

PUBLIC RECORD



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,)
)
and)
)
PITT-DES MOINES, INC.,)
)
a corporation.)
_____)

Docket No. 9300

PRETRIAL BRIEF OF RESPONDENT CHICAGO BRIDGE & IRON
AS CORRECTED ON OCTOBER 29, 2002

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This case involves radically different views of post-acquisition market conditions for four

two years since CB&I's acquisition of Pitt-Des Moines, Inc.'s ("PDM") EC and Water Divisions ("Acquisition") closed, thus proving that these markets are vibrantly competitive today, and that the Acquisition has not substantially lessened competition. In contrast, Complaint Counsel looks

alleged post-Acquisition conduct selectively chosen from the discovery record. Complaint Counsel's perspective necessarily ignores the impact of the recent substantial and sufficient entry. CB&I's competitors have successfully entered three of the four relevant markets since February 2001, and the fourth market, thermal vacuum chambers, has been dormant for many years because it is overbuilt. The law is clear that this evidence of sufficient entry rebuts

908 F.2d 981 (D.C. Cir. 1990); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

Dependents also intend to show that PDM EC's assets were going to be liquidated absent the Acquisition, and that there were merger-specific and cognizable efficiencies gained from the Acquisition. Further, Dependents will demonstrate that Complaint Counsel relies on expert

testimony that is based on misapplied economic theories and false and misleading testimony.

I. SUMMARY OF THE ARGUMENT

Complaint Counsel's Trial Brief (referred to herein as "FTC Br.") is more remarkable for what it does not say. Complaint Counsel dismisses new LNG entry with the shorthand term

peak-shaving facilities. Nor does Complaint Counsel mention that this market, which was
dominant until recently, is a small portion of a competitive global market. The new entrants are

experience working for U.S.-based petrochemical companies on LNG projects abroad. These
LNG tank and facility competitors represent some of the world's largest construction companies

no longer divided solely between two U.S. competitors, as it was before the Acquisition. Recent

example, Dynegy Industrial Services (Dynegy) recently accepted [redacted] for the largest
LNG terminal in the U.S. Similarly, just last week,

1

Sufficient entry has also occurred in the U.S. market for LIN/LOX tanks. Complaint
Counsel fails to mention that, despite the low demand for this product given an overbuilt

recent entrant, American Tank & Vessel (AT&V), the third-largest tank company in the U.S.

Given AT&V's current 75% post-Acquisition market share, coupled with customer satisfaction
with AT&V's pricing and quality, Complaint Counsel's characterization of AT&V as a "fringe"

competitor is false.

¹ Further, Complaint Counsel fails to note that these five multinational construction giants are viewed as qualified, capable and cost-competitive by the vast majority of the customer base.

CB&I has been awarded but a single LPG contract in the last eight years. In fact, sales in this market are so rare that competition in the LPG tank market is legally insignificant.

demand for IVCs in the past five years and CB&I has not even built a IVC in nearly 20 years.

CB&I is prepared to address any competitive concerns in this dormant market with a

results in a change of zero in three of the four identified markets. Five years is a more than

been another purchaser ignores the professional percipient judgments of PDM's management and its investment banker, as well as the unique facts under which PDM-EC was being sold: the largest shareholder -- PDM's founding family -- had ordered all five divisions of the company

PDM was awarded in a year when it was losing \$20 million, which was more than its budget

as compared to Complaint Counsel's theoretical academic argument

Notwithstanding the fact that sufficient competition exists in each of the four markets and

sense for a number of reasons, such as the fact that CB&I has lost almost every competitive bid

testified that a breakup of CB&I into two competitors would lessen and not increase competition by creating two smaller and weaker competitors in largely dormant markets. Further, a breakup would reverse the many and substantial efficiencies created by the Acquisition.

II. BACKGROUND

A. Transaction Background

In June 2000, PDM's Board of Directors retained an investment banker to sell the company's five divisions. The Board's mandate was to obtain cash and not stock in these transactions. In September 2000, CB&I signed a letter of intent to buy the assets of the Water and Engineered Construction ("EC") divisions of PDM for over \$93 million.³ On September 12, 2000, CB&I made its USD filing. On October 10, 2000, the USD waiting period expired. Nevertheless, one week later, the FTC began an inquiry.

At the request of the FTC, Respondents voluntarily delayed the closing of the transaction for more than three months. Facing possible liquidation of the PDM-EC Division by the seller if CB&I delayed any further, CB&I closed the transaction on February 7, 2001, four months after the waiting period expired. The FTC could have initiated its inquiry at that time, but did not

investigation began, the FTC filed its Complaint.

³ CB&I initially agreed to pay \$93 million for the assets of PDM's EC and Water Divisions. Due to PDM-EC's poor performance in 2000, CB&I renegotiated the price to approximately \$80 million.

The assets that are the subject of this Complaint are a fraction of the total value of the Acquisition, representing about \$17 million of the total \$83 million deal. In addition, the

challenged assets. CB&I had generated no revenues from the LNG and TVC markets over the previous five years.

B. Factual Background

At issue in this case are: 1) liquefied natural gas ("LNG") storage tanks which store natural gas at a very low temperature which allows it to be stored in liquid form; 2) cryogenic liquefied nitrogen, oxygen and argon ("LIN/LOX") tanks which store these gases in liquid form; 3) liquefied petroleum gas ("LPG") tanks, which store gases such as butane, propane and heterodimethylsiloxane ("HDMS") at low temperatures in liquid form and 4) tanks ("TVCs"), which are used to test satellites.

The design for all of the relevant products has changed little in the last 50 years and is similar to the design of flat-bottom industrial storage tanks that are used to store chemicals and

same or similar materials. Every company that constructs basic flat-bottom storage tanks has a fabrication shop and personnel as well as migratory field crews who are paid hourly and who assemble the fabricated pieces of the customer's location using compressed air equipment

plants. LNG import terminals cost hundreds of millions of dollars to construct, with the LNG tanks constituting approximately one-third of the total cost. An LNG import terminal can be

smaller facility using smaller LNG tanks.

have been constructed since 1996. Between 1990 and 1996, only two other peak-shaving facilities were constructed and no import terminals were built. Since the Acquisition, customers

multinational companies involved in the oil, gas and chemical industry, such as Dynege, Shell, El Paso Corporation ("El Paso"), and others. These customers have significant experience purchasing these tanks in the world market from a wide variety of international competitors, including CB&I. A photo of a typical LNG tank is attached.

LIN/LOX tanks are used by air separation companies to separate air into its various components of oxygen, nitrogen and argon and then to sell the component gases to end users.

LIN/LOX tank is attached.

gases such as propane. LPG tanks are not complex structures, and companies who make basic flat-bottom tanks can construct them. There is little demand for field-erected LPG tanks in the U.S. Since 1998, only four LPG tanks have been awarded in the U.S. A photo of a typical LPG

and PDM constructed both TVCs constructed in the U.S. between 1990 and 2001. Since 1998,

no TVCs have been constructed. A photo of a typical TVC is attached.

III. THE GOVERNING LEGAL STANDARDS FOR PERMANENT INJUNCTIONS UNDER SECTION 7 OF THE CLAYTON ACT PLACE A HEAVY BURDEN ON COMPLAINT COUNSEL.

To succeed on a Section 7 claim (15 U.S.C. Section 18), Complaint Counsel has the

burden to demonstrate that the challenged acquisition may be anticompetitively

supported by the defendant. See, e.g., *New York v. Kraft Gen. Foods, Inc.*, 206 F.

United States v. Baker Hughes, Inc., 908 F.2d 981, 982 (D.C. Cir. 1990), *United States v.*

M.D.M. Inc., 207 F. Supp. 79, 81 (D. Colo. 1975) (noting that the "burden to demonstrate a

substantial lessening of competition or a tendency to create a monopoly lies . . . with the

plaintiff, a burden shifting can occur with the burden of persuasion always ultimately residing

with Complaint Counsel. The D.C. Circuit, in *Baker Hughes*, 908 F.2d at 982-83, has succinctly

summarized the relevant standard:

"[I]f . . ."

⁴ Although the Complaint challenges the Acquisition under both Section 7 of the Clayton Act and Section 5 of the

For additional regulatory information, see the following:

If the defendant rebuts the presumption, the burden of producing additional evidence of anticompetitive effects shifts to the government and merges with the ultimate burden of persuasion,

however, evidence of a high market share does not require a district court to conclude that there

Complaint Counsel must show more than some impact on competition -- it, instead, "has

substantial anticompetitive effects." Kraft, 926 F. Supp. at 358 (quoting United States v.

90 ("Probability of the proscribed evil is required.").

Historical concentration statistics do not by themselves satisfy Complaint Counsel's burden of proving "demonstrable and substantial" anticompetitive effects. As Justice Thomas

v. Waste Mgmt., Inc., 743 F.2d 976, 982 (2d Cir. 1984) (holding that under General Dynamics,

is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any of the likely anticompetitive effects of the proposed merger. . . . A court's finding that there exists ease of entry into the relevant product market can be sufficient to offset the government's *prima facie* case of anticompetitiveness."⁵

Fig. 6: Entry is established by evidence of timely, frequent, sufficient entry.⁶ See

approximately two years. See Ninth Circuit at 666. Entry is likely and sufficient if ease of

effects from . . . the acquisition. . . "). Moreover, in Baker Hughes, the D.C. Circuit specifically rejected the Government's argument that a defendant must show "quick and effective" entry to rebut the Government's *prima facie* case. Id. at 987-88. The court also recognized that

given market," and that "a firm that never enters a given market can nevertheless exert

⁵ Further, Complaint Counsel, in attempting to justify selecting an HHI measuring 12 years of demand, grossly distorted Section 1.41 of the Merger Guidelines. . . . In Section 1.41, the Guidelines state that "annual data may be unrepresentative, the Agency may measure market shares over a longer period of time." (FTC Br. at 14.) The operative terms in Section 1.41 are found in the phrase where "annual data may be unrepresentative." (emphasis added). CD&L does not dispute that for many individual cases the use of annual data of the HHI in exactly another direction to include 12 years of demand. CD&L, in including six years of demand in its suggested HHI measuring period of 1996 through 2001, respectfully suggests that six years of competition is more than ample to measure competition in any relevant market.

