-off date for measuring market shares, PDM would have a market share in the LNG tank market, CB&I would have , and there would be change in the HHI. (Harris Report ¶ 82a). This approach is exactly the type criticized in *Baker Hughes*, as it ignores the fact that, prior to the acquisition, CB&I and PDM were almost always the only two bidders on LNG tanks and won every LNG project in the U.S. since .

### 2. Concentration in LPG Tanks

CB&I and PDM erected out of the fourteen LPG tanks constructed in the U.S. since 1990. The acquisition increases the HHI, as measured by dollar sales of LPG tanks in the U.S., by , from to 8380. CX 1153 at Attachment D (Simpson).

### 3. Concentration in LIN/LOX/LAR Tanks

CB&I and PDM combined supplied about of the LIN/LOX/LAR tanks constructed in the U.S. since 1990. Graver, the only other substantial constructor of LIN/LOX/LAR tanks during a portion of that period, supplied approximately of the LIN/LOX/LAR tanks during the relevant period. However, after declaring bankruptcy during 2001 and liquidating its production facilities, Graver has exited the market. The other current suppliers, which together built the remaining of the LIN/LOX/LAR tanks constructed, are Matrix Services and American Tank & Vessel. The acquisition increases the HHI, as measured by dollar sales of LIN/LOX/LAR tanks in the U.S., by , from to 5845. *Id*. at Attachment F.

### 4. Concentration in Thermal Vacuum Chambers

CB&I and PDM supplied all of the thermal vacuum chambers constructed in the U.S. since 1990. PDM built one chamber for , while won a contract to construct a chamber for . The project . The acquisition the HHI, as measured by dollar amounts of winning bids for thermal vacuum chambers in the U.S., by , from to 10000. *Id*. at Attachment E.

### B. The Acquisition Eliminated CB&I's Most Substantial Competitor Among Differentiated Competitors

The high level of direct competition between CB&I and PDM heightens the competitive concerns associated with the large increases in concentration, for in markets where the products offered by firms are differentiated, mergers between firms that are particularly close competitors are much more likely to reduce competition. *Merger Guidelines* § 2.21. The Commission presumes that if the combined market shares of the merging firms reaches 35%, "a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Id.* at § 2.211. Here, not only do the combined market shares far exceed that level, but the continued success of CB&I and PDM in securing contracts in the relevant markets, over an extended period of time, makes it abundantly clear that CB&I and PDM were each other's most direct

As Dr. Simpson, Complaint counsel's expert economic witness, has described, most of the customers make sourcing decisions based on some type of competitive bidding process among potential suppliers. CX 1153 ¶ 31 (Simpson). The record of the firms selected as the winning bidders in these processes, for the period from 1990 to the time of the acquisition in early 2001 demonstrates that CB&I and PDM have been far and away the leading suppliers in the relevant markets.

- Seven LNG tanks were built in this period; CB&I built , valued at almost million, and PDM built , valued at almost million. *Id*. at Attachment C.

- 109 LN/LOX tanks were built in this period; CB&I built , valued in total at approximately million, and PDM built , valued in total at over million. Graver built , valued in total at almost million, Matrix built , valued in total at almost million, and ATV built , valued at over million. *Id*. at Attachment F. As discussed *supra* page 18, Graver has exited the market, and its assets have been liquidated.

- Twelve LPG tanks were built in this period; CB&I built , valued in total at over million, and PDM built , valued in total at almost million. Morse Tank built , valued at slightly over million, and ATV built , valued at . CX 1153, Attachment D (Simpson). CB&I acquired Morse Tank in December 2001.

- One thermal vacuum chamber was built in this period, and projects were contracted; CB&I prevailed in one of the projects, valued at approximately million, and PDM prevailed in the other, valued at approximately million.

Thus, except in rare circumstances, the only other firms that continue to have any market presence, however small, have simply been unable to compete viably against CB&I and PDM.

In each of the relevant markets, pricing is determined by the competition for individual projects. Depending on the competitive process that the customer uses, suppliers will have different levels of information about the competition for the project. No matter what the scenario, the presence of PDM as CB&I's closest competitor played a key role in CB&I's pricing decisions. Where CB&I knew that

PDM was bidding, it could make a decision on whether to try to beat PDM. Even in instances where CB&I may not have known who the other bidders were for a particular project, CB&I's assessment that PDM may have been bidding, and its experience in bidding against PDM would itself have been information that affected the pricing levels that CB&I relied upon in developing its own bid proposals. CB&I would have used this information to formulate a bid that would strike a balance between the price necessary to be competitive with the likely competition and the price that would generate the most attractive returns. As PDM would have been CB&I's closest competitor, it therefore would have been the firm that had the greatest impact on how CB&I bid even when CB&I did not know specifically who the other bidders were.

Thus, the competition between CB&I and PDM to secure new contracts benefitted customers in all of the relevant markets by serving to maintain pricing levels. Because PDM regularly offered pricing and terms either better than or at least comparable to CB&I, that competition required CB&I, in order to secure contracts for new projects, to develop proposals for customers that would be competitive with what it believed PDM would offer. For example, PDM was able to secure a contract to build a thermal vacuum chamber, only after its initial bid in response to a

head price war with PDM and CBI

[CB&I]

are in a very competitive situation and need to save every dollar

budget prices are always higher than PDM's, PDM always beats their budget price.

PDM, was the very

low bidder and met all of the technical requirements. In fact, prior to the acquisition, competition was so intense from PDM on LIN/LOX/LAR tanks that it caused CB&I to bid at margins for these projects.

Customers in each of the relevant markets found the competition between CB&I and PDM critical to determining the level of pricing. Customers that purchase thermal vacuum chambers

absent the competition between CB&I and PDM, would have been forced to pay much higher prices.

head-to-head price competition between CB&I and PDM

PDM would likely not have

decreased its price

Absent CBI's and PDM-EC's competition,

would have been forced to pay at least 50 percent more and to accept lower quality

materials and services. Further, the competition has spurred product

innovations in thermal vacuum chambers. intense competition between

CB&I/XL and PDM/PSI led to develop several thermal control innovations which will cut

the operating costs of its thermal vacuum chamber by .

that CB&I presented many innovative engineering solutions .

