UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

Honors Paralegal

February 25, 2003

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

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

- **Extraordinary Post-Merger**

defense.

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

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

The result is that the parties now agree that there is no other competitor in the TVC market. Thus, Respondents' case stops dead in the water. Facing this prospect, it was no surprise that their only defense in TVCs was an offer of settlement. But even there, Mr. Glenn didn't get it. Along with a mentoring

[illegible]

evidence is to the contrary. It has been two years since the acquisition, and none of these foreign competitors has entered. Moreover, the evidence is undisputed that CB&I and PDM were the low-cost and preferred suppliers in this industry. For example, foreign companies, with previous joint ventures, tried unsuccessfully to compete in 1995 in Memphis and could not come within 20% of CB&I and PDM's prices. When a new LNG tank needed to be contracted for in Memphis, just last year, the customer ignored the

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

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

When there is proof of any post-acquisition anticompetitive conduct, such as attempted collusion or higher prices, all bets are off. As a leading antitrust commentator said, such evidence "cements" Complaint Counsel's case. J. Von Kalinowski, *Antitrust Law & Trade Regulation*, § 4.03[4] (2d 1996) (hereinafter "Von Kalinowski") (Citations omitted). And there is more evidence of anticompetitive effects here than Complaint Counsel can find in any prior FTC case where divestiture has been ordered. Anticompetitive effects have actually turned up here in spades. For example,

- ***Spectrum Astro***: After they agreed to merge, CB&I then met and talked about the bidding, saying that the customer was now "D.O.A." CB&I discussed colluding with PDM to both [ ] to the customer. Then, for the first time they did the [illegible]

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

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

- ***Memphis*** *world-wide 31Scorsone camera $7 million 36 0 597 /F1 12 597 /FTD ugh TD rgra*

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

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

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

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

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

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

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

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

In the end, Respondents created what CB&I's management called, the "900 pound gorilla." (CX1681 at 1). As Mr. Glenn put it, the merger gave CB&I "unequaled capability" and "execution capabilities unmatched by competitors." (CX 1720 at 1; CX 1532 at 1) As they boasted internally regarding the LNG market, "no other company in the world is more uniquely or strategically positioned to capitalize on that emerging market." (CX 832 at 5) There is no talk of entry or anything that might possibly disturb CB&I's vision of "margin improvement and accelerating earnings growth." (CX 1527 at 2) As Mr. Glenn admitted, the acquisition 221 Tw (aMi%y322 TD -0.638 Tc 67wth. c 67wth74 Ttegic8iows put it-30 .7

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In sum, the substantial evidence shows that CB&I's acquisition of the EC and Water Divisions of PDM violates Section 7 of the Clayton Act, and Section 5 of the FTC Act. Accordingly, this Tribunal should follow Congress' mandate in Section 11(b) of the Clayton Act and order CB&I to divest all of the assets

“Section 7 is designed to arrest in its incipiency not only the substantial lessening of competiti

University Health, Inc., 938 F.2d 1206, 1211 n.12 (11th Cir. 1991) (HHI is the "most prominent method" of measuring market concentration); *Merger Guidelines*, § 1.5. To determine the HHI's, one first identifies the markets at issue and the market shares of the participants. Here, Respondents have conceded that field-erected LNG tanks, LNG import terminals, LNG peak shaving plants, LPG tanks,

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

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

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

In other words, where Complaint Counsel shows post-acquisition HHI level bove 1,8

(here they are far above 5,000), the ***case is over*** unless Respondents "produce evidenc ut this leg

presumption. When the evidence demonstrates that concentration is high, the " idence t

defendant must present to rebut it successfully." *U.S. v. Baker Hughes, Inc.*, 908 F. 991 (D.

Cir. 1990).

Those are the standards; here are the results:

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

The results are clear. For example,

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

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

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

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

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

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

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[6] The Commission, courts and the Merger Guidelines allow consideration of such pre-acquisition industry evidence. *E.g., Merger Guidelines* §2.211, n.22 ("normal course of business documents from industry participants"); *Coca-Cola Co.*, 117 F.T.C 795, 945 (1994) (Using Coca-Cola's "own documents" as corroboration of market dynamics); *Heinz*, 246 F.3d at 717 ("Heinz's own documents recognize the wholesale competition and anticipate that the merger will end it").