⁶ The Merger Guidelines, cited by Complaint Counsel, are not binding upon the court. F.T.C. v. PPG Indus., 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); Olin Corp. v. F.T.C., 986 F.2d 1295 (9th Cir. 1993).

antitrust purposes, that market would be 087,088 (emphasis added). In other words, "if

barriers to entry are insignificant, the threat of entry can stimulate competition in a concentrated market regardless whether entry ever occurs." Id. at 988. See also F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 581 (1967). The court also noted that "failed entry in the past does not imply failed entry in the future: if prices reach supracompetitive levels, a company that has failed to enter in the past could become competitive." Baker Hughes, 908 F.2d at 989 n.9, see generally

substantial, and sufficient entry has occurred since the merger closed.

Nonetheless, none of post-acquisition data conclusively establishes the sufficiency of entry, which Complaint Counsel essentially ignores. Post-acquisition evidence is dispositive. See, e.g., Baker Hughes, 908 F.2d at 989 (rejecting Government's merger challenge because two new companies had recently entered the U.S. drilling rig market, winning one contract apiece "and were poised for future expansion"); Svufv. 903 F.2d at 662-66 (rejecting Government's

500 (1974) (noting that post-acquisition evidence tending to diminish the probability of impact of anticompetitive effects might be considered in a Section 7 case); United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400, 1421-22 (S.D. Iowa 1991); United States v.

anticompetitive effect is judged at the time of trial, which makes the consideration of post-Acquisition evidence critical. Complaint Counsel, however, suggests that post-Acquisition

evidence should be disregarded here, because it is the result of CB&I's manipulation in light of

Acquisition market share. Complaint Counsel's position makes no sense, however, where the

without the questioned acquisition. LEKRO-VERU CORP. v. VERU CO., 600 F.2d 255, 270 (7th Cir. 1981). There will be no evidence, and there can be no argument, that entry by competitors

THE RELEVANT MARKETS.

Respondents intend to show that entry has occurred in each of the relevant markets, the result of which prevents CB&I from successfully imposing a price increase. Despite defining four relevant markets, Complaint Counsel greatly confuses the entry issue by lumping all of the markets together. As some of the entrants are different in each market, each entrant must be

⁷ Hospital Corp of Am. v. F.T.C., 807 F.2d 1381 (7th Cir. 1986), is not contrary. There, the Seventh Circuit states

A. Timely, Substantial And Sufficient Entry Has Occurred In The LNG Market.

the Acquisition.⁸ In order to make this ancient data relevant to post-Acquisition conditions,

Recent events directly contradict this contention. The evidence will show that five large

based customers. Further, many of these companies have established joint ventures with domestic tank manufacturers to more quickly gain a foothold into the U.S. market.

company is experienced and formidable. Each foreign entrant is actively pursuing work in the U.S. LNG market for two reasons. First, they have identified an increased demand for LNG tanks and facilities in the U.S. Second, they believe that the Acquisition created an opportunity

In pursuing these opportunities, each of these competitors has invested hundreds of

significant additional capital in pursuing U.S. LNG projects.

⁸ Specifically, Complaint Counsel stresses that Respondents supplied all of the LNG tanks in the U.S. during this

More importantly, those customers who are currently planning LNG projects in the

United States, many of whom have significant experience with these competitors from LNG

competitive prices.

Complaint Counsel repeatedly argues that the LNG geographic market is limited to the

United States. However, the Commission has found that the market is broader than the United States.

Complaint Counsel's argument is critical to understanding competition for LNG tanks and facilities in the U.S.

Due to recent changes in domestic energy markets, U.S. customers have, for the first time

For example, Dynegy is currently planning to build the largest LNG import terminal in the U.S. in Hackberry, Louisiana. A variety of other customers are currently in the process of planning LNG storage and peak-shaving facilities.

founders into the U.S. market.

Specifically, six different companies and joint ventures have entered the U.S. market since the

Acquisition Complaint Group fail to recognize that these entities are missing international

market.

(a) Technigaz/Zachry

French-based SN Technigaz ("Technigaz"), a subsidiary of Bouygues Offshore, and now Saipan, is one of the world's leading suppliers of liquefied gas facilities.

Technigaz has vast experience designing and constructing LNG tanks and LNG import terminals

Zachry is one of the largest, most respected construction companies in the U.S.

The Technigaz/Zachry joint venture has been hotly pursuing several LNG opportunities in the U.S. and Mexico. For instance, Technigaz/Zachry

in submitting a bid proposal to

In addition, Technigaz has submitted budgetary pricing to

a and to

In addition, the joint venture has made sales presentations to a

number of North American LNG customers, including

LNG customers and consultants in the U.S. agree with the assessment that

TKK/AT&V is likely to successfully build LNG tanks on a competitive basis in the U.S.

(b) TKK/AT&V

TKK has been a leading world builder of LNG tanks and facilities. TKK possesses unparalleled experience in the construction of double- and triple-skinned LNG tanks and has built LNG tanks in many parts of the world including, for example, Greece, Iran, and the Caribbean. TKK

entered the U.S. LNG market in late 2001. To aid in this effort, it forged a joint venture with AT&V, a leading U.S. tank builder with experience in building cryogenic tanks.

The TKK/AT&V joint venture has been energetically pursuing LNG opportunities in the U.S. and elsewhere in North America.

The joint venture also for the LNG tanks associated with the and the evidence will show that it is one of the

two

The joint venture has also

submitted formal bids and/or budgetary pricing on several other U.S. LNG projects.

In addition, representatives of the joint venture have made numerous sales calls to other U.S. customers and have prepared formal marketing materials.

Specifically, believes that
TKK/AT&V's bid on the -- met all
technical expectations and was within expected price range.

Further, is confident that the joint venture has the reputation necessary to construct the
is capable of doing the necessary fabrication and field erection work on the
and will be able to manage the actual construction of the LNG tanks for the

(c) Skanska/Whessoe

Skanska AB ("Skanska") is the largest construction group in the world. Its U.S.
subsidiary is the fourth largest contractor in the U.S.

worldwide. Skanska recently acquired Whessoe International ("Whessoe"), a

international LNG tank construction business.

Whessoe has constructed LNG

facilities in the U.S. and other countries such as India, Trinidad and Algeria.

There is no doubt that Skanska/Whessoe has successfully entered the U.S. LNG market.

LNG customers in the U.S. agree that Skanska/Whessoe is likely to build quality LNG facilities at a competitive price. Many customers have commented on their favorable view of Skanska/Whessoe's reputation in this regard.

Those who have evaluated Skanska/Whessoe's prices have found them to be competitive. Dynegy chose Skanska/Whessoe as the winner of the bid contest for the EPC of the

evaluating a provided by Skanska/Whessoe, found that it has within

(d) Daewoo/S&B

Daewoo has become the dominant contractor in the design and construction of LNG terminals in Korea, the world's largest importer of LNG. Daewoo entered the U.S.

This joint venture has begun to aggressively compete for LNG work in the U.S. Earlier this year, the joint venture made efforts to bid to

It is currently pursuing an LNG import terminal for in

Further, Daewoo/S&B was recently retained by

to prepare preliminary tank designs and engineering in connection

capability to build these tanks, and will consider it for future LNG work.

9

⁹ approached after prequalified its bidders for the LNG tanks. Although did not accept a bid from it did not do so because it already had enough bidders. not because it questioned the abilities

(e) Tractebel

Tractebel SA ("Tractebel"), a large Belgian company, has entered the U.S. LNG market

have had negotiations about
based on confidence in ability to

In addition, Tractebel recently bid on an LNG import terminal

In light of is selling the land and development
plans for this project. is attempting to buy and
with an eye on establishing itself in the U.S. market.

(f) MHI

Mitsubishi Heavy Industries ("MHI"), a Japanese conglomerate, is poised to enter the
U.S. LNG tank and facility market, having built 36 large LNG storage tanks in diverse
international locales. MHI has a prominent presence in the LNG market

and is discussing work in the U.S. with

Moreover, customers believe that MHI has the capability to construct similar projects in
the U.S. at a competitive price.

that these customers uniformly believe that the entry of foreign competition in this market is of a high quality and provides a sufficient level of competition. This evidence of successful entry is

926 F. Supp. 321, 351 (S.D.N.Y. 1995) ("Plaintiff offered no evidence that retailers [primary customers of ready-to-eat cereal] object to, or have been harmed by, the Acquisition," and the two largest customers testified in support of merger).¹⁰ The evidence will show that U.S.

bids. Evidence of specific examples of current, successful post-merger competition essentially obliterate Complaint Counsel's LNG case. This evidence is dispositive:¹¹

(a) Dynege

This year, Dynege awarded an EPC contract to Skanska/Whessoe for the -- an import terminal worth between million.

The facility will contain three full-containment LNG tanks.

As part of its search for an EPC contractor, Dynege engaged in

¹⁰ See also *F.T.C. v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 94-95 (N.D. Ill. 1981) ("A key factor to consider in investigation, June 14, 2002 (found at www.ftc.gov/speeches/omer/schenmanabanyebar.pdf) (visited October 26,

¹¹ Complaint Counsel asserts that all of the LNG tanks in the U.S. are single-containment

Dynergy interviewed

including

Dynergy eventually selected Skanska/Whessoe -- identified as a "fringe

Project."

After selecting Skanska/Whessoe as its EPC contractor, Dynergy began the process of bidding out the LNG tank portion of this project, which Skanska would supervise. To this end,

Dynergy investigated and disqualified different bidders

Dynergy asked all bidders to submit lump-sum turnkey bids for the construction of the LNG tanks for this project.¹⁵

Dynergy received bids from

expectations, and were within Dynergy's expected price range.

¹⁵ Complaint Counsel asserts that "Exhibit 1000 and until the merged CD&I and BDM failed to bid on D

markets." This statement is false, as Skanska was awarded the EPC job for Dynergy.