In LIN/LOX/LAR tanks, customers found PDM to be almost always more competitive on pricing than CB&I. In LPG tanks, also, PDM had typically quoted lower prices than CB&I. And in LNG tanks, CB&I and PDM fiercely competed for these projects.

Based on their experience in competing for projects for over 25 years in the construction of these specialized structures, CB&I and PDM recognized each other to be their most substantial competitor. CB&I PDM's *only* competitor for projects in the U.S. CBI is PDM EC's only competitor on domestic cryogenic, LNG, LPG, Ammonia

spheres and thermal vacuum projects. [18] PDM believed that CBI is PDM EC's major competitor considering all of the markets PDM EC serves CBI and PDM EC are often the only competitors for international and cryogenic storage contracts.

PDM is main competitor in turnkey LT&C market. When CB&I began assessing the PDM acquisition, of the acquisition described PDM as a formidable competitor to CB&I in LNG/LPG tanks and terminals, spheres and vacuum chambers. [19]

CB&I and PDM competed intensely with each other for new projects. likened the CB&I/PDM rivalry to the Crips vs. Bloods or the Jets vs. Sharks.

PDM had been a particular thorn in CB&I's side, for it had been able to obtain a cost advantage over CB&I and regularly set prices below CB&I's. PDM's lower costs forced CB&I to

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[18] The companies' business documents provide a highly reliable means to establish the high level of direct competition between CB&I and PDM. In *Coca-Cola Bottling*, for example, the Commission relied heavily on such evidence in concluding that an acquisition created unilateral effects:

> CCSW's business records reveal that CCSW viewed Mr. PiBB as the closest substitute to and a direct competitor of Dr. Pepper.

118 F.T.C. at 607.

[19] Western Hemisphere-CBI & PDM EC are two main players bid against each other a lot

reduce its own prices or risk losing business to PDM.

comparable competitors to CB&I and PDM, then as Complaint counsel's economic expert has shown, it would be virtually impossible, purely as a matter of probability, for customers to have repeatedly selected CB&I and PDM at the level that they did. Thus, because customers have almost always chosen not to do business with other firms, they have made it clear that CB&I and PDM provided their leading alternatives among the companies bidding to secure contracts for new projects. CX 1153 ¶ ¶ 75, 95, Attachments C, D (Simpson).

Since 1990, and until the merged CB&I and PDM

not one overseas firm has been successful in competing for new projects in any of the relevant markets.

In the cases where foreign firms have bid on U.S. projects in the relevant markets, their bids have been much higher than the bids of CB&I and PDM for both LNG projects[20] and other projects.[21]

[20] In 1994, for example, Memphis Light, Gas and Water put an LNG peak shaving plant, including a cryogenic storage tank, out for bid.

[21] When sought bids for a LIN/LOX tank project, submitted bids that were significantly higher than the bids submitted by CB&I and PDM.

When tried to partner with a U.S.

Over the same period since 1990, the domestic firms that constitute CB&I's competition today have also failed to capture any business in LNG tanks and thermal vacuum chambers. In total, these existing firms have captured only about percent of the total revenues from the different projects that have been awarded in LIN/LOX/LAR, and percent of the revenues from LPG tanks.

### 3. By Eliminating its Closest Competitor, the Acquisition Likely Increases CB&I's Market Power

It is the competition between CB&I and PDM that has served to maintain the level of pricing, and also has served to ensure a sharp and continuing emphasis on service and innovation. The record of competition between CB&I and PDM, and the success of these companies in winning contracts, therefore provides "information that directly reflects customers' actual preferences" for sourcing from either of those two rivals. *Donnelley*

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construction firm , its bids became even less competitive.

of Swedish Match's primary direct competitors."); *Staples*, 970 F. Supp. at 1083 ("The merger would

110 F.T.C. at 314 (post-acquisition HHIs, which were less than 1800, are "well above those that

created a

22

alternatives." *Coca-Cola Bottling*, 118 F.T.C. at 609.[23]

While other firms in the past have been uncompetitive with CB&I and PDM due to their higher pricing, any success that CB&I's competitors may have in the current environment demonstrates that since CB&I has eliminated PDM, which had been its closest competitor, *the only* remaining alternatives are higher-priced and less experienced firms.[24] The efforts by customers to maintain some alternative to CB&I should not, however, be mistaken for evidence that the competition that occurs today remains as intense as the competition that had existed between CB&I and PDM. Thus, Complaint counsel's expert, Dr. Simpson, has followed the reasoning of the Commission's decision in *Coca-Cola Bottling*, and has described how the continued competition from these consistently inferior alternatives reflects CB&I's increased market power. CX 1153 ¶ ¶ 35-38 (Simpson).

In particular, CB&I, after eliminating PDM, does not need to be as competitive as it had previously been in order to secure new contracts. Even if CB&I, in some cases, has imperfect information about its competitors for a particular piece of business, it will always know one key fact - that it has eliminated PDM as its key competitor. As such, it can even in those cases increase the

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

[24] *See also United States v. Eastman Kodak Co.*, 63 F.3d 95, 103 (2d Cir. 1995) ("[A] monopolist . . . always faces a highly elastic demand; its products are so overpriced that even inferior substitutes begin to look good to consumers."); *Pepsico, Inc. v. The Coca Cola Co.*, 114 F. Supp.2d 243, 257 (S.D.N.Y. 2000) ("[the] existence of significant substitution in the event of further price increases or even at the current price does not tell us whether the defendant already exercises significant market power.'" (quoting *Eastman Kodak Co. v. Image Tech. Serv. Inc.*, 504 U.S. 451, 471 (1991)).