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

First, the *Merger Guidelines*, established case law and economic theory teach that in markets "where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market 91 Tc (markets;) Tj 39 0 TD 0 TTD -0.28 18.75 0 TD 0 Tcow Tc (only) Tu0 Tc ( ) Tj 3.75 0 TD /F2

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] ***Second,*** the fact that CB&I was a major force in bidding and even winning a recent bid demonstrates that they were a significant market participant and thus must be included in the market for merger analysis purposes. *See, e.g., FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967) (Condemning merger with potential competitor because "[i]t is clear that the existence of Procter at the edge of the industry exerted considerable influence on the market"); *U.S. v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-36 (1973); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964). Thus, following these cases and *El Paso Natural Gas*, which rejected the same argument made by Respondents here and ordered "divestiture without delay," this Tribunal should reject Respondents' argument. *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 661-671 (1964) ("Unsuccessful bidders are no less competitors than the successful one. The presence of two or more suppliers gives buyers a choice.... If El Paso can absorb Pacific Northwest without violating § 7 of the Clayton Act, that section has no meaning in the natural gas field").

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

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

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

* * * * *

In sum, the acquisition has increased the HHI substantially in each of the relevant markets at issue in this case to extreme HHI levels of [ ] to 10,000 – the level of "pure monopoly." *Merger Guidelines* § 1.5, n.17. Increases of this magnitude are far beyond the thresholds that the *Merger Guidelines* state raise competitive concerns (*i.e.,* a change of >100). *Merger Guidelines* § 1.51. The Commission has consistently found that such large increases in concentration in an already highly concentrated market create the strongest competitive concerns. *Hospital Corp. of Am.*, 106 F.T.C. 361, 488 (1985) (finding increases in concentration "in an already concentrated market to be of serious competitive concern"); *Coca-Cola Co.,* 117 F.T.C. at 943 (High HHIs create "serious competitive concerns"). Indeed, the ***lowest*** post-acquisition HHI in this case (for LIN/LOX/LAR) is [ ], and the highest (for thermal vacuum chambers) is 10,000. When one compares these HHIs to recent decisions where the FTC has prevailed, it is apparent that Complaint Counsel's burden of proof has already been met overwhelmingly. *See, e.g., Cardinal Health,* 12 F. Supp. 2d 34, 54 (D.D.C. 1998) (2,224 HHI); *FTC v. Swedish Match,*

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

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

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

Once Complaint Counsel has established a strong *prima facie* case through market share evidence,

thstrong warrants(m a r k e t)

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

entry must be (i) timely (within two years); (ii) likely to be "profitable at premerger prices"; and (iii) sufficient to "deter or counteract" the possible anticompetitive effects of the acquisition. *Merger Guidelines* §§ 3.1-3.4; *Coca Cola*, 117 F.T.C. at 953 (1994) (Entry "must be able to restore competitive pricing – i.e., it must be effective in offsetting any loss of competition due to the business combination in question"). Yet, all that Respondents tried to prove was that Messrs. Glenn and Scorsone may think that foreign firms may enter the LNG market.

The only supposed evidence of entry were several press releases about joint ventures involving TKK, Whessoe, or Technigaz desiring to enter the LNG market. Respondents conceded that the press releases and other so-called entry evidence would be admitted ***solely*** to prove the state of mind of CB&I. This kind of evidence is inherently suspect. *See Falstaff*, 410 U.S. at 565-8 (Discounting defendant's testimony as to whether they would enter a market because "it is in the very nature of such evidence that in the usual case it is not worthy of credit").

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

shareholders that CB&I's costs were now lower than those of its competitors: "we can still be low bidder and make more money on it than most of our competitors, if not all of them." (Glenn Tr. 4381; CX 1731 at 42) The fact is that CB&I can "win the work" whenever they want to, unless someone bids under their cost. (Glenn Tr. 4380; CX 1731 at 44) PDM and CB&I even discussed the fact that they had a "pricing advantage" that they could use to prevent any loss of market share. (CX 1544 at 7941) Thus, no competitor will be successful in achieving profits at pre-merger prices – instead, if they try to undercut CB&I, as Mr. Glenn admitted, he'll just "watch them go out of business." (Glenn, Tr. 4380)

C. Entry Cannot Be *Sufficient* To Replace PDM.

There is simply no evidence that any of the supposed entrants can replace the competitive force that PDM was before. Indeed, CB&I never expected that it would lose any of the market share it bought by buying PDM. (Glenn, Tr. 4252, 4259, 4315-16, 4321) So far, none of these foreign entrants have won any projects, and the only one that seems to be any possibility is Dynegy's LNG tank, for which CB&I ***refused to bid***. Even that customer now has little choice and is concerned that it will have to pay a higher price than it would have if CB&I had bid. (Price, Tr. 578,, 622)