As a result of this bid process, Skanska was awarded the EPC job for Dynergy.

just the opposite is the case. The fact that Dynergy did not have to accede to terms proves its lack of market power. See, e.g., *Syufy*, 903 F.2d at 670 (rejecting a merger challenge in part because of post-acquisition evidence that the one time Syufy tried

Although [redacted] had not submitted a bid for the LNG tanks during this process, it later
Dynegy and [redacted] Dynegy

[redacted]
Dynegy's

willingness to entrust the [redacted] Hackberry Project (the largest ever built in the U.S.) to
these [redacted] dispositive of the quality of existing competition for LNG tanks in
the U.S.¹⁶

(b)

17

¹⁶ Complaint Counsel argues that Dynegy did not let [redacted] This
argument assumes Dynegy is irrational, since Dynegy could have saved [redacted] if Complaint Counsel's view

[redacted]
17

(c)

18

(d) **Cheniere**

Cheniere, along with other partners, is developing a state-of-the-art,

LNG import terminal which will export

Cheniere is currently in the process of

obtaining FERC approval for this project, and plans to solicit final firm price bids in

18

[REDACTED]
identified by Complaint Counsel. In December of 2001, Cheniere hired [REDACTED] to

[REDACTED] graduate engineering and design work on its LNG project.

In the summer of 2002, Cheniere hired [REDACTED] assist it in preparing its
[REDACTED] EPC contract for building detailed LNG tank design and other technical
support. When Cheniere solicits formal bids for the EPC contract on

this job, Cheniere plans to consider

Importantly,

with respect to the U.S LNG market, Cheniere is confident that

(e) Yankee Gas

[REDACTED]
Connecticut.

The Waterbury

facility will include a two billion cubic foot LNG tank.

The

cost of the Waterbury facility is

[REDACTED]
Yankee Gas has entered the market of CNG facilities in [REDACTED] and

In addition, Yankee Gas has

[REDACTED]
While Yankee Gas has not yet reached the point of securing a final EPC contract for

to bid on the EPC contract for this project.

19

In addition, it appears that some of these foreign companies may have a specific competitive advantage to CB&I on this project. Local safety requirements may require

to build an double-containment LNG tank.

has experience constructing

tanks, but has never built such tanks

If such a tank is required, may not qualify to submit a bid.

(f)

20

19

also believes that local union labor will physically erect the tank, managed by

20

25

(g) El Paso

El Paso is a leading provider of natural gas services in North America, is currently
California, Mexico; (2) the Altamira terminal in Altamira, Mexico; and (3) the Bahamas terminal
on Grand Bahamas Island. El Paso corporate website at

For the Altamira project, El Paso has pre-qualified
including

Each of these companies submitted bids for the LNG tanks, and are "still in the running for
the Rosarito job"

In short, El Paso is investing over in the above facilities. It is permitting these
companies to bid on these jobs and expects that they can perform the job if successful, whether
or not they are located inside or outside the U.S

El Paso does not believe that the Acquisition of PDM by CR&I will

²¹ This type of evidence is in stark contrast to evidence cited by Complaint Counsel. In claiming that "customers can

(h)

22

(i) CMS

Finally, CMS has entered into an EPC agreement with

Prior

market entrant -- has been awarded three out of the four competitively bid

22

²³ LIN/LOX storage tanks are constructed in conjunction with plants known as air separation facilities. An air separation facility liquefies air by cooling it to several hundred degrees below Fahrenheit, and then distilling the air into its component parts. The end-result is the production or distillation of industrial gases

component parts, then it may require a field-erected LIN/LOX storage tank.

Construction

LIN/LOX jobs since the Acquisition.²⁴

Given AT&V's 75% post-Acquisition market share, Complaint Counsel's reliance on historical pre-merger evidence is inapposite and misleading. In addition to AT&V, two other

bid on these projects.

Chattanooga Boiler and Tank

Customers believe that these companies are qualified and sufficient in number to provide

1. The LIN/LOX Tank Market Is Insignificant Because Demand For LIN/LOX Tanks Is Extremely Low.

Demand for field-erected LIN/LOX tanks is very low due to excess capacity of oxygen and nitrogen production in the U.S.

In fact, this market is suffering the "most extended and lowest drop in business" in recent memory.

Due to excess capacity, traditional purchasers of LIN/LOX tanks are rarely in the market for new tanks or plants.²⁵

²⁴ Complaint Counsel includes as part of this product market, among other things, liquid helium spheres and liquid helium

them. Third, Respondents will present customer testimony demonstrating that the acquisition has not caused any harm. Fourth, and finally, these products are legally insignificant, as none have been built in the U.S. since 1996.

²⁵ For example, Graver Manufacturing went out of business due to an overall lack of demand in this tank market.

2. There Has Been Substantial And Sufficient Entry In The LIN/LOX/LAR Market.

Complaint Counsel dismisses CB&I's LIN/LOX competitors as "fringe firms."

In fact, these companies are strong competitors in the U.S. market for LIN/LOX tanks, so strong that CB&I has lost most of the post-Acquisition business in this market. This fact demonstrates that the Acquisition did not lessen competition.²⁶

(a) AT&V

~~AT&V is the third largest tank builder in the U.S. A recent customer~~

has described AT&V's performance as "exceptional."

Within months of the Acquisition, AT&V won its first LIN/LOX tank bid, a two-tank project. [redacted] was pleased with the price AT&V offered, because it was lower than the amount budgeted for the project.

~~AT&V has completed the project and was very pleased with AT&V's~~
performance on this job. In fact, [redacted] subsequently awarded AT&V another LIN/LOX tank in just this month.

Other purchasers of LIN/LOX tanks believe that AT&V can effectively compete in this market. Based in part on a positive reference from [redacted] pre-qualified AT&V for a LIN/LOX tank. [redacted] AT&V was the eventual winner of that competitively bid job, beating out [redacted]

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~~26. In 2002, [redacted] contracted with [redacted] for the construction of a LIN tank in [redacted]. In [redacted] entered into a [redacted] In [redacted] exchange for [redacted]. The agreement was extended [redacted] to [redacted] through [redacted]. When [redacted] assumed the role of [redacted] in the agreement. [redacted] As a result of [redacted]~~

²⁷ In 2002, [redacted] contracted with [redacted] for the construction of a LIN tank in [redacted]. In [redacted] entered into a [redacted] In [redacted] exchange for [redacted]. The agreement was extended [redacted] to [redacted] through [redacted]. When [redacted] assumed the role of [redacted] in the agreement. [redacted] As a result of [redacted]

has also requested LIN/LOX for a proposed

in AT&V

provided the received by for this project.

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(b) Matrix

Matrix Service Company ("Matrix") is the second-largest tank builder in the U.S. Matrix entered the LIN/LOX market in 1998. Between 1998 and 2000, Matrix won (and successfully completed) LIN/LOX tank jobs for In 2000, Matrix won (and successfully completed) a competitively bid LIN/LOX job for . Matrix won these contracts even though it bid against more experienced competitors, such as

Matrix can engineer, fabricate, and construct any type of LIN/LOX tank that a customer may request. Matrix continues to actively pursue this type of work, and has for various LIN/LOX projects for

believes that the LIN/LOX tank market remains extremely competitive.

(c) CBT

the

Since the beginning requested the project from being

(including a former Graver LIN/LOX tank builder) and has obtained substantial amounts of equipment from Graver. CBT plans to use this material and personnel to expand its presence in this market.

CBT has been actively submitting formal bids and budget pricing for LIN/LOX tanks.

CBT has submitted for Further, CBT has been pre-qualified by as a supplier of LIN/LOX tanks.

3. Recent LIN/LOX Projects Demonstrate Timely, Substantial and Sufficient Competition that Rebut Complaint Counsel's Case

The evidence will show that entry of the so-called "fringe firms" has created intense competition sufficient to constrain prices. The preponderance of customers, sophisticated players in the industrial gas field, believe that the Acquisition has not affected prices for LIN/LOX tanks. For example, does not believe that prices for these tanks have increased, and is satisfied with the current level of competition. Other

has created opportunities for them in this market, and that the market is extremely competitive.

Five specific examples of post-Acquisition activity in this market demonstrate that the Acquisition has not lessened competition in any way:

²⁸ In light of this evidence, it is remarkable that Complaint Counsel could assert that CBT's competitors are unable

First, competitively bid LIN/LOX tanks during

[REDACTED] selected [REDACTED]

so satisfied with AT&V's performance that it has given AT&V additional LIN/LOX work and

[REDACTED] was satisfied with the price it paid for this project

lowered its final bid to ²⁹ [REDACTED]. Despite this steep price cut, [REDACTED] was unsuccessful -- [REDACTED] awarded this project to AT&V.³⁰

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Third, also in 2002, [REDACTED] signed a letter of intent with [REDACTED] to construct a LIN tank in

[REDACTED] believed that the [REDACTED] from that job would save costs on the [REDACTED]

²⁹ [REDACTED] Joint General agrees that it will take steps to restore intense competition in this market

considered to be anticompetitive.

³⁰ [REDACTED] Joint General agrees that [REDACTED] will take steps to restore intense competition in this market

³¹ [REDACTED] Joint General agrees that [REDACTED] will take steps to restore intense competition in this market

Fourth, [redacted] solicited pricing for a LIN/LOX tank project in [redacted] in mid- [redacted] solicited budget pricing from [redacted] initially internally priced the [redacted] utilizing a profit margin [redacted] but ultimately provided a firm fixed price bid for the project at a [redacted] in response to competitive [redacted] pressures.

[redacted] awarded that project to [redacted] in March [redacted]. Based on its analysis of pricing from recent projects [redacted] was satisfied with the price it paid for this tank [redacted]

[redacted] is currently contemplating the purchase of a field erected LNG tank for a facility in [redacted] will competitively bid the contract [redacted]

[redacted] bidder will win the [redacted]

C. Timely, Substantial and Sufficient Entry Has Occurred In The LPG Market.

1. Although Demand For LPG Tanks Is Low, Significant Competition Exists.

Since 1999, there have been four LPG projects sold in the U.S.

[redacted] Of these four, AT&V has won three of the projects, including two in 2001 [redacted]

There is no evidence that the merger substantially lessened competition.³²

[redacted] different tank in any of the markets he defines. It is curious that he considers contracts for ammonia tanks in this instance. Furthermore, he apparently never considered whether other types of tanks were also similar to LPG tanks and thus whether there was a good reason for including them in the analysis as there supposedly is for ammonia tanks. Thus, Dr. Simpson's analysis of the rates of success in bids for LPG and ammonia tanks is based on data that are not outdated but arbitrarily selected.