pricing levels in its bid proposals to customers to reflect the important fact that the next-best proposal will not likely be as competitive as PDM's would have been. While customers may continue to seek to have an alternative bidder to CB&I, therefore, the fact is that when the competitive alternatives become less favorable than PDM had been, the terms of sale that customers are able to obtain also become less favorable. *Id.* Dr. Simpson cited the experience of one customer, , who awarded a LIN tank contract to , simply because that customer did not want to be held hostage by CB&I. if CB&I and PDM had continued to compete, he would have been less likely to award the bid to . *See id.* at ¶ 138 (Simpson)

Complaint counsel is not required to demonstrate that the acquisition has led to actual post-acquisition price increases. Rather, the Commission and courts are cautious in evaluating post-acquisition pricing evidence because respondents can, during the pendency of this proceeding too easily manipulate prices to avoid the appearance of the exercise of market power. "Post-acquisition evidence that is subject to manipulation by the party seeking to use it is entitled to little or no weight." *Hospital Corp. of Am.*, 807 F.2d at 1384.[25] However, the evidence of pricing that has occurred since the acquisition provides additional evidence of CB&I's market power. Prior to the acquisition, CB&I regularly included margins in its budget estimates for LNG peak shaving projects and lower margins of for the LNG tank portion of the project. Post-acquisition, however, CB&I has included margins in some of its budget

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

estimates both for LNG peak shaving projects and for LNG tanks.

(Simpson Rebuttal) (citing CB&I's increased margin for LNG project for

, and high priced quote on LNG project for . As described

by the Complaint counsel's economic expert, in addition, some customers in the relevant markets have

cited post-acquisition pricing increases by CB&I.

(Simpson) (citing testimony by and by representatives of

Respondents' expert has emphasized that in connection with

the only bidders approved to participate in the final bid

on the LNG tank were . However, that situation does not help Respondents' case, since

in this instance CB&I for LNG tanks, despite repeated requests

from the customer that it do so.

Because did not want to have the LNG tanks necessarily tied to the overall project manager,

it ultimately selected which agreed to seek

competitive bidders for the LNG tanks, as overall project manager.[26]

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[26]

When competitors expressed concerns about giving their bids to , an LNG tank competitor, designated as having sole responsibility for evaluating the LNG bids. Even after making this arrangement,

Ultimately, therefore, the choice that was forced on the customer by virtue of CB&I's decision not to bid certainly does not suggest that the customer, has been able to maintain the level of competition that would have existed but for the acquisition.

**B. Other Firms Will Continue to Provide Only Weak Competition to CB&I In Each of the Relevant Markets**

In order to rebut the strong presumption of anticompetitive effects, respondents must demonstrate that other firms will be sufficient to restore the competition that had existed between CB&I and PDM in each of the relevant markets alleged in the Complaint. However, the few marginal competitors, who, despite years of effort have gained only a small fraction of the sales of CB&I and PDM, do not have capability to "reposition" their product lines to replace PDM and maintain the level of competition that had existed prior to the acqusition. *Merger Guidelines* § 2.212. Even if other firms continue to bid against CB&I, as they have in the past-vIfcando nld be expectsudponllity bemar to

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CB&I did not submit a separate bid for the LNG tanks. By the time CB&I finally expressed some interest in bidding for the LNG tanks alone, had closed the bidding process. To date, the tank business has not yet been awarded.

[27] This case contrasts to the situation in *Donnelley*, where the Commission relied on evidence that because "the customers for whom the merging firms were first and second choices represent a minor portion of a proposed relevant market," the other firms "should be expected to reposition with alacrity." 120 F.T.C. at 198. The evidence in this case establishes that although other firms have bid against CB&I and PDM, it has been the rare occassion when they have succeeded. Unlike *Donnelley*, there is no track record of substantial and successful competition from other firms. Rather, the conclusion that the historical record suggests is that other firms will not likely provide as effective a constraint on

CB&I believes that "[p]rice, quality, reputation, safety record and timeliness of completion are the principal competitive factors within the industry." CX 1021 at 36. Based on these factors, CB&I is the most cost-effective potential supplier for customers in all of the relevant markets. It enjoys significant cost advantages over both foreign and domestic competitors, is a more experienced competitor which faces less market risk, and has a reputation among customers for providing reliable products on a timely basis. Other firms, therefore, simply cannot consistently compete effectively in the U.S. against CB&I. *See American Medical Int'l*, *Inc.*, 104 F.T.C. 1, 201 (1984) (because smaller hospitals did not have facilities equivalent to the combined company, and failed to provide "a full range of hospital services," the Commission concluded that "[a]s a result of the acquisition of the French hospital, AMI faces little or no competition in either market."). *See also Donnelley*, 120 F.T.C. at 195 ("In the context of localized competition, unilateral competitive effects may result from . . . a merger between rival sellers that have similar advantages in serving a particular group of buyers.").

**1. CB&I Enjoys Cost Advantages Over Other Firms**

CB&I enjoys significant cost advantages in building high-quality and reliable products over the competitors which now must be relied upon - instead of PDM - to provide a competitive alternative. Foreign competitors, such as Technigaz, Whessoe and TKK for LNG tanks, face significantly higher costs than either CB&I or PDM to compete for contracts in the U.S. because, unlike CB&I and PDM, they would need to rely extensively on more expensive subcontracting for construction services,

and for the fabrication of steel components.

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CB&I as PDM had provided.

[28] Subcontracting is more expensive because it adds to the number of companies which must earn an independent profit from a single project. Dr. Simpson referred to these added costs as "double marginalization." Subcontracting significant aspects of facility construction also increases the risk of error and the possibility of delay in the projects.

Industry participants recognize the importance of self-performing all aspects of project construction. It is for these reasons that these foreign firms - although quite competitive and successful in their home markets - have always been inferior competitive alternatives in the U.S.

Domestic competitors, such as , also face higher costs in the markets in which they attempt to compete, primarily LIN/LOX/LAR and LPG tanks. began bidding on LIN/LOX/LAR tanks in and since that time successfully constructed tanks for . However, has sold the fabrication facility it used to build these tanks, and its costs have increased significantly as it must subcontract fabrication work for these tanks. Since despite bidding on LIN/LOX/LAR projects in the U.S., has become a high priced bidder and has not won any contracts.