CB&I's only other competition – though weak – is ATV for LIN/LOX, but it lacks capacity to replace PDM (Cutts, Tr. 2366, 2375; CX 460 at 7235; CX 1654) [

] (Kistenmacher, Tr. 862, 870; Patterson 466-467, 470 *in camera*; Kamrath, Tr. 2241, 2255 *in camera*) Recently, ATV did such a poor job on an Air Liquide job that the customer asked CB&I to step in and do the project, but CB&I refused. (Scorsone, Tr. 5036) ATV's capacity is also so small that just recently it had to turn down two projects and could not get proper bonding for "larger jobs." (Cutts, Tr. 2366, 2375)

In case after case, the Commission and courts have found that potential expansion by smaller

competitors like ATV was not sufficient to overcome the presumption of anticompetitive effects from mergers creating leading firms with large market shares. *Coca-Cola*, 117 F.T.C. at 960 ("If new entrants cannot sufficiently expand output to prevent existing producers from raising prices, their entry will not be sufficient to prevent a cartel from raising prices."); *Cardinal Health,* 12 F. Supp. 2d at 58 (The "absence of another national" competitor through "merger is too great a competitive loss – which the [smaller competitors] cannot sufficiently replace."); *Staples,* 970 F. Supp. at 1087-88 (Other less-dominant companies were not "likely to avert the anti-competitive effects resulting from Staples' acquisition of Office Depot."); *Swedish Match*, 131 F. Supp. 2d at 170 (D.D.C. 2000) (Effective expansion by smaller firms was "highly unlikely"); Areeda at ¶ 911b ("The nascent entrant into such a market ordinarily earns only competitive returns, while the dominant firm's returns are far larger").

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

.] (Jolly, Tr. 4706-10, 4715, 4720, 4757 *in camera*); *See U. S. v. Franklin Electric Co.*, Inc., 130 F. Supp. 2d 1025 at 1033-35 (W.D. Wisc. 2000) (Rejecting defendants' assertions that the presence of newly established competitor, whose success was "highly uncertain," would maintain the competition that had existed prior to the acquisition); *U. S. v. United Tote, Inc.*, 768 F. Supp. 1064, 1080-82 (D. Del. 1991) (Because success of entry remained uncertain, such entry "would not constrain anti-competitive price increases by incumbents"). What is also telling is that Technigaz would [

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

In short, this is hardly evidence of entry sufficient to replace PDM. Moreover, when one considers

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

D. *Barriers to Entry* Prevent Potential Competitors From Replacing PDM As A Major Supplier To Force Prices Back Down To Pre-Merger Levels.

Another reason why these alleged foreign entrants are not likely to have much of an impact, if any, is that there are significant barriers to entry. Barriers to entry are "additional long-run costs that must be incurred by an entrant relative to the long-run costs faced by incumbent firms." *Coca-Cola,* 117 F.T.C. at 485 (citing *Echlin Mfg. Co.*, 105 F.T.C. 410, 485 (1985) (citing G. Stigler, *The Organization of Industry* 67 (1968)). Existence of barriers reduces the effect of potential entry. Many witnesses, including those of Respondents, testified that to be successful in these markets, a company has to be large, have know-how, local manufacturing plants, etc. CB&I explained to its shareholders that "price, quality, reputation, safety record and timeliness are the principal competitive factors" in these markets. (Glenn, Tr. 4375; CX 1061 at 10) In short, not any company can do this work; there are barriers to entry. For example, ***CB&I has lower costs and distinct size, quality and fabrication advantages over the alleged competitors:***

! Gerald Glenn, CEO of CB&I, admitted that with the acquisition of PDM, CB&I "now ha[s] unequaled capability." (Glenn, Tr. 4384; CX 1720) He also admitted that CB&I has lower costs than its competitors. (Glenn Tr. 4381; CX 1731 at 42) The fact is that CB&I can "win the work" whenever they want to, unless someone bids under their cost. (Glenn, Tr. 4380; CX 1731 at 44) PDM and CB&I even discussed the fact that they had a "pricing advantage" that they could use to prevent any loss of market share. (CX 1544 at 7941)