2. There Has Been Substantial and Sufficient Entry in the LPG Market.

Three companies in the U.S. are already in the market for LPG tanks, and several others are capable of entry. First, AT&V has successfully bid on and completed three different LPG tank projects for

These customers have been pleased with AT&V's work, and AT&V plans to pursue this type of work in the future.

The fact that AT&V has taken such a large share of the post-Acquisition market is dispositive. See Syufy, 903 F.2d at 667-68.

Second, Matrix is a viable competitor in this market. Matrix has built LPG tanks in the past, and is respected by customers such as

Two former PDM employees, both project managers, now work for Matrix.

They possess experience and knowledge related to

In fact, CBT has built a variety of API 650 storage tanks, API 620 storage tanks, and ASME pressure vessels. CBT has also built ambient petroleum gas storage tanks for clients such as

LPG tanks are, in many ways, similar to these structures,

In addition to these three competitors, numerous other tank manufacturers in the U.S. can make LPG tanks. Any builder capable of constructing an API 620 or API 650 storage tank has the capability to build LPG tanks.

Further, foreign

companies can construct these tanks in the U.S. and are actively seeking this work.

U.S. customers, many of whom are foreign-owned, would consider a foreign contractor for an LPG project.

~~Current LPG Customers Recognize The Presence Of Sufficient Dom~~

increases. For example, believes that competition among CB&I, AT&V, and Matrix alone is sufficient to prevent price increases and further competition would enter the market if competition slackened.

from smaller tank manufacturers.

Two examples illustrate fierce competition in this market. In 2000, purchased an LPG tank for its facility in and

awarded the contract to AT&V because it had the and could competently handle the job. AT&V's price was so competitive that it

Second, most tank construction companies can compete with CB&I on LPG projects,

addition to Morse and bid on the project. Texaco ultimately selected Morse as the lowest bid and because Morse met all the other requirements.

major problems, and Texaco was satisfied with the performance, the price and the quality

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The Thermal Vacuum Chamber Market Is De Minimis/Sufficient
of large thermal vacuum chambers ("TVCs") in the U.S. there is currently no demand for TVCs

Remarkably, Complaint Counsel fails to note that CB&I has not built a TVC since 1984, and that there has only been one constructed since 1992 (in 1997 by PDM). Under the facts of this case,

³³ The weakness of Complaint Counsel's case regarding LPG tanks is evident from the argument set forth in its Trial Brief. Unlike Respondents, who have cited evidence that all small

has no relevant knowledge in this area. Further, Complaint Counsel ignores the testimony of customers or

Complaint Counsel's historical sales data show that CB&I has not constructed a single TVC since 1984, when it exited the market.

CB&I's exit left PDM as the only competitor for field-erected TVCs in the U.S. from 1984 until 1997.

CB&I attempted to re-enter the TVC market in 1997, but failed to build any XL systems (XL), but has not built a field-erected TVC since its entry.

CB&I has subsequently sold XL, returning it to its pre-Acquisition capability level. Given the dormant market, the change in the HHI for field-erected TVCs as a result of the CB&I merger is zero, which means Complaint Counsel cannot establish a statistical *prima facie* case.

35

The satellite industry has excess capacity in its existing TVCs.

Most satellite manufacturers already have one or more of these chambers, which have

Only two field-erected TVCs have been built in the U.S. since

field-erected TVCs obsolete.

36

proof of technical expertise

VI had some capability in the medical industry

Smaller shop-erected TVCs -- which CB&I does not make -- should be adequate to test satellites

in the future

36

industry and the miniaturization of satellites, will ultimately cause the number of TVC suppliers

in the TVC market.

2. Competition Exists If Customers Choose To Utilize It

Moreover, the evidence will show that Howard Fabrication has entered the TVC market.

Although Howard's prior experience is primarily with smaller shop-erected projects, it entered the field-erected TVC market in 2001 by forming a consortium of industry participants called IMCO/Howard.

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IMCO/Howard entered

the market after Howard had received a bid request

This consortium is as qualified to build field-erected TVCs as CB&I because its

³⁶ The line between field-erected and shop-erected chambers is blurred. Many companies delineate this distinction by-chamber size. For example, one prominent competitor in the industry believes that shop-erected TVCs are those that are less than 15 feet in diameter, and the field-erected chambers are larger than that in weight, diameter, or

whole.

Many companies are able to field-

erect larger TVC including Metair

The steps taken is the design

is not really a new entrant to the market.

Likewise, fabricating market.

also testified that XL Systems and are currently Thus, entry has occurred in the TVC

Furthermore, the main customers for field-erected TVCs are large companies such as Boeing, Northrup Grumman (which just acquired TRW), Raytheon and Lockheed Martin.

These companies have the financial resources to sponsor a new entrant. For

such a structure before.

V. OTHER FACTORS SHOW THAT THE ACQUISITION HAS NOT SUBSTANTIALLY LESSENED COMPETITION IN ANY RELEVANT MARKET.

Two additional factors demonstrate that the Acquisition has not substantially lessened competition. First, the evidence will show that the PDM-EC Division would have been

other alternative buyers were available. Respondents respectfully submit that these facts satisfy

1993), which is a variation of the failing firm defense. Second, the Acquisition generated

evidence will show that these efficiencies are merger specific and would not be realized by any other buyer.

The Acquisition of PDM's EC Division would not result in the liquidation of PDM's EC Division.

The evidence will show that, absent the Acquisition, PDM's EC Division assets would have been liquidated. The evidence will also show that Complaint Counsel's argument is largely an academic one that fails to account for actual market conditions and realities. Accordingly, CB&I's Acquisition did not substantially lessen competition.

In 2000, PDM's major (30%) shareholder decided to explore various ways of converting its PDM stock to cash. PDM's major shareholder initially explored various options, including selling the PDM stock to a private equity firm, but ultimately decided to sell the PDM stock to a public company.

fact.

Tanner and PDM management concluded that selling the EC and Water Divisions

Further, at the time PDM's board committed to sell the assets, the PDM-EC Division's profitability had dropped more than 18.3% from 1999 to 2000, resulting in a loss that was initially estimated to be \$9.0 million. In March

Tanner and PDM's management determined that, because of these losses, it was unlikely

that another purchaser would acquire the EC and Water Divisions. In December 2000, at a time when it looked like the CB&I deal might fall apart because of a disagreement over commercial terms, Tanner and PDM management went as far as to draw up a plan of liquidation for the EC Division. Similarly, a February 2001 analysis

found and a liquidation of the business may be the most effective resolution."

According to Tanner, PDM's estimated liquidation value was between \$14 and \$31 million; CB&I paid an estimated \$17 million for the

The evidence will also show that no other purchasers were interested and/or able to purchase PDM's EC assets. See *U.S. v. M.P.M. Inc.*, 397 F. Supp. 78, 102 (D. Colo. 1975) (finding "failing company" defense established where, *inter alia*, there was no other prospective purchaser for the entity at issue). As such, Respondents urge this Court to recognize that the purchase of these assets did not substantially lessen competition.

First, the evidence will show foreign companies were not interested in purchasing the EC Division's assets and made no inquiry to suggest such an interest.

Second, no financial investor was interested because "it would have been a very difficult and

The only passing interest in the EC Division came from [redacted] was not a viable purchaser because it was only interested in purchasing PDM's EC Division, a plan that was contrary to the wishes of PDM and the advice of its consultants.³⁸ It is

Based on its financial statements, PDM's professional investment banker determined that [redacted] could have at best offered insufficient consideration in the [redacted]

³⁸ only interest in PDM focused on the two fabrication facilities associated with PDM's Water Division. In order to accommodate [redacted] as a purchaser, PDM would have had to liquidate its Water Division. This would have been nonsensical, given that PDM's Water Division was the only asset that had value as a going concern.

stock, which was insufficient to meet the liquidity goals of PDM's major shareholder.

(emphasis added) (quoting John E. Kwoka, Jr. & Frederick R. Warren-Boulton, Efficiencies,

(1980)).

that PDM's EC Division lost \$30 million in a short period of time and had no chance for a successful reorganization, both because business was not likely to improve and because PDM

its EC assets would have been liquidated if the Acquisition had not been completed. That decision is far from self-serving as it was reached two months before closing at a time when management viewed the CB&I deal as shaky. PDM's management had a duty to maximize revenue from selling the EC assets (and the investment banker, paid on commission, had a similar incentive), and they determined that liquidation was the way to accomplish that goal. Thus, there is no factual dispute that the assets of PDM's EC Division would have been

was the only available buyer.

The failure of the Government's prima facie case is that

first, the proponent of the acquisition must show that the company
to be acquired is in imminent danger of failure. Second, the failure

D. D. (S. I. 1980) I. 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991

as proposed by PDM would have continued to operate its EC Division (D. T. 1991-1992)

also FTC v. Great Lakes Chem. Corp., 528 F. Supp. 84, 87 (N.D. Ill. 1981) ("The competitive weakness of one of the two merging parties goes to the heart of the Government's statistical *prima facie* case and warrants a finding that no substantial lessening of competition is likely to occur in any market without reaching the issues of geographic and product markets.").³⁹ In sum,

PDM EC's poor financial condition in the years prior to the Acquisition and its imminent

substantially lessen competition.

B. The Acquisition Generated Merger-Specific And Cognizable Efficiencies.

The evidence will show that the Acquisition has generated merger-specific and cognizable efficiencies, and that these efficiencies have resulted in lower costs to consumers and

³⁹ See also U.S. v. International Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977) (acquired firm's "weakness as a competitor" was "precisely the kind of information into which the Supreme Court in recent cases has mandated an inquiry").

improved CB&I's ability to compete in the world market for cryogenic tanks.

Merger-specific efficiencies are defined as those unlikely to be accomplished in the absence of either the proposed merger or another means during a comparable time frame. They must be verified, and not automatically accepted as a result of efficiency reductions in output or prices. Merger Guidelines § 4.0. See also FTC v. H&M, 240 F.3d 706, 721 n.20 (D.C. Cir. 2001).