Furthermore, CB&I's successful completion of so many projects has provided it with the benefits of the learning curve inherent in its continuing experience in building tanks, which provides it

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[28] A construction team for an LNG tank, for example, would likely consist of people. For a foreign competitor, importing its own work force would likely be cost-prohibitive.

with an additional source of cost advantages over other firms in each of the relevant markets. In contrast to CB&I, fringe competitors have completed far fewer projects in the U.S., and simply have not had the opportunity to gain the experience that CB&I has had.

For example, like began bidding on LIN/LOX/LAR tanks in , but did not win its first contract until when it won a contract to construct a pair of LIN/LOX/LAR tanks for . With its limited experience in constructing LIN/LOX/LAR tanks, is simply not as adept in building these tanks as cost effectively as CB&I. Customers do not expect either to be able to replace PDM as a very effective competitor in LIN/LOX/LAR tanks.[29]

### 2. CB&I's Years of Experience Also Reduces its Market Risks and Enhances its Reputation With Customers

CB&I's years of experience in bidding on and completing projects also provides it with the ability to minimize the level of commercial risks for its customers' operations as well as its own operations. In order to limit the risk of financial (and potentially human) losses associated with product failure, customers in each of the relevant markets prefer to source from suppliers who have a track record of completing multiple projects that have operated successfully over many years. In thermal vacuum chambers, for example, a problem with the construction of the chamber can damage satellites worth hundreds of millions of dollars, or cause a satellite manufacturer to miss a delivery deadline, triggering expensive liquidated damages clauses.

[29] also states that some of its customers would not consider to be an acceptable alternative.

[30] Customers are typically testing satellites costing $50MM to $200MM in thermal vacuum chambers costing $5MM-$20MM. Therefore the choice of equipment and supplier is

completing projects on schedule.[33] All of these factors go directly to a firm's ability to manage its business in order to compete effectively to meet the needs of U.S. customers.[34]

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the resource commitment even to bid is high, and the competition strong.
mistakes in estimate (items missing), among the factors that can negatively affect a contract's profitability. Having built several LNG tanks in the United States, CB&I and PDM are not subject to the same bid estimation risk as a firm that lacked that experience.

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LNG facilities built in the U.S. have specific code requirements that are not necessarily applicable in foreign countries.
Customers are aware of the advantage that CB&I has over foreign competitors in the U.S. through its extensive experience in making FERC filings.

CBI brings unmatched experience in preparing the documents describing the facility that are necessary for permitting and/or filings for FERC authorization permits. Virtually all major LNG facilities in the United States (including Puerto Rico) that have required FERC submittals have been created by CB&I or its recent acquisition (PDM).
the permitting agencies, most especially FERC, know and respect.

33

34 For example, delays in gaining regulatory approval can be extremely costly for customers,
as can be delays in construction schedules in general.

The quickest way to get on the gas industry's manure list and never build another USA peak shaving facility is not to have an LNG peak shaving facility ready for the winter weather it is supposed to handle. There is absolutely no acceptable excuse for missing a peak shaving season and causing a gas company to pay demand penalties.

Because of the financial risks associated with LNG projects, owners often demand large liquidated damages provisions for late project completion.
liquidated damages provisions of per day for late completion of the first tank of an LNG project .
Other LNG projects and thermal vacuum chambers require performance bonds.
performance bond required for LNG peak shaving project .

The fringe competitors in the U.S., who do not have the experience and track record of CB&I or PDM, simply cannot be as effective competitors as those companies had been.[35] Indeed, recognizing how important its experience is to potential customers, CB&I makes sure that potential customers are fully aware of its vast experience, by maintaining and distributing lists of projects that it has successfully completed.[36]

### 3. New Joint Ventures Will Not Maintain the Competition that Had Existed Prior to the Acquisition

Respondent's expert, Dr. Barry Harris, has stated that some overseas firms have established joint ventures, with domestic construction partners, to pursue LNG projects in the U.S. Harris Report ¶ ¶ 50-53. What Dr. Harris fails to note is that even these joint ventures would surely operate at a higher cost than either CB&I or PDM. Unlike CB&I and PDM, the domestic partners that the foreign LNG firms have chosen for field-erection have never even constructed an LNG tank.

As a result, these firms would not have the benefits that CB&I and PDM have from their extended experience in completing many LNG tanks over time, experience which, due to "learning curve" effects, translates directly into better operating procedures and lower costs.

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[35] Moreover, a foreign competitor that entered into the U.S. by subcontracting portions of its operations could not itself perform all phases of project construction, which would adversely affect its reputation. CB&I predominantly self-erects its products with crews, employing traveling craftsmen and supplemented by local laborers. Prior to the acquisition, PDM also self-performed most aspects of tank construction.

[36] the company has constructed low temperature and cryogenic terminal facilities and low temperature and cryogenic field erected tanks.

large thermal vacuum chambers in the near future. Because of CB&I's acquisition of PDM, fear that CB&I will be able to increase its price by at least million to million for the next thermal vacuum chamber purchases.

[37] Industry participants do not believe that other firms will be able to replace the lost competition in a way that would maintain prices in any of the relevant markets.[38]

### D. The Acquisition Increases the Ability of CB&I to Tie the Sale of its LNG Tanks to Additional Products and Services

CB&I has historically tied the sale of its LNG tanks for both LNG import terminals and LNG

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[37]

[38] some of it customers would not consider to be an acceptable alternative. For example, an employee with LNG responsibilities at wrote:

While could provide a reasonable argument that CB&I has competition in the US, especially in the conventional metal tank business, the reality for today is that in the US, they are the leading company in the LNG Tank business and the other competitors will need to demonstrate their capabilities in the market.

peak shaving plants to turn-key construction, as the Project Manager, of the rest of the facility. CB&I typically will not bid its LNG tanks separately because it does not want to sponsor competition from other potential Project Managers,

In a conversation inquiring as to the possibility of purchasing an LNG tank from CB&I,

need for a U.S. tank supplier damaged its competitiveness:

CB&I responded to

would not offer tank-only pricing to competitors for LNG facility inquiries which we are also building turn-key.