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

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

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

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

! Cutts – ATV – testified that his company is too small to be as competitive as PDM; ATV cannot "bond these larger jobs," and in fact recently had to refuse "to bid two cryogenic tanks" because they lacked "capacity." (Cutts Tr. 2366, 2375; *see* CX 460 at 2 and CX 1654 (showing ATV's capacity is dwarfed by CB&I)). ATV's woes were also corroborated by Kistenmacher – BOC – who testified that ATV had a "very poor track record" and "had many change orders [so] that in the end the price was higher than the price of the conventional vendors." (Kistenmacher, Tr. 862, 870) [

.] (Patterson, Tr. 466-67, 470, *in camera* (wouldn't use ATV because of lack of experience and bad reputation))

- [*in camera*]

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

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

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

- Air Products tried to get a foreign firm (BSL) to work with them on LIN/LOX tanks, but they simply could not compete on price. (Hilgar, Tr. 1378-79 (off by 20-30%); Fan, Tr. 955)

[9] As the Commission described in the analogous situation acquic 0w (analo4 TD /F1 12 Tf ( ) Tj 6 0 TD /F1 10.5

higher-priced and less experienced firms. *See, e.g.*, *U. S. v. Eastman Kodak CaT..TD j 2.25 0 TD 0.63 TD 0.0405*

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

(Citations omitted).

And there is more evidence of anticompetitive effects here than Complaint Counsel can find in any prior FTC case where divestiture has been ordered. Anticompetitive effects have actually turned up here in spades: CB&I has colluded with a potential competitor and prices and margins have increased dramatically. Under the law, if Complaint Counsel had nothing else, it could base its entire case on just one of these instances. *General Dynamics*, 415 U.S. at 505, n.13 ("[P]ost merger evidence showing a lessening of competition may constitute an 'incipiency' on which to base a divestiture suit"); *Merger Guidelines* § 2.2; *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1267 (E.D. Pa. 1987) ("The most recent evidence of defendants' monopoly power is found in defendants' post-acquisition pricing decisions").

Many witnesses, including admissions from Mr. Scorsone, and dozens of documents proved that prices and margins indeed went up and that Respondents had discussed at least one bid with a competitor. When faced with these facts, Dr. Harris claimed a lack of any knowledge of them. (*E.g.* Harris, Tr. 7498 (regarding price increase at Cove Point [illegible]

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

The *Merger Guidelines* recognizes that anticompetitive effects may be likely when a "significant share of sales" in the market are made to buyers who "regard the products of the merging firms as their first and second choices." The *Merger Guidelines* § 2.21; *R.R. Donnelly & Sons Co., et. al.*, 120 F.T.C. 36, 193-201 (1995) (discussing the unilateral exercise of market power through a combination of the two closest substitutes and citing to *Merger Guidelines* § 2.21). The *Guidelines* also presumes that if the combined market shares of the merging firms reaches 35%, that "a significant share of sales in the market are accounted for by consumers who regard the products of the merging firms as their first and second choices." *Merger Guidelines*

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

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

In recent years, the FTC has brought numerous cases in which an acquisition involved the elimination of either the closest, or a significant competitor of the acquiring firm. *See, e.g., Heinz Co.*, 246 F.3d at 711-12, 725 (The merger of the two low cost providers may likely "increase prices"); *Swedish Match,* 131 F. Supp. 2d at 169 (Merger of two closest competitors made it "likely" that prices would "increase"); *Staples,* 970 F. Supp. at 1082 (Merger of two low cost providers of office suppliers would allow the resulting company to o f t w o l o T n o f t w o

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

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

Although not required to prove that anticompetitive effects have occurred in order to establish a violation of the law, Complaint Counsel has done so in spades. For example,

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

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

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

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

stunt with another customer and potential competitor. In the Fall of 2002, TRW requested rough order magnitude pricing from the only two possible remaining sources for thermal vacuum chambers, Chicago Bridge rough Chicago

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

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

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

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

]

: Respondents' TVC pricing to [ ] demonstrates both how competition between CB&I and PDM drove TVC prices down prior to the acquisition and how, following the

acquisition, CB&I has increased price. In [

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

The Fairbanks, Alaska Project: In 2002, Fairbanks explored the possibility of expanding its storage capacity with a field-erected LNG tank. Based on an outside consultant's analysis, Fairbanks concluded that the tank it wanted would cost approximately $2.2 million dollars. (CX 370 at 18, 19, 21 (Britton, Dep.)). But CB&I's $3.6 million price was $1.4 million higher than Fairbanks' estimate of $2.2 million based on its consultant's analysis. (RX 407 at CB&I 066666; CX 370 at 19 (Britton, Dep.)). CB&I had also included a 50% margin for the job. (RX 407 at 6666 ("includes 20% margin" plus "30%" for location). Yet, on a recent LNG tank project in nearby British Columbia before the acquisition, PDM had offered a price that was comparable to the estimated price of $2.2 million for the tank – demonstrating that if PDM had not been eliminated from competition, Fairbanks could have received a substantially lower price. (*See 1.5 0 TD -0.435 2.25 g3j 21i.25 43Tc 0.05 43Tc (SeCX7 T wa260CX 30 at 199*