Respondents will prove the existence of millions of dollars in recurring annual savings (compared to the \$84 million purchase for the PDM-EC and Water Divisions' assets).

administrative functions, as well as rationalization of fabrication and engineering services. The Acquisition has also improved CB&I's access to volume discounts, generated substantial savings through implementation of "best practices" in engineering, construction, and other areas, and allowed CB&I to lower its Technical Services Fee ("TSF") charged on each cryogenic tank – a

any evidence to rebut evidence of efficiencies presented by Respondents. Such uncontradicted evidence, combined with the significant entry discussed above, rebuts Complaint Counsel's case and requires judgment for Respondents.

VI. COMPLAINT COUNSEL'S EVIDENCE FAILS TO PROVE THAT CB&I'S ACQUISITION WILL SUBSTANTIALLY LESSEN COMPETITION IN ANY RELEVANT MARKET.

The evidence will show that Complaint Counsel's case is deficient in numerous respects.

A Complaint Counsel's Use Of 12 Year Old HHI Data Is Misleading And

irrelevant here because such data fails to account for the strong competitive pressures being

lost two LIN/LOX projects for BOC, one LIN/LOX project for Air Liquide,

won only one competitively bid LIN/LOX job since the Acquisition and

LNG tank Yet Complaint Counsel insists that these numerous

historical HHIs is subject to manipulation by Complaint Counsel. Complaint Counsel chooses to

an LNG tank in the U.S. since 1992; CB&I has not built a TVC in the U.S. since 1984; and prior to the Acquisition, CB&I had not built an LPG tank in the U.S. since prior to 1996. (See *supra* at 34-40.)

B. Complaint Counsel Fails To Address The Sufficiency Of Post-Acquisition Entry.

It is undisputed that substantial entry has occurred in all of the relevant markets since

acquisition entry in this case is actual, substantial, and sufficient.

in the LIN/LOX market. The jobs that CB&I has won have been at (See supra at 12-40.)⁴⁰ Complaint Counsel essentially ignores these facts, as does their expert Dr. Simpson. Remarkably, Dr. Simpson fails to address, or distorts the enormous importance of, the story.⁴¹

C. Complaint Counsel's Supposed Entry Barriers Are "Red Herrings."

Complaint Counsel has identified several entry barriers faced by CB&I's competitors in

directly undercuts Complaint Counsel's arguments on this score. See *In re Grand Union Co.* 102.

these so-called entry barriers is misplaced, as set forth below.

a. Subcontracting

Subcontracting is not an entry barrier.

⁴⁰

⁴¹ Dr. Simpson suggests that behavior in the bid might have been an instance of

reason, CB&I often subcontracts portions of an LNG job, as do its competitors.

- Fabrication -- Fabrication is not an entry barrier. Fabrication is

can fabricate steel overseas more cheaply than in the U.S. If fabrication were an entry barrier, foreign entrants would not waste their money attempting to enter the U.S. market. Their very presence belies Complaint Counsel's argument.

- FERC -- FERC is not an entry barrier. Dynegy and Cheniere

- Reputation -- Reputation is not an entry barrier. Virtually all current customers believe that the foreign entrants have excellent reputations for building LNG facilities, and that they can build those facilities in the U.S.

- Lack of experience -- Lack of experience in building LNG tanks in the U.S. is not an entry barrier. Customers do not require that foreign tank

Further, Complaint Counsel contends that alliances between foreign LNG tank builders

This claim ignores the extensive size, experience, and reputation of each domestic partner. Customers have recognized this experience as relevant.

2. LIN/LOX "Entry Barriers"

LIN/LOX tanks, CB&I subcontracts portions of those jobs.

- Equipment -- Access to equipment is not an entry barrier. Equipment needed to construct LIN/LOX tanks is readily available. It is not substantially different from the equipment needed to construct a conventional storage tank.
- Fabrication -- Fabrication is not an entry barrier. Any company able
- Engineering -- Engineering is not an entry barrier, as it is a fairly standard process that a tank construction company can easily accomplish through subcontracting to an outside firm, hiring experienced personnel, or simply training current employees.
- Personnel -- Access to personnel is not a barrier to entry. Each new entrant has already hired personnel with LIN/LOX experience.
- Reputation -- Reputation is not a barrier to entry. AT&V, Matrix and

⁴² testified that low price, not reputation or performance record, is the number one factor in selecting a tank manufacturer.

Q: So then, is it fair to say that even if a field erected LIN/LOX tank supplier is having some problems with a particular job, that wouldn't preclude you from considering them for the next job down the pike?

A: That is correct. *Low price will always get you there.*

- Experience -- Experience is not a barrier to entry, as the primary motive in awarding a project is low cost, not experience. For example, although [redacted] was concerned about using [redacted] to construct a LIN/LOX tank, it awarded the project after checking its references. [redacted] made this award despite the fact that [redacted] was not pre-qualified at the time it submitted its [redacted]

3. LPG "Entry Barriers"

There are no meaningful entry barriers in the LPG market. AT&M has successfully entered, winning three of the last four projects, and Morse successfully made a hit-and-run entry [redacted] without adding a single new employee.

D. Complaint Counsel Improperly Relies On Budget Pricing To Argue That

[redacted] in a vain effort to show that prices have been affected by the acquisition, Complaint Counsel relies on budget pricing provided by CB&I to customers over the past two years.

[redacted] price for a particular job. Generally, budget prices are [redacted] to assist customers in managing their budgets, and to manage the customer's expectations. For that reason, budget prices for the products at issue, such as LIN/LOX tanks, [redacted]

Budget prices often vary and can be unreliable indicators of true price because they are [redacted] generally based on incomplete information. When a customer solicits a budget price, they [redacted]

bid. For that reason, a contractor will err on the "high side" when calculating a budget price. For

this information is crucial to calculating a final fixed price bid, and that a lack of information on these and other issues can result in dramatically varying budget prices.

Customers do not purchase structures based on a budget price. When they wish to purchase a product, they solicit a final, firm price bid. At that time, they provide all of the necessary information set forth above.

such as CB&I do not put extensive effort into calculating a budget price, primarily because the number is not binding on CB&I or the customer. For example, CB&I does not solicit the best price on steel, insulation, or concrete at the budget pricing stage. This effort is reserved for the process of calculating final firm price bids; this effort generally involves contacting 50 to 70 vendors for current materials costs. For that reason, a budget price is generally higher than the final firm price bid on the same job.

Budget pricing is the only post-Acquisition evidence upon which Complaint Counsel relies in an attempt to establish an anticompetitive effect. ⁴³ For the reasons discussed above, this evidence is meaningless.

⁴³ In addition, many of the budget prices used by Complaint Counsel are inflated and do not reflect current market prices.

E. Complaint Counsel's Case Relies On Distorted Evidence.

Complaint Counsel relies on a variety of distorted and misinterpreted evidence to support its case. For example, Complaint Counsel claim that "Industry Participants Predict Higher Prices for the Relevant Products As a Result of the Acquisition". However this

claim is largely based on outdated affidavits, which fail to address the substantial post-

Complaint Counsel to carry its burden, a clear preponderance of the evidence favoring Complaint Counsel's case is required. See United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 183, 190-91 (N.D. Ill. 2001) (finding that DOJ failed to carry its burden on product

flawed "critical loss" analysis. Critical loss theory measures the percentage loss in sales necessary to make a given price increase unprofitable for a producer. The higher the fixed costs as the percentage of a product's total cost (the "contribution margin"), the lower a firm's willingness to risk the loss of business a price increase might cause.

⁴⁴ Further, Dr. Simpson relies on the same type of unreliable evidence. While he suggests that the opinions of buyers "should only be given weight if the customers have a meaningful basis for forming these opinions"

Dr. Simpson ignores the large number of witnesses who have an active involvement in

or computing the contribution margin almost entirely on a single document describing the projected costs of a single project. Based on this document, he incorrectly assumes that several important categories of costs, including the number of

will show they are not.

Dr. Simpson's critical loss analysis is also flawed in that it underestimates the

increase price. Based on his erroneous estimate, Dr. Simpson concludes that a 5% price increase

The evidence suggests that over the next three years, CB&I is unlikely to be able to be

increase destroys Dr. Simpson's estimates.

in LNG, LIN/LOX, and LPG markets have occurred. For example, Dr. Simpson refers

45 however, these include that It is unlikely that CB&I will be able to compete for all the remaining projects. For one of these projects, the preliminary engineering study for the project calls for the Moreover, at least these projects are at a very early stage of planning. It is highly likely that most of these

repeatedly to a 1994 bid solicitation by Memphis Gas, Light and Water.

This bid, like many cited by Dr. Simpson, took place

TKK AT&V, Technigaz/Zachry, and Daewoo/S&B, which were formed for the express purpose of competing for LNG tank projects in the United States. Nonetheless, Whessoe and TKK did

participate in one form or another in the Memphis bidding.⁴⁶ Dr. Simpson's bid book contains

In fact, PDM-EC's bid did not meet the customer's technical specifications and was

rejected for that reason. Thus, PDM-EC's bid was not

comparable to those of the other bidders. Dr. Simpson's selective review of the record

his selective review of the record renders his opinion suspect in every respect.

VII. REMEDY SOUGHT BY COMPLAINT COUNSEL IS INAPPROPRIATE AND PUNITIVE

As stated above, the value of all four products at issue is a small percentage of the revenue of PDM-EC. Yet Complaint Counsel seeks divestiture of the entire two-division

competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326

(1961). See also *In re Grand Union Co.*, 102 F.T.C. 812 (1983) ("The Supreme Court . . . has

⁴⁶ Complaint Counsel fails to mention that it bid reluctantly at the urging to MLGW.

participation in this bid was limited to engineering tasks, and was the entity that actually submitted the bid

MacMillan, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973). Rather, there must be "factual bases

in a case of a judicial determination that an acquisition was in violation of Section 7, a claim of

remedy for the redress of antitrust violations where something short of divestiture will effectively redress the violation." U.S. v. International Tel. & Tel. Corp., 349 F. Supp. 22, 31 (D. Conn. 1972).

If the Court finds that Complaint Counsel has met its burden of proof in this case, which CB&I respectfully submits it has not, then, in the alternative CB&I urges the Court to deny

First, PDIM no longer exists except on paper. Therefore, rescission simply cannot be done.