Similarly, which bid the process portion of the project in conjunction with approached CB&I about having it build tanks, principally for LNG import facilities. After meeting with

executives, CB&I's business development manager

Many customers, prefer competitive bidding of LNG and LPG projects.

These customers believe that purchasing tanks through a Project Manager in a lump sum turn-key contract increases their costs.

By acquiring its closest competitor in the U.S., CB&I has increased its ability to convince customers to go with lump sum, turn-key contracts, because the next best choice is a foreign LNG tank constructor that has never built an LNG tank in the U.S.

**E. New Entry Would Not Be Sufficient to Prevent Anticompetitive Effects**

The analysis of the conditions of entry by potential new competitors into a relevant market is part of a determination of the likely anticompetitive effects of any acquisition, because if entry is unlikely, the merged entity can raise prices without attracting new competition. *Merger Guidelines* § 3.0. *See Staples*, 970 F.Supp. at 1086. In assessing the conditions of entry, the ultimate issue is whether entry is so effective that it "would likely avert anticompetitive effects from [the] acquisition." *Baker Hughes*, 908 F.2d at 989.

The *Merger Guidelines* articulate the conditions under which entry would likely avert anticompetitive pricing. Entry is considered "easy" if it would be "timely, likely and sufficient in its magnitude, character and scope to deter or counteract the [anti]competitive effects" of a proposed transaction. *Merger Guidelines* § 3.0, *quoted with approval*, *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995), *cert. denied*, 516 U.S. 987, 116 S. Ct. 515 (1995). Entry is timely if a new entrant would have a significant market impact within t

[39] CB&I's and PDM's industrial and water divisions engage in extensive sharing of metal fabrication facilities, field erection equipment,

produce relevant products cannot be relied upon to provide entry that would be sufficient to restore competition.

Furthermore, it would take many years for a new competitor to have enough of a significant market impact to restore competition. Simply to bid on and construct a single tank, such as an LNG tank, would take two years or more.

Developing the in-house design, engineering and construction capabilities to bid would itself require close to two years.[42] Although began bidding on LIN/LOX/LAR tanks in

[43] it is only now, years later, in the process of constructing its first LIN/LOX/LAR tanks. Moreover, because of the significant reputational barriers that exist in the industrial tank market, a new entrant would have to successfully design, bid and build a tank before it could exert any competitive influence on the market. *See United States v. United Tote , Inc.*, 768 F. Supp. 1064, 1068 (D. Del. 1991); *see also United States v. Franklin Electric*, 130 F. Supp.2d 1025, 1031-32 (W.D. Wisc. 2000). To develop the level of experience to replace the competition eliminated by the acquisition, a firm would need to build several such tanks over a period of many years.

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[42] More experienced suppliers like CB&I need only eight months to construct a LIN/LOX/LAR tank.

[43] In submitted a bid of for LIN/LOX/LAR tanks to .

historically was a profitable company.[45]

The company's EBITDA increased from to in the years between 1994 and 1999. Similarly, PDM EC historically was a profitable division within PDM. The division's EBIT increased from to in the years between 1995 and 1999.

2000 was a poor year for both PDM and CB&I, due to a cyclical downturn in spending by petrochemical companies and other factors. PDM had EBITDA of .

However, as late as February 7, 2001, the date CB&I acquired PDM's EC and Water divisions, PDM projected that the EC division would in 2001 earn EBIT of . Following the acquisition, CB&I's

PDM was a successful company in the engineering construction business.

they had capabilities, they performed services that were acceptable to those people that were behind those services, and they made money, and they were attractive to their investors. After looking at CB&I's and PDM's engineering construction businesses in detail, that the companies' cost structures are quite similar.

Moreover, CB&I cannot meet its requirement to show that CB&I is the only available purchaser for PDM's EC and Water Divisions. *Citizen Publishing Co. v. United States*, 394 U.S.

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[45] Nonetheless, management endeavored to divide up the company and sell off its divisions for estate planning purposes.

the division to another entity prior to reaching a deal with CB&I.

called PDM, and

informed him of his interest in purchasing PDM. told

that PDM already had a buyer and would call him if that deal fell through.

Thus, PDM did not take the steps necessary to find an alternative purchaser to CB&I. PDM's investment banker could recall sending its offering memorandum to only one company - CB&I. By the time the offering memorandum was completed, PDM had already entered into a letter of intent with CB&I or was close enough to that point that it didn't make sense to send it out to other people.[46]

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46

By way of contrast, contacted or planned to contact strategic buyers for PDM's Steel division and strategic buyers for PDM's Bridge division.[47]

never initiated the process of contacting any other potential buyers for the PDM EC division, because they had already reached what they believed was a good deal with CB&I.

One reason that not even contact any other potential purchasers was the high price that CB&I was willing to pay. CB&I initially agreed to pay for the EC and Water divisions, at the of preliminary estimates.

it is doubtful that PDM could achieve a value exceeding in an alternative transaction. Alternative buyers would unlikely pay a premium price for the EC division because they would face continued tough competition from CB&I.

Need informed buyer willing to fund war with CB&I

As late as February 7, 2001, the date CB&I acquired PDM's EC division and Water divisions, concluded that on a

[47] Thus, as of August 18, 2000, over ten parties had received the Confidential Memorandum for Steel Distribution and groups had received Bridge Division books.

discounted cash flow basis, the value of PDM's EC and Water divisions was

million to , and that PDM would prefer to sell both Divisions in one deal.

Having concluded that sale to a competitor would yield a higher price than sale to an alternative buyer, there were few potential buyers who competed with PDM in both water and EC and that few competitors had adequate resources to buy both divisions. Further, it would likely be costly and difficult to separate the two Divisions, PDM's EC and Water Divisions could be marketed independently in stand-alone transactions.

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[48] The only evidence supporting that proposition is PDM's An acquisition by CB&I of PDM's Water Division, including assets necessary for the competitive operation of PDM EC, would have raised antitrust concerns similar to those raised by the acquisition of the combined divisions. See *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34, 45-50 (D.D.C. 2002).