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

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

] illustrates that: Based on actual prices obtained from CBI, PDM and Whessoe, [ ] knew that CB&I and PDM had lower costs than other firms; [ ] knew that with the acquisition of PDM, CBI dominated the United States market; Without PDM to turn to, [ ] could encourage competition only by turning to untested, higher-priced alternatives; and [ ] has no choice but to acquiesce to CBI's demand that [ ] work exclusively with CBI. In 2001 [ ] analyzed the

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

* * * * *

In sum, any one of these undisputed acts of actual or attempted collusion or price/margin increases, asor

efforts to" find other buyers; and (iv) otherwise, the assets would actually "exit the relevant market." *Id.* § 5.1. Respondents have not attempted to meet any of these tests, nor could they. (*See* Byers, Tr. 6848, 6899; CX 522 at 3398-3399 ([illegible]

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

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

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

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

Whereas Tanner contacted twenty-five prospective buyers for another division of PDM, it contacted no one for the EC Division. Instead, PDM's CEO simply called up CB&I's CEO, and they made the deal that would give both the most value. Indeed, PDM even rebuffed expressions of interest from at least one prospective purchaser, Matrix. (Vetal, Tr. 418-423) Byers admitted on cross-examination that other companies would have been interested in buying the divisions, and yet he has never seen any proof that anyone else was ever contacted. (Byers, Tr. 6799, 6858, 6806-6812; RX 29 at 5 (Even as of closing, "few potential buyers," and "some competitors might be interested" in buying the EC division). Even PDM's CEO promised the Board that he would contact other purchasers if the CB&I deal fell through. (Byers, Tr. 6864; CX 1590 at 6065) They just never did. The short answer as to why CB&I was the only one canvassed was PDM's desire to get more money; they had other options. (Byers, Tr. 6796) Quite clearly, therefore, PDM has not made a "clear showing" that it "undertook a well conceived and thorough canvas of the industry such as to ferret out viable alternative partners." *United States v. Pabst Brewing Co.*, 296 F. Supp. 994, 1002 (E.D. Wisc. 1969), *quoted in* Areeda at ¶ 954d ("Failure even to inquire of such obvious candidates as competitors...presumptively indicates that the search has not been diligent").[17]

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

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[17] Respondents' claim that it was enough to send out a press release is also simply insufficient as a matter of law. *FTC v. Harbour Group Investments, L.P.,* No. 90-2525, 1990 WL 198819, at *3 (D. D.C. Nov. 19, 1990) (Merely sending "offering materials" and "brochures" and "exploratory phone calls" was insufficient to establish the defense); *Olin,* 986 F.2d at 1307 (Rejecting defense in part because FMC's management had not "conducted an exhaustive effort to sell" the assets").

isn't enough to trigger this requirement, and that is all Respondents really claim here. *See, e.g., U.S. v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971) (Even though "owners wished to sell," defendant still had to prove that "there was no other prospective purchaser for it"); *U.S. v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1260 (C.D. Cal. 1973) (Desire by management to exit the business does not satisfy the defense); *U.S. v. Blue Bell, Inc.,* 395 F. Supp. 538 (M.D. Tenn. 1975) (Company's intention to divest itself of its business is immaterial); *See Olin v. FTC*, 986 F. 2d at 1307 ("[T]he first finding - that the assets would not be exiting the relevant market...is sufficient to sustain the Commission's ruling that Olin did not establish an 'exiting assets' defense").

Respondents' argument, however, is that if the acquisition had not occurred, Byers would have recommended to his Board that they liquidate the assets. But this is irrelevant for two reasons. ***First***, Byers had no authority to make such a decision and never asked the board to consider it. (Byers, Tr. 6797-98; 6815-16) It is thus pure speculation to assume that the Board would have made such a decision. ***Second***, if Byers had convinced the Board to liquidate the EC division, his plan was to sell the current contracts, the plant, and the engineering and intellectual property assets to another competitor who would carry out the current business. (Byers, Tr. 6802-04; RX 29 at 5) In short, if CB&I had not purchased PDM, under Byers' plan, some company other than CB&I (such as Nooter or Pasadena Tank) would be building Cove Point as we speak! *Id.* In other words, the assets would ***not*** "exit" the market. *Olin,* 986 F.2d at 1307 (Commission was correct in rejecting defense because "assets would not be exiting the relevant market").