Second, customers in this case have testified that "[a] key factor to consider in analyzing whether the proposed acquisition will violate Section 7 is the impact of the transaction on customers". For example, one CEO of a customer stated that a breakup of CB&I would "weaken a good supplier, while not reconstituting a viable alternative supplier."

testified that if as a result of a breakup "CBI was weakened enough so it couldn't

the major U.S. player at this time.

Third, Complaint Counsel's proposed remedy of complete divestiture presents innumerable practical and logistical problems, making it impossible to implement. The evidence will show that, at any given time, CB&I's Industrial Division has about 300 tank projects pending in various stages. Labor on each project must be split up, and CB&I and the divested

entity must both have experienced workers to round out the requirements for each product line. This presents enormous logistical problems as recognized by customers. Both

CB&I was constructing a tank for them.

Fourth, any newly formed entity would have to be large enough to provide the guarantees required for LNG and IVC tank projects today. a project manager for

whether it would be able to make the parent company guarantee. He further noted that, at this point, he would not want to work with a company any smaller than CB&I.

The evidence will show that a new competitor created from just the tank business of CB&I would not

have enough assets or revenue to satisfy the types of financial guarantees that LNG owners now demand. Customers have testified that the Acquisition has made them more comfortable in accepting a parent company guarantee from CB&I.

~~Based on the evidence, any breakup remedy would fail to establish a competitor for LNG jobs in the United States or, for that matter, internationally.~~

~~Fifth, a breakup remedy is not available. The available remedies are:~~

~~1. A breakup remedy is not available because the Acquisition is a horizontal merger.~~

~~2. A breakup remedy is not available because the Acquisition is a vertical merger.~~

~~3. A breakup remedy is not available because the Acquisition is a conglomerate merger.~~

~~4. A breakup remedy is not available because the Acquisition is a merger of convenience.~~

SIXTH, SHOULD THE COURT FIND THAT THE ACQUISITION HAS CAUSED ANY COMPETITIVE PROBLEM, given the existing supply-side capacity of many tank constructors not currently involved in these four markets, less "drastic" and punitive remedies are available to create even more competition in the four product markets in this case.

As to the TVC market, although Respondents do not agree that the TVC market should constitute a relevant antitrust market under Section 7, it has proposed a package of behavioral

~~remedies in the form of a proposed Consent Decree in case 1:11-cv-00001-DCB.~~

~~7. A breakup remedy is not available because the Acquisition is a merger of convenience.~~

There are several components.

Customers testified that this agreement would benefit competition.

the last competitively bid

thermal vacuum chamber was won at a price

Despite the dormant market for TVCs, Complaint Counsel argues to break CB&I

TVC market. TVC customers would be concerned if this litigation resulted in a spinning of
CB&I into two companies, with neither company having the expertise to properly make field-

produced TVCs. Customers have testified that

its unknown financial circumstances.

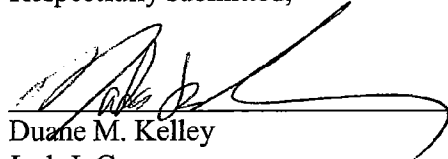
Similarly, were a foreign competitor to acquire a divested PDM-EC, the customers do not know

whether that divested company would be able to produce TVCs.

Further, if any remedy imposed by this Court resulted

Dated: November 5, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Nada S. Sulaiman, hereby certify that on this 29th day of October, 2002, I

prepared a true and correct copy of this Public Version of the District Brief of Respondent Chicago

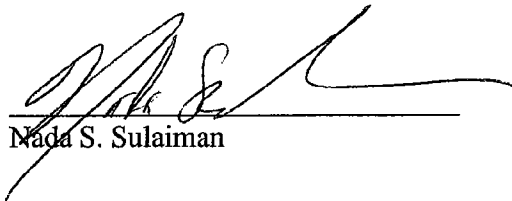
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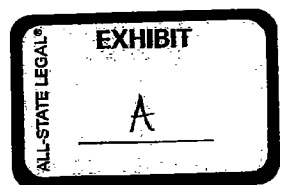
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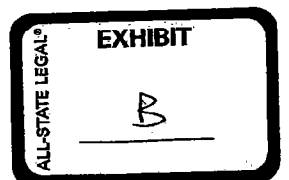


Nada S. Sulaiman

IN CAMERA



IN CAMERA



6. Since the Acquisition, CB&I has lost LIN/LOX projects for , one LIN/LOX project for and lost LNG bid to . (See supra at 12-34.)

7. CB&I has not built any competitive LNG/LOX tank since the

8. PDM has not built an LNG tank in the U.S. since 1992; CB&I has not built a TVC in the U.S. since 1984; and prior to the Acquisition, CB&I had not built an LPG tank in the U.S. since prior to 1996.

A. Legal Basis

1. Proof of low barriers to entry is one type of evidence which rebuts a *prima facie* case. It is settled that "where entry barriers are low, market share does not accurately reflect the party's market power." United States v. Syufy Enterprises, 903 F.2d 659, 665 (9th Cir. 1990). See also United States v. Waste Management, Inc., 743 F.2d 976, 982 (2d Cir. 1984) (stating that under General Dynamics "a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect," and the Commission's Merger Guidelines state that ease of entry is relevant to measuring the impact upon

2. Ease of entry is established by evidence of timely, likely and sufficient

903 F.2d 659, 666 (9th Cir. 1990). Entry is likely and sufficient if "ease of entry in the market is such that the producers in the market could not long sustain an unjustified price increase."

the acquisition . . ."); Grand Union Co., 102 F.T.C. 812 (1983) ("Evidence of low entry barriers includes recent entry into the target market, or recent capacity expansion by existing competitors

3. Entry does not have to be "easy" to be likely and sufficient. Baker Hughes, 908 F.2d at 987-988. In addition, Respondent's evidence of entry does not have to be

"substantial." See Baker Hughes, 908 F.2d at 987-88 (rejecting the Government's argument that a defendant must show "quick and effective" entry to rebut the Government's prima facie case

were poised for future expansion"). See also Syufy Enterprises, 903 F.2d at 662-666 (entry barriers low where a movie theater owner opened up three new cinema multiplexes within a thirteen month period, and within two years of the challenged acquisition was operating more screens than previously). "Post acquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a § 7 case." United States v. General Dynamics Corp., 415 U.S. 486, 505 (1974). See also United States v. Archer-Daniels-Midland Company, 781 F. Supp. 1400, 1421-22 (S.D. Iowa 1991).

5. Since probability of anti-competitive effect is judged at the time of trial, and "post-acquisition evidence favorable to a defendant can be an important indicator ... where the evidence is such that it could not reflect a deliberate manipulation by the merged companies

representing less active market competition than would otherwise have occurred without the questioned acquisition." Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 276 (7th Cir. 1981).

See also United States v. International Harvester Co., 564 F.2d 769, 778-781 (7th Cir. 1977).

Further, customer evidence is one of the most important forms of evidence for assessing anticompetitive effect. FTC v. Great Lakes Chem. Co., 528 F. Supp. 84, 94-95 (N.D. Ill. 1981); New York v. Kraft Gen. Foods, Inc., 926 F. Supp. 321, 351 (S.D.N.Y. 1995).

B. Factual Basis -- LNG

, one of the largest, most respected construction companies in the U.S.

3. The joint venture has been hotly pursuing several LNG

5.

6. also submitted a formal bid for the LNG tanks, and the evidence will show that it is finalists. The has also submitted formal bids and/or budgetary pricing on several other U.S. LNG projects.

7. Customers have concluded that TKK/AT&V is a formidable new competitor to CB&L in the U.S. market for LNG tanks and facilities.

8 believes that bid on the -- met all technical expectations and was within the expected price range.

budgetary quote from

10. Skanska/Whessoe is the largest construction group in the world. Its U.S. subsidiary is the fourth largest contractor in the U.S. Whessoe has constructed LNG tanks across the globe, even in remote locations such as India, Trinidad and Algeria.

11. Skanska/Whessoe is the exclusive licensee of technology to construct LNG tanks with an inner concrete containment as well, a technology that is favored by

12. Dynegy has selected Skanska/Whessoe as the EPC contractor for the Hackberry Project.

13. _____ has submitted budget pricing to _____ for its

_____ prepared

_____ facilities and to

_____ for the _____

14. _____ LNG _____ in the U.S. _____

15. Dynegy chose Skanska/Whessoe as the winner of the bid contest for the EPC of the Hackberry Project.

16. Daewoo/S&B, a Korean multinational corporation, has built 12 LNG storage tanks in Korea since 1993. Daewoo has become the "dominant contractor" in the design and construction of LNG terminals in Korea, the world's largest importer of LNG. Daewoo entered the U.S. LNG market this year. To assist it in this regard, Daewoo forged an alliance with S&B Engineers & Constructors ("S&B"), based in Houston, Texas.

17. Earlier this year, _____ made efforts to bid to _____ on the _____ It is currently pursuing an LNG import terminal for _____

18. _____ was recently retained by _____ to _____

19. Customers believe that _____ is a competitive force in the U.S. market for LNG facilities. _____ and others believe that the joint venture has the requisite experience and capability to build these tanks, and will consider it for future LNG work.

20. Tractebel, a large Belgian company, has entered the U.S. LNG market since the Acquisition _____

21. _____ and _____ have had negotiations _____

22. _____ recently bid on an LNG import terminal _____

_____ the terminal with an eye on establishing itself in the U.S. market _____

23. Mitsubishi Heavy Industries ("MHI"), a Japanese conglomerate, is a

project in and is discussing work in the U.S. with

24. Customers believe that MHI has the capability to construct similar projects in the U.S. at a competitive price.

25. U.S. customers continue to be interested in MHI for the LNG tanks for bidding and accept their bids.

26. Dynegy awarded an EPC contract to Skanska/Whessoe for the Hackberry LNG facility with a capacity of 1.5 million cubic feet per day. When completed, the Hackberry Project will be the largest in the U.S.

27. As part of its search for an EPC contractor, Dynegy received bids from

28. Dynegy felt that all of these companies Skanska/Whessoe over Dynegy eventually selected to serve as its EPC contractor for the Hackberry Project.