[49]

[50] the amount of money that can be realized through a liquidation is difficult to predict. estimated the liquidation value of the EC division at between and , a range of about .

[51] Less than two months before trial, CB&I "discovered" an additional in annual recurring savings from best practices.

[52] CB&I's calculation, for example, that it will save annually from continuing to use is incorrect. Post-acquisition, CB&I adopted its own

CB&I has not taken any steps to verify that these estimated savings have actually been realized. [53] Respondents have claimed "purchasing" savings of . However, respondents have been unable to verify virtually any of that asserted savings to be specific to the acquisition.

Even though the acquisition was consummated over 18 months ago, providing ample time to verify actual cost savings, respondents' expert economic witness, Dr. Harris, did not make any claim in his report that the acquisition would either generate efficiencies, or that these efficiencies would be sufficient to maintain the level of competition that had existed prior to the acquisition.[54]

If respondents assert an "efficiencies defense" to the acquisition, therefore, Complaint counsel intends to show that the asserted efficiencies cannot outweigh the likely anticompetitive effects of the acquisition.

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methodology. As CB&I was already building its waterspheroids pre-acquisition using this methodology, CB&I cannot apply these savings to tanks that it would have built absent the acquisition. Yet CB&I applied these savings to CB&I and PDM's combined market share of percent, even though **PDM** controlled a minority stake–only –in that market. Similar gross miscalculations are reflected in CB&I's estimated savings in the manufacture of claims in savings from the adoption of PDM's practice of manufacturing based upon CB&I and PDM's combined market share, yet PDM controlled percent of the market and CB&I's share was only percent).

[53] At times, CB&I's numbers are simply over-inflated. In its efficiencies for its water products, CB&I claims that the implementation of PDM's practices will save CB&I approximately per tank, . This number is rounded up from the actual calculated figure of a difference of almost per tank.

[54] Respondents have made no effort, in the context of this proceeding, to update or to verify that CB&I has achieved the efficiency claims that they made in that report.

## VI. REMEDY

To remedy the anticompetitive effects of the acquisition in any of the relevant markets alleged in the Complaint, the Notice of Contemplated Relief provides that the Commission may order such relief against respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order to cease and desist from any action to effect the acquisition or continued holding by CB&I of any assets or businesses of PDM;

2. Rescission of the acquisition;

3. Reestablishment by CB&I of two distinct and separate, viable and competing businesses, one of which shall be divested by CB&I, engaged in the design, engineering, construction and sale of the lines of commerce alleged in the complaint, including all improvements to existing products and new products developed by CB&I or PDM, and in such other businesses as necessary to ensure each of their viability and competitiveness in the lines of commerce alleged in the complaint and each possessed, including through divestiture, replacement and reconstitution by CB&I, of all assets, tangible and intangible, including but not limited to all intellectual property, knowhow, trademarks, trade names, research and development, customer contracts, and personnel, including but not limited to management, sales, design, engineering, estimation, fabrication and construction personnel, and such other arrangements as necessary or useful in restoring viable competition in the lines of commerce alleged in the complaint;

4. Such other or additional relief as is necessary to ensure the creation of one or more viable, competitive independent entities to compete against CB&I in the manufacture and sale of

the Commission's Complaint. Divestiture has long been standard relief to undo the anticompetitive effects of an unlawful merger. *See id.* at 327-31; *Seeburg Corp. v. FTC*, 425 F.2d 124, 129 (6th Cir. 1970), *cert. denied*, 400 U.S. 866, 91 S. Ct 104 (1970); *RSR Corp.*, 88 F.T.C. 800 (1976); *American Medical Int'l*, 104 F.T.C. at 222-223; *HCA*, 106 F.T.C. at 513.

Effective relief on occasion must go beyond ordering simple divestiture of the acquired assets.

> To achieve [the] positive goal of restoration and rehabilitation [of competition], it may not be sufficient to prohibit merely the particular acts or practices found to be unlawful, or to undo merely the particular unlawful transactions that have been consummated. It may be necessary and proper to forbid acts lawful in themselves . . . or to compel affirmative acts of compliance; and if so, the Commission has the power and the duty to provide such relief . . . [T]he Commission might order such divestiture of other assets as is required to recreate a viable concern having approximately the competitive strength of the acquired firm at the time of the acquisition; in addition, . . . the Commission could require that the acquired firm be recreated in such form as would reflect the firm's probable growth.

*Ekco Products Co.*, 65 F.T.C. 1163, 1216-17 (1964) (emphasis added); *Kaiser Aluminum & Chem. Corp.*, 93 F.T.C. 764, 850 (1979), *vacated and remanded on other grounds*, 652 F.2d 1324 (7th Cir. 1981); *Retail Credit Co.*, 92 F.T.C. 1, 161 (1978), *rev'd on other grounds, sub nom. Equifax, Inc. v. FTC*, 618 F.2d 63 (9th Cir. 1980); *see Goodrich*, 110 F.T.C. at 344-45.

Remedies may also require the seller to undertake certain acts in order to reestablish a viable entity, especially when the selling firm knew of a probable challenge to the legality of a merger. *See Goodrich*, 110 F.T.C. at 346, n.264; *Dean Foods Co.*, 70 F.T.C. 1146, 1293-94 (1966), *modified as to order*, 71 F.T.C. 731 (1967). *See also United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227-31 (9th Cir. 1978), *cert. denied*, 439 U.S. 959, 99 S. Ct 362 (1978) (sellers may be included in Section 7 remedies.) Commission orders have also utilized rescission as a remedy where divestiture alone was deemed ineffective. *See, e.g.*, *Brunswick Corp.*, 99 F.T.C. 411

(1982); *Continental Oil Co.*, 72 F.T.C. 850 (1967); *Phillips Petroleum Co.*, 70 F.T.C. 456 (1966). *See Coke/Los Angeles*, 575 F.2d at 227.