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

and puts them in the position to be the single dominant firm which can "win" every job it wants. (CX 1731 at 44); *see* Areeda at ¶ 952b ("[E]xit might be preferable on competitive grounds to acquisition by an already dominant firm because without such acquisition small rivals may have a better opportunity to pick up the failing firm's customers or resources"). Accordingly, this Tribunal should reject Respondents' attempted defense, which is not supported in law.

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

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

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

Administrative Law Judge Hyun explained Congress' mandate when he stated without equivocation: "It is axiomatic that the normal remedy in Section 7 cases is the divestiture of what was acquired unlawfully. Indeed, divestiture is the remedy specified in Section 11(b) of the amended Clayton Act." *Olin Corp.*, 113 FTC at 584.[18] Indeed, the U.S. Supreme Court made it clear that Congress meant what it said in Section 11(b).

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

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

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

analogy and chastised the plaintiffs:

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

As the *Microsoft* Court recognized, merger cases are different. Under both the Clayton Act and Supreme Court law, divestiture is the proper remedy for illegal mergers. 15 U.S.C. § 21; *Du Pont*, 366 U.S. at 326-27; *Greater Buffalo Press,* 402 U.S. at 556; *Ford Motor Co. v. U. S.*, 405 U.S. 562, 573 (1972). The Supreme Court has noted that "[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." *Ford Motor Co.,* 405 U.S. at 573. Moreover, as explained below (Section V.A.), Section 11(b) of the Clayton Act grants the Commission a specific mandate to order divestiture of assets when a violation of Section 7 is found. In addition, Section 5(b) of the FTC Act expressly authorizes the Commission to award any further relief that would restore competition. And the Commission has determined that this authority allows it to order "broad divestiture" including divestiture of assets outside of the relevant product market "in order to increase the likelihood of a restoration of competition."

[20] *See, e.g, Olin,* 113 F.T.C. at 619 (Order to divest relevant product as well as a corollary one as well); *Crown Zellerbach Corp.*, 54 F.T.C. 769, 808 (1957) (Order to restore whatever assets "as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition"); *Fruehauf Trailer Co.*, 67 F.T.C. 878, 939 (1965) (Order to divest "all assets of its Strick Trailers Division and such other assets

as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern

or stock acquisitions violate the antitrust laws."). "Divestiture is a start towards restoring the pre-acquisition situation," *Id.*

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

In order to restore competition, an effective divestiture must be complete, that is, sufficient to create a viable entity that operates independent of Respondents. *Ford Motor Co.*, 405 U.S. at 573. Anything less is a waste of time.[21] For divestiture to be successful, a ***complete*** divestiture that reestablishes the acquired firm as a viable competitor is necessary. The Commission "will require a divestiture that will likely create a viable business entity (rather than the creation of lawyers) to resolve the competitive problems posed

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

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

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

combined, the highest probability of restoring competition comes from full divestiture"); Elzinga at 45-47 ("Whenever an anticompetitive increment in market power is attained by merger, structural relief requires the restoration of the acquired firm"); *see Ford*, 405 U.S. at 574 (Court ordered Ford to restore Autolite as a viable, independent com *s*

[24] Of course, the evidence is that such a remedy would not work in any event. (*See, e.g.,* Gill, Tr. 202)("It would take more than mentoring"); Neary, Tr. 1458 (Mentoring wouldn't make Howard a "real viable competitor)).

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

To "ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success," divestiture must be broad. *Id.* at 619 In *Olin*, the Commission ordered respondents to

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

Several witnesses testified as to the desirability of Complaint Counsel's proposed remedy. (Neary, Tr. 1489, 1502) (Reestablishing PDM would give his company the "competition" they're "looking 370e

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

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

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

The record is clear that CB&I must be ordered to secure customer consent to assign customer contracts to the divested entity. Mr. Byers conceded that PDM was fully prepared to go th[illegible]

of any customers going elsewhere to have their contracts completed

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

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

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

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

D. The Provisions of Complaint Counsel's Proposed Order Are Tailored to Restore the Competition that Existed Prior to the Acquisition

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

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

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

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

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

VI. CONCLUSION

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

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

April Tabor, Attorney

Dated: February 25, 2003