29. Dynegy investigated and pre-qualified different bidders -- Dynegy asked all bidders to submit lump-sum turnkey bids for the construction of the LNG tanks for this project. Dynegy received bids from , sometime after February 1, 2002. All bids met Dynegy's

30. Although had not submitted a bid for the LNG tanks during this process, it later approached and asked to submit a bid. a bid from , because it was satisfied with the bids already submitted by

31.

32.

33.

34. has also solicited budget pricing from

was comfortable with the

35. along with other partners, is developing a state-of-the-art,
LNG import terminal which will contain

LNG tanks

36. In December of 2001, hired -based to conduct preliminary engineering and design work on its LNG project.

In the summer of 2002, hired to assist it in preparing its permitting application to FERC by providing detailed LNG tank drawings and other logistical support.

37. When solicits formal bids for the EPC contract on this job plans to consider as potential candidates.

38. is confident that "there is enough competition between the others, with and and all the rest of them that we have mentioned that we will get a good selection of bids when we go out for bids."

39. facility will include a LNG tank.

40. has retained the services of to perform front-end engineering and design work for this project.

Representatives of had face-to-face negotiations with In addition, has received budget pricing from

While has not yet reached the point of securing final firm price bids, it is considering inviting

which is performing the preliminary engineering analysis, to bid on the EPC contract for this project.

41. Local safety requirements may require to build an all-concrete double-containment LNG tank.

43. _____ is currently considering a proposed LNG import terminal in _____ which will contain _____ LNG tank.

44. _____ has had a number of discussions with several potential EPC _____

45. _____ believes that each of these _____ companies is able to handle this _____

_____ to the _____ project in _____

47.

48.

49. _____ has entered into an EPC agreement with _____ to add a LNG tank to its _____ import terminal.

50. Prior to hiring _____ solicited a budgetary price from _____ which fell within a "very reasonable range" compared to _____ price. Such an effort served to constrain a high price. As a result, _____ is "very comfortable with the price that we were getting on the tank." _____

C. Factual Basis -- LIN/LOX

1. It has been well established that AT&V, Matrix and CBT have all been accepted as qualified by the majority of the LIN/LOX customer base.

2. ~~As a result of the Acquisition, AT&V has secured a 75% post-acquisition market share.~~
LIN/LOX jobs that have occurred since the acquisition for a 75% post-acquisition market share.

3. Within months of the Acquisition, AT&V won its first LIN/LOX tank bid, a two-tank project for

4. [redacted] was pleased with the price AT&V offered, because it was lower than

5. [redacted] subsequently awarded AT&V another LIN/LOX tank [redacted] just

6. [redacted] Based in part on a positive reference from [redacted]

7. [redacted] has requested LIN/LOX budget pricing from [redacted] for a proposed [redacted] project provided the [redacted] budget price received [redacted] for this project.

8. Matrix Services, began to participate in the LIN/LOX market in 1998 and has successfully and satisfactorily competed a total of four LIN/LOX tanks.

9. Between 1998 and 2000, Matrix won (and successfully completed) LIN/LOX tank jobs for

10. In 2000, Matrix was awarded (and successfully completed) a competitively bid LIN/LOX job

11. Matrix continues to actively pursue this type of work, and has LIN/LOX projects for [redacted] customers.

12. CBT has been actively submitting formal bids and budget pricing for LIN/LOX tanks.

13. Chattanooga Boiler and Tank ("CBT") is a 100-year-old tank company that specializes in the construction of steel plate storage tanks.

14. CBT has submitted a formal bid for LIN/LOX tanks

15. has also been pre-qualified by as a supplier of LIN/LOX tanks.

16. Demand for field-erected LIN/LOX tanks is very low due to excess capacity of oxygen and nitrogen production in the U.S.

17. Due to excess capacity, traditional purchasers of LIN/LOX tanks are rarely in the market for new tanks or plants.

18. Graver Manufacturing went out of business due to an overall lack of demand in this tank market.

19. competitively bid and awarded LIN/LOX tanks during 2000-2001.

20. evaluated bids from and selected because it was the

21. was satisfied with the price it paid for this project.

22. In 2002, competitively bid a LIN/LOX tank and received bids from

23. Due to the fierce competition for this job, lowered its final bid to a

24. Despite this steep price cut, was unsuccessful -- awarded this project to

25. In 2002, signed a letter of intent with to construct a LIN tank

26. approached because it was pleased with

and because believed that the use of engineering documents from that job

27. [redacted] solicited pricing from [redacted] for a LIN/LOX tank project in [redacted]

29. [redacted] awarded that project to [redacted] in March 2002.

30. [redacted] was satisfied with the price it paid for this tank.

31. [redacted] is currently contemplating the purchase of a field-erected LIN tank for a facility in [redacted]

33. The low bidder will win the [redacted] contract.

34. [redacted] have each testified that they do not believe prices have increased, do not believe that prices will increase, and further testified [redacted]

35. [redacted] testified that it believes it has more potential bidders [redacted]

36. [redacted] in the industry shares the same opinion as the customers. [redacted] does not believe that the prices of field erected LIN/LOX tanks will be affected by the [redacted]

37. [redacted] has stated that the merger of CD & I and DDMM [redacted]

38. [redacted] awarded a LIN/LOX project in [redacted]

39. [redacted] awarded a LIN/LOX project in [redacted], to [redacted] after competitive pressure forced [redacted] to reduce its original bid with a [redacted]

profit margin to a bid containing a margin of

4. PDM's last LPG project was in 1998. Id.
5. AT&V has successfully bid on and completed three LPG tank projects.
6. These LPG customers are pleased with AT&V's work.
7. AT&V plans to pursue this type of work in the future.

8. AT&V has bid on LPG projects in the past and is respected by LPG customers, such as

9. AT&V has bid on LPG projects in the past and is respected by LPG customers, such as
10. CBT has built a variety of API 650 storage tanks, API 620 storage tanks.
11. CBT plans to pursue future LPG tank projects.
12. Any builder capable of constructing an API 650 or API 620 storage tank

may enter.

13. Foreign companies can construct these tanks in the U.S. and are actively seeking this work.

14. AT&V believes that competition among AT&V alone is sufficient to prevent a price increase, and foreign competitors would enter the market if

18. submitted bids on the project.

19. price was so competitive that it "beat the socks off of

20. ~~The most tank construction companies successfully competed~~
against on an LPG project despite no prior LPG, low temperature or cryogenic tank experience.

21. permitted to bid even though it was not on approved bid list.

22. timely completed the project without any major problems, and was satisfied with the performance, the price, and the quality.

E. Factual Basis -- Thermal Vacuum Chambers

1. believes that shop-erected TVCs are those that are less than 15 feet in diameter, and the field-erected chambers are larger than that in weight, diameter, or length.

2. The main difference between the two categories is the need to have a field crew with the equipment to align the pieces of steel together in the field.

3. Some small TVCs must be field-erected because they can only fit into the customer's building by being shipped in pieces instead of whole.

4. The steps taken in the design, procurement, fabrication and field-erection ~~processes are~~ identical for both cryogenic storage tanks (including TVCs) and conventional flat

constructed a single TVC since 1984, when it exited the market.

7. CB&I attempted to reenter the TVC market in 1977 by acquiring AL Systems (NYSE:AL) but has not built a field-erected TVC since its acquisition.

8. CB&I has subsequently sold AL,

10. CB&I has subsequently sold AL, which has been used for various purposes, TVCs or cryogenic pumps for TVCs.

12. Most satellite manufacturers already have one or more of these chambers

14. Only two field-erected TVCs have been built in the U.S. since 1990. (Harris Rpt., 150.)

15. Demand for TVCs is in further decline for two reasons. First, demand for commercial and government satellites is nearly non-existent. Second, satellite sizes are shrinking, rendering the large, field-erected TVCs obsolete.

16. Smaller shop-erected TVCs -- which CB&I does not make -- should be adequate to test satellites in the future.

17. Industry participants expect that the low level of demand, driven even

18. is not really a new entrant to the market.

19. also testified that XL Systems and its subcontractor, Votaw, are currently fabricating two 15-foot field-erected TVCs.

20. IMCO/Howard entered the field-erected TVC market in 2001 by forming

21. IMCO/Howard entered the market after Howard had received a bid request from for a large TVC project.

22. This consortium is as qualified to build field-erected TVCs as CB&I because its personnel include many industry veterans, and based on its experience, potential customers would consider using IMCO/Howard if demand returns.

23. The main customers for field-erected thermal vacuum chambers are large companies such as

24. These companies have the financial resources to sponsor a new entrant. For example, in the chose over to build an expensive and sophisticated even though had never built

V. THE ACQUISITION GENERATED SIGNIFICANT EFFICIENCIES

A. Legal Basis:

B. Factual Basis:

1. The Acquisition has generated merger-specific and non-merger-specific efficiencies, and that these efficiencies have resulted in lower costs to consumers and improved

2. Merger-specific efficiencies are defined as those unlikely to be accomplished in the absence of either the proposed merger or another means during a

anticompetitive reductions in output or service. Merger Guidelines § 4.0. See also FTC v. H.I.

3. Respondents will prove the existence of millions of dollars in recurring annual savings (compared to the \$84 million purchase for the PDM-EC and Water Divisions' parts). (See BY 66.)

4. Because CB&I and PDM had redundant capabilities in several areas, the Acquisition permitted them to reduce fixed costs of production by consolidating and/or

5. The Acquisition has resulted in significant elimination of redundant personnel and administrative functions, as well as rationalization of fabrication and engineering services. The Acquisition has also improved CB&I's access to volume discounts generated

which would have allowed CB&I to lower its acquisition costs by 100% to 100% of such

revenue that is received on its CB&I customers.

VI. ABSENT THE ACQUISITION, THE ASSETS OF PDM'S EC DIVISION WOULD HAVE BEEN LIQUIDATED AND NO OTHER ALTERNATIVE PURCHASERS FOR THE EC DIVISION WERE AVAILABLE

A. Legal Basis:

Olin Corp. v. FTC, 986 F.2d 1295, 1304, 1307 (9th Cir. 1993); Dr. Pepper/Seven-Up Cos. v. FTC, 991 F.2d 859, 864-65 (D.C. Cir. 1993); FTC v. Great Lakes Chemical Corp., 528 F. Supp. 84, 87 (N.D. Ill. 1981); United States v. International Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977)

B. Factual Basis:

1. In 2000, PDM's major (30%) shareholder decided to explore various ways of converting its PDM stock to cash.

2. PDM retained the right to sell its assets.

PDM's divisions for each as much as possible.