Relief in this matter must assure that the divested assets are reestablished as operating and viable competitive entities in these markets. *See Goodrich*, 110 F.T.C. at 344-45; *Kaiser Aluminum,* 93 F.T.C. at 856-58 (1979) (final order, requiring respondent to divest plants, and provide technical

competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act in the relevant markets. In order to restore the competition that was eliminated by the acquisition, CB&I must now be required to divest all of the assets it acquired from PDM, and take other steps necessary to reestablish two distinct and separate, viable and competing businesses in the relevant markets, including purchasing assets, rehiring personnel, and other taking steps to reconstitute the PDM EC and Water divisions as they existed prior to February 7, 2001.

Dated: Washington, D.C.
October 21, 2002

Respectfully submitted,


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**COMPLAINT COUNSEL'S POSITION ON EACH ELEMENT OF THE CASE**

Paragraph 42 of the Complaint in this matter charges Chicago Bridge & Iron Company N.V. with consummating an illegal acquisition in violation of Section 7 of the Clayton Act, 15. U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. "Section 7 does not require proof that a merger or other acquisition [will] cause higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986). To prevail in a Section 7 case, the government must establish, by a preponderance of the evidence, (1) a product market, (2) a geographic market, and (3) a transaction that will lead to undue concentration in the relevant markets. By establishing these three elements, the government establishes a presumption of illegality. *FTC v. Swedish Match*, 151 F. Supp.2d 151, 156-166 (D.D.C. 2000) . *See also Merger Guidelines* § 1.51. The burden of producing evidence to rebut the presumption then shifts to the defendant. *Swedish Match*, 151 F. Supp. at 167. The defendant may attempt to rebut the government's case by presenting evidence on a number of factors, including entry and efficiencies, sufficient to show that the acquisition is not likely substantially to lessen competition. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 985-86 (D.C. Cir. 1990). If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); *Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

**PRODUCT MARKET**

*The product markets are (i) LNG tanks, (ii) LNG import terminals, (iii) LNG peak shaving plants, (iv) LPG tanks, (v) LIN/LOX/LAR tanks, and (vi) thermal vacuum chambers.*

**Legal Basis:** The relevant product market includes those products for which "sellers, if unified by a hypothetical cartel or merger, could raise prices significantly above the competitive level." *Coca-Cola Bottling Company of the Southwest*, 118 F.T.C. 452, 540 (1994), *quoting H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Thus, "[a] market is the set of sellers to which a set of buyers can turn for supplies *at existing or slightly higher prices*." *FTC v. Elders Grain,* 868 F.2d 901, 907 (7th Cir. 1989) (emphasis added). The market "must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n.31, 73 S. Ct. 872, 882 n.31 (1953). The *Merger Guidelines* define the relevant product market by taking the smallest possible group of competing products and asking whether a "hypothetical monopolist over that group of products would profitably impose at least a 'small but significant and nontransitory' [price] increase." *Merger Guidelines* §1.11. If customers of the relevant products would not reduce consumption of the relevant products by an amount sufficient to make the price increase unprofitable, the market is established. *Merger Guidelines* § 1.11.

**Factual Basis:**

1. In his expert report, respondents' expert witness, Dr. Barry Harris, "accepted the product markets defined in the complaint." Harris Report ¶ 16.

2. There are no economic alternatives for the relevant products. Shop-manufactured LNG tanks, LPG tanks, LIN/LOX/LAR tanks, and thermal vacuum chambers are not a substitute for field-erected versions of the relevant products.

Other products would not be economic substitutes even in the event of a significant increase in price in the relevant product markets.

3. Customers in each of the relevant markets project that they will continue to make substantial purchasers of relevant products over the next several years. Consequently, each market will generate substantial amounts of commerce.

**THE PRESUMPTION OF ANTICOMPETITIVE EFFECTS**

*CB&I's acquisition of PDM EC caused an undue increase in concentration in the relevant markets, establishing a presumption of illegality.*

**Legal Basis:** Because of the competitive risks they create, mergers that significantly increase market concentration are presumptively unlawful. *See Hospital Corp. of Am.*, 807 F.2d at 1389; *Merger Guidelines* § 1.51. Market concentration may be measured by determining the market shares of industry leaders or by calculating the Herfindahl-Hirschman Index ("HHI"). *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986); *FTC v. University Health, Inc.* 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (HHI is the "most prominent method" of measuring market concentration); *FTC v. Staples*, 970 F. Supp. 1066, 1081-82 (D.D.C. 1997); *Cardinal Health*, 12 F. Supp.2d 34, 53-54 (D.D.C. 1997); *Merger Guidelines* § 1.5.[55] A merger that results in an HHI over 1800 indicates a highly concentrated market; it is presumed that mergers producing an increase in the HHI of more than 100 points in such markets are likely to create or enhance market power or facilitate its exercise. *Merger Guidelines* § 1.51. It is appropriate to examine market shares over an extended period of time "where individual sales are large and infrequent so that annual data may be unrepresentative." *Id.* at § 1.41 *See U.S. v. Baker Hughes*, 731 F. Supp. 3, 17 (D.D.C. 1990), *aff'd* 908 F. 2d. 981 (D.C. Cir. 1990).

**Factual Basis:**

1. Complaint counsel has measured market shares by examining the values of contracts firms have secured for a period of over a decade. CX 1153 at ¶ ¶ 60-65.

2. The acquisition increases the HHI in the U.S. market for LNG tanks by from to 10000. *Id.* at ¶ 60.

3. The acquisition increases the HHI in the U.S. market for LPG tanks by from to 8380. *Id.* at ¶ 61.

4. The acquisition increases the HHI in the U.S. market for LIN/LOX/LAR tanks by from to 5845. *Id.* at ¶ 65.

5. The acquisition increases the HHI in the U.S. market for thermal vacuum chambers by from to 10000. *Id.* at ¶ 62.

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[55] The HHI is calculated by summing the squares of the market shares of all firms in the market. *Merger Guidelines* § 1.5.