4. PDM management concluded that selling the EC and Water

division and their planned expansion, and therefore recommended selling them together as one

6. In March 2001, the EC Division was forced to take additional write downs on certain projects, and its actual EBIT loss for fiscal year 2000 was approximately \$30 million. There were no signs that the EC Division's business was improving after 2000.

7. PDM's management determined that, because of these losses, it was unlikely that another purchaser would emerge. They decided that if the CB&I deal did not close, they would simply liquidate the EC Division.

8. In December 2000, at a time when it looked like the CB&I deal might fall apart because of a disagreement over commercial terms, PDM management wanted to analyze liquidation of the EC Division if the deal did not close and liquidated

9. According to PDM's estimated liquidation value was between \$14 million and \$21 million. CB&I had an estimated \$17 million for the EC Division assets.

10. No other purchasers were interested and/or able to purchase PDM's EC assets. Foreign companies were not interested in purchasing the EC Division's assets and made no inquiries to proceed with an interest.

11. No financial investor was interested because "it would have been a very difficult and probably impossible sale" for a financial based buyer to buy a company that is losing \$9 million (and later \$30 million.)

12. The only passing interest in the EC Division came from Matrix was not a viable purchaser because it was only interested in purchasing PDM's EC Division, a plan that was contrary to the wishes of PDM and the advice of its consultants.

13.

14. could have at best offered sufficient consideration in the form of stock, which was insufficient to meet the liquidity goals of PDM's major shareholder.

VII. THERE ARE NO SIGNIFICANT ENTRY BARRIERS AT ISSUE

A. Legal Basis

Actual entry of competitors is dispositive of the question of whether entry barriers

B. Factual Basis -- LNG

1. Subcontracting is not an entry barrier. In fact, subcontracting portions of

2. Fabrication is not an entry barrier. Fabrication is routine, and can be easily performed. Further, foreign LNG tank builders can do the necessary fabrication. In some cases, these builders can fabricate steel overseas more cheaply than in the U.S. If fabrication were an entry barrier, foreign entrants

application.

4. Reputation is not an entry barrier. Virtually all current customers believe that the foreign entrants have excellent reputations for building LNG facilities, and that they can build those facilities in the U.S.

5. Lack of experience in building LNG tanks in the U.S. is not an entry barrier. Customers do not require that foreign tank companies have previous experience building LNG tanks in the United States.

C. Factual Basis -- LIN/LOX

1. Subcontracting is not an entry barrier. Subcontracting can often lower a contractor's costs. Construction of a LIN/LOX tank is easily

of LIN/LOX tanks, CB&I subcontracts portions of those jobs.

7 Access to equipment is not an entry barrier. Equipment needed to

3. Fabrication is not an entry barrier. Any company able to fabricate steel plate storage tanks can fabricate the components a LIN/LOX tank. New entrants are capable of fabricating a LIN/LOX tank.

hiring experienced personnel, or simply training current employees.

5. Access to personnel is not a barrier to entry. Each new entrant has already hired personnel with LIN/LOX experience.

Customers' primary motive in

project is low cost, not experience.

D. Factual Basis - LPG

1. AT&V has successfully entered the LPG market, winning three of the last five projects engineering and without adding a single new employee.

3. Other competitors are capable of competing in the LPG market, such as Matrix and Chattanooga Boiler & Tank.

E. Factual Basis - TVC

1. believes that shop-erected TVCs are those that are less than 15 feet in diameter, and the field-erected chambers are larger than that in weight, diameter, or length.

7 The main difference between the two categories is the need to have a field

3. Some small TVCs must be field-erected because they can only fit into the

4. The steps taken in the design, procurement, fabrication and field-erection processes are identical for both cryogenic storage tanks (including TVCs) and conventional flat-bottom storage tanks.

6. CB&I's exit left PDM as the only competitor for field-erected TVCs in the U.S. from 1984 until 1997.

7. CB&I attempted to reenter the TVC market in 1997 by acquiring XL Systems ("XL"), but has not built a field-erected TVC since its reentry.

8. CB&I acquired XL

9. CB&I has subsequently sold XL

10. When CB&I sold XL, CB&I lost the ability to manufacture thermal shrouds, TVCs or cryogenic pumps for TVCs.

11. Given the dormant market, the change in the HHI for field-erected TVCs as a result of the CB&I merger is zero, which means Complaint Counsel cannot establish a

13. Most satellite manufacturers already have one or more of these chambers, which have long lifespans. uses a TVC built and uses one built

14. Only two field-erected TVCs have been built in the U.S. since 1990. (Harris Rpt., 150.)

15. Demand for TVCs is in further decline for the reasons stated in Exhibit 10.

Second, satellite sizes are shrinking, rendering the large, field-erected TVCs obsolete.

16. Smaller shop-erected TVCs -- which CB&I does not make -- should be adequate to test satellites in the future.

17. Industry participants expect that the level of demand will remain

18. not really a new entrant to the market.

19. contract manager also testified that

20. IMCO/Howard entered the field-erected TVC market in 2001 by forming a consortium of industry participants.

21. IMCO/Howard entered the market after had received a bid request from for a large TVC project.

22. This consortium is as qualified to build field-erected TVC's as CB&I because its personnel include many industry veterans, and based on its experience, potential customers would consider IMCO/Howard a

23. companies such as Boeing, Northrup Gumman (which just acquired TRW), Raytheon and Lockheed Martin.

24. These companies have the financial resources to sponsor a new entrant. For example, in the fall of 2001, Boeing chose Puget Sound Fabricators over CB&I to build an expensive and sophisticated 80 foot diameter vacuum sphere even though PSF had never built

such a structure before. 25. Alternatively, customers are not necessarily concerned about the

experience level of vendors for TVCs. For instance,

VII. BUDGET PRICING IS NOT AN ACCURATE INDICATOR OF ANTICOMPETITIVE EFFECTS

A. Factual Basis

1. Budget pricing is merely an initial effort to give the customer a "ballpark" price for a particular job. They are usually over-estimated to assist customers in managing their budgets, and to manage the customer's expectations.

2. Budget prices for the products at issue, such as LIN/LOX tanks, range from 25% above the final bid price to 5% below the final bid price.

3. Budget prices often vary and can be unreliable indicators of true price because they are necessarily based on incomplete information. When a customer provides information such as 1) the schedule the customer plans to follow in building the structure; 2) the exact location; 3) what design details; 4) customer identity; or 5) start date of the project. This information is needed to calculate a final fixed price bid and that a lack of information on these and other issues can result in a budget price that is significantly higher or lower than the final bid price.

4. Customers do not purchase structures based on a budget price. When they wish to purchase a product, they solicit a final competitive bid. At that time, they compare the budget price to the final bid price and determine whether to purchase the product.

5. Contractors do not generally spend much time on budget pricing; accordingly, it is not as accurate or as low as possible.

VIII. COMPLAINT COUNSEL'S RELIANCE ON ITS CRITICAL LOSS ANALYSIS

1. With respect to LNG tanks, Dr. Simpson incorrectly estimated the costs associated with his contribution margin calculation.

2. Dr. Simpson underestimates the competition that CB&I faces and thus the

decline by no more than 25%. The evidence suggests that

, CB&I is unlikely to be able to be asked to bid on any more than U.S. LNG tank projects. A correct estimate of variable costs shows a price increase would be

Simpson in no way accounts for the fact that the number of cryogenic tank projects is sporadic. If loses one project in a given year, that project could represent 100% of its sales for that

There, the cost of a loss of some large, high-grade agencies increases. Jackson D. Simmons's

3. The bid process took place before the merger that formed

4.

5.

IX THE REMEDY SOUGHT BY COMPLAINT COUNSEL IS INAPPROPRIATE AND PUNITIVE

A. Legal Basis:

"The key to the whole question of antitrust remedy is to bind effective measures to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 326 (1961). See also Grand Union, Docket No. 9121, 102 F.T.C. 812 (1983) Divestiture is a "drastic" remedy, and "cannot be had on assumptions." United States v. Crowell, Collier & MacMillian, Inc., 361 F. Supp. 983, 991 (S.D.N.Y. 1973). Rather, there must be "factual basis and economic theory as applied to such facts" to support such a remedy. Id. Furthermore, the

B. Factual Basis

1. The assets that are the subject of this Complaint are a fraction of the total

2. In addition, the commerce from the relevant markets at issue is small

3. CB&I had generated no revenues from the LNG and TVC markets over the previous five years.

4. For example, one CEO of a competitor stated that a buyout of CB&I would "weaken a good supplier, while not reconstituting a viable alternative supplier."

5.

, testified that if as a result of a breakup "CBI was

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LIN/LOX tank customers would be

8. LIN/LOX customers have also commented that a breakup would be disruptive

9.

would scrutinize the financial status of any new owner of PDM to determine whether it would be able to make the parent company guarantee. further noted that he would not want to work with a company

10. PDM was already losing business due to concerns related to PDM's financial status.

11. Customers have testified that the Acquisition has made them more comfortable in accepting a parent company guarantee from CB&I.

12. For example, in the year prior to the Acquisition, there were no sales whatsoever in three of the four markets, and only \$5 million in sales in the LIN/LOX market.

13. Breakup is not appropriate when \$66 million of the total \$84 million in purchased assets relate to the construction of municipal water tanks, which Complaint Counsel does not challenge.

14. Complaint Counsel has not collected any evidence as to the impact of a breakup on the customers in all the other markets that are owned by CB&I but not subject to

15. Demand for field erected I N/I OX tanks is very low due to overcapacity.

16. Due to excess capacity, traditional purchasers of I N/I OX tanks are

17. Graver Manufacturing went out of business due to an overall lack of demand in this tank market.

18. Moreover, six foreign LNG tank builders ventures have entered the U.S. market since the Acquisition.

19. The proposed Consent Decree includes a

20. The proposed Consent Decree offers

21. The proposed Consent Decree alleviates potential concern of TWC

22. The proposed Consent Decree includes

23. The proposed Consent Decree includes

24. Customers have testified that they did not know whether a divested PDM

security.

IN CAMERA