*The acquisition eliminated competition between the two closest competitors in each of the relevant markets.*

**Legal Basis:** The Commission presumes that if the combined market shares of the merging firms reaches 35%, then "a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Merger Guidelines* § 2.211. Furthermore, the success of CB&I and PDM in winning contracts provides "information that directly reflects customers' actual preferences" for sourcing from either of those two rivals. *R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, 196 (1995). Respondents' internal documents also provide probative evidence that CB&I and PDM recognized each other to be their closest competitor.

**Factual Basis:**

1. CB&I and PDM accounted for the vast majority of sales in each of the relevant products, for a period of over a decade.

2. CB&I and PDM recognized each other to be their closest competitor in the U.S. markets for the relevant products.

3. Bids submitted by other firms for U.S. projects in the past have not been competitive with bids from CB&I and PDM.

4. The acquisition eliminated intense, head-to-head competition between CB&I and PDM in the relevant products.

*The evidence establishes a strong presumption of anticompetitive effects.*

**Legal Basis:** Two factors contribute to establish a strong presumption of anticompetitive effects in this case. First, high market shares traditionally establish a strong presumption that the acquisition would lessen competition and therefore is illegal under Section 7. *Coca-Cola Bottling,* 118 F.T.C. 452, 586 (1994) (high HHIs "create a strong presumption of possible anticompetitive effects); *Goodrich*, 110 F.T.C. 207, 314 (1988) (post-acquisition HHI's which were less than 1800 are "well above those that created a presumption of illegality" and "create a relatively strong presumption of anticompetitive effects."). Second, in markets where the products offered by firms are differentiated, mergers between firms that are particularly close competitors are much more likely to reduce competition. *Merger Guidelines* § 2.21. "The closeness of the merging firms' products has a critical effect on the profitability of a post-merger price increase because the more closely substitutable are two

products (relative to their substitutability with other products), the greater is the degree to which substitution away from each of the products will be 'internalized' by the merged firm." *Donnelley*, 120 F.T.C. at 196. Thus, CB&I's "market power relative to other market participants increases as its share becomes disproportionately larger than the shares of other market participants." *Coca-Cola Bottling*, 118 F.T.C. at 587.

**ANTICOMPETITIVE EFFECTS OF THE ACQUISITION**

*Respondents are required to present substantial evidence in order to rebut the strong presumption of anticompetitive effects in each of the relevant markets.*

**Legal Basis:** Once Complaint counsel establishes a prima facie case through market share evidence, the burden shifts to respondents to provide evidence to rebut the presumption of anticompetitive effects. *B.F. Goodrich*, 110 F.T.C. at 308. "To meet their burden, the [respondents] must show that the market-share statistics . . . 'give an inaccurate prediction of the proposed acquisition's probable effect on competition.'" *Cardinal Health,* 12 F. Supp.2d at 54 (quoting *Staples*, 970 F. Supp. at 1083). The stronger the market share evidence, the stronger the evidence must be in order to rebut the presumption. *Coca-Cola Bottling,* 118 F.T.C. at 586 (high HHI's "create a strong presumption of possible anticompetitive effects; thus, relatively strong evidence from other factors will be necessary to rebut that presumption."); *Baker Hughes*, 908 F.2d. at 991 ("The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.").

**Factual Basis:**

1. Complaint counsel has established a strong prima facie case in each of the relevant markets: LNG; LPG; LIN/LOX/LAR and thermal vacuum chambers.

*The acquisition has had direct anticompetitive effects.*

**Legal Basis:** By eliminating PDM as a competitive alternative to CB&I, the acquisition has put customers "in the position of having to switch to less desirable alternatives." *Coca-Cola Bottling*, 118 F.T.C. at 609. *See Merger Guidelines* § 2.21 n. 21 ("A merger involving the first and second lowest-cost sellers could cause prices to rise to the constraining level of the next lowest-cost seller.").

**Factual Basis:**

1. Prior to the acquisition, CB&I regularly included margins in its budget estimates for LNG projects. Post-acquisition, however, CB&I is including margins in some of its budget estimates for LNG projects. *See* CX 1559 ¶ ¶ 53, 47 (Simpson Rebuttal) (citing CB&I's increased margin for and high priced quote

2. Some customers in the relevant markets have cited post-acquisition pricing increases by CB&I. CX 1153 ¶ ¶ 120, 140 (Simpson) (citing testimony by

).

*Fringe competitors will not maintain or restore the competition that existed between CB&I and PDM.*

**Legal Basis:** Anticompetitive effects are unlikely only if "rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines." *Merger Guidelines* § 2.212. Therefore, in order to demonstrate that the presence of fringe competitors would be sufficient to restore the lost competition, respondents must demonstrate that the fringe competitors will develop

many tanks, over a period of years, to reach the level of experience of CB&I and PDM.

**RESPONDENTS' DEFENSES**

*Respondents' failing division argument fails factual and legal scrutiny.*

**Legal Basis:** In order to establish a failing firm or failing division defense, respondents must establish that the firm (or division) was on the brink of financial failure and that there were no alternative purchasers available that would have been less anticompetitive. *Merger Guidelines* §§ 5.1-5.2.

**Factual Basis:**

1. PDM's EC Division was not a failing division. Up until the time of the acquisition, it had been consistently profitable. The division had only in the year the acquisition agreement was signed, due to a downturn in the markets CB&I and PDM served, profitability in the near future.

2. Even if the division met the criteria of a failing division, PDM never made any effort to find a purchaser other than CB&I. Other companies would likely have had interest. Immediately prior to the CB&I acquisition, the called PDM, and informed him of his interest in purchasing PDM.

**Legal Basis:**

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 | ) | **CONFIDENTIAL: SUBJECT TO PROTECTIVE ORDER** |
| a corporation, | ) | |
| | ) | Docket No. 9300 |
| and | ) | |
| PITT-DES MOINES, INC. | ) | |
| a corporation. | ) | |

The following persons should be notified of the Federal Trade Commission's intent to disclose, in a final decision, the confidential material contained in Complaint Counsel's Pretrial Brief:

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**Page Redacted**

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the public version of Complaint counsel's Pretrial Brief to be delivered by hand to

The Honorable D. Michael Chappell
Federal Trade Commission
H-104
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