PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

)
In the Matter of)
)
CHICAGO BRIDGE & IRON COMPANY N.V.,)
)
a foreign corporation,)
)
CHICAGO B

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INTRODUCTION

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

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

Complaint Counsel's response to this evidence in its post-trial brief was astounding. It simply ignored weeks of testimony regarding the entry efforts of huge, multinational construction consortia into the LNG markets and the efforts of several well-respected domestic tank manufacturers in the LIN/LOX and LPG markets. Instead, Complaint Counsel advocates a "heads I win, tails you lose" approach (CC Br. at 58), asserting that Respondents must show evidence that entry has actually occurred in the relevant markets and that it is timely, profitable at pre-merger prices, *and* sufficient to constrain prices. Yet the law does not require such a specific, detailed showing from Respondents. Respondents need only show that Complaint Counsel's prima facie case is flawed. The burden rests with Complaint Counsel to prove that anticompetitive effects are likely to occur. The law places this burden firmly on the shoulders of Complaint Cmhh33D -0.0091e like3D -0.2461e like3D -0.2468 Tc2 Tw

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

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

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

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

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

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

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

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

instead holding that such statistics are "not conclusive indicators of anticompetitive effect" and that "[e]vidence of past production does not as a matter of logic, necessarily give a proper picture of a company's future ability to compete." *United States v. General Dynamics Corp.*, 415 U.S. 486, 499, 501 (1974). The Supreme Court in *General Dynamics* instructed lower courts to look beyond such statistics because "only a further examination of the particular market -- its structure, history and probable future -- can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Id.* at 498. Lower courts have followed *General Idnamics* landscape. (*See* Opening Br. at 16-19) (FOF 7.78, 7.108, 7.114, 7.115, 7.116, 7.123, 7.127, 7.130, 7.235, 7.237).

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

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

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

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

[4] Complaint Counsel cites Luke Scorsone for the proposition that PDM was CB&I's only competitor on domestic LPG projects, and states that "[t]here is no (x-) Tj 4 0.375 379 Tw (In 2.25 0 T.562Tj -387 -0 0 TD 2.9999 TD5 (

- In the TVC market, Complaint Counsel calculated the HHI figure as "a perfect 10,000." (CC Br. at 13). Complaint Counsel fails to note that a properly-calculated premay be unrepresentative." (CC Br. at 14-15) (citing Merger Guidelines § 1.41). This reliance is misplaced. First, there is a large middle ground between the use of annual data and 12 years of data. Nothing in the Merger Guidelines endorses going back so far. Further, a Section 7 case examines whether an acquisition *will affect competition in the future*. It defies logic to base a case regarding future competition on old and moldy data. Recognizing this fact, the Merger Guidelines do not allow Complaint Counsel to use a time period as long as it likes; they instruct that "[m]arket shares will be calculated using the *best indicator of firms' future competitive significance*." Merger Guidelines, § 1.41 (emphasis added). There is no evidence that market share data from 1990-1995 is remotely predictive of future competitive conditions. In fact, Complaint Counsel's expert witness could offer no other explanation for why he chose to use 1990 as a starting point for HHI calculations, other than that the information was available to him. Complaint Counsel's citations (CC Br. at 15) lend no s approach has been recognized by a leading antitrust commentator relied on by Dr. Simpson in forming his expert opinions. (*See* Simpson Tr. 3044-45) (FOF 7.237). Under the less arbitrary approach suggested by Professor Areeda, 1995 or 1996 is a more appropriate measuring date because, beginning at that time, CB&I's large LNG and LPG market share fall to zero over a six-year period. (Simpson, Tr. 3744).[8]

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

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

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

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

A. POST-ACQUISITION EVIDENCE IS HIGHLY RELEVANT.

Complaint Counsel misstates the law regarding post-Acquisition evidence. (*See* CC Br. at 16-17). It cites authority holding that such evidence is suspect if it "is subject to manipulation by the party seeking to use it" and if it "may have been made to improve [defendant's] litigating position." (CC Br. at 16) (quoting *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986)). Reliance on this authority is misplaced, as Complaint Counsel has not produced a shred of evidence to support the view that Respondents have manipulated any of the evidence presented at trial or that they would be able to do so. Entry into the markets by third party firms is not subject to manipulation. For example, Respondents did not engineer (and could not have engineered) the entry of Skanska/Whessoe into the U.S. market for LNG tanks, Dynegy's refusal to allow CB&I to bid on its LNG tank project, AT&V's ability to bid on projects at lower costs relative to CB&I, and the trend from single-containment to double and full-containment LNG tanks. Simply put, competitors are not entering in and succeeding in the relevant markets because CB&I is taking "voluntary actions" (CC Br. at 16) to allow them to do so. Rather, they are using competitive advantages and market developments to score wins in the relevant product markets.[10] Complaint Counsel speciously argues that post-Acquisition evidence is suspect because it cannot answer the factual record, yet it provides no answer to the extensive post-Acquisition factual record. Complaint Counsel disregards such evidence because it does not like what so. Ra2 record /F0I"0ut anst lowe onls64 0 TD /.

on guidelines authored by the government. This is inappropriate because the ultimate burden of persuasion in a Section 7 case "*remains with the government at all times*." *Id.* at 983 (emphasis added). This Court should reject Complaint Counsel's improper disingenuous setting of legal standards. Respondents respectfully suggest that its "heads-I-win, tails-you-lose" approach (CC Br. at 58) is flatly inconsistent with controlling precedent and should not be adopted in this case.

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

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

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

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

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

Complaint Counsel's solution for dealing with Respondents' extensive entry evidence is to simply ignore it. In its initial brief, Complaint Counsel casually asserts that "[t]he only supposed evidence of entry were several press releases about joint ventures involving TKK, Whessoe, or Technigaz desiring to enter the LNG market" and that "all that Respondents tried to prove was that Messrs. Glenn and Scorsone may think that foreign firms might enter the LNG market." (CC Br. at 2, 18-19). These statements mischaracterize several weeks of evidence. Respondents presented an array of evidence from customers and competitors describing in detail the entry efforts of several large, multinational corporations and domestic tank builders into the relevant markets. (*See* Opening Br. at 19-118; FOF 3.56-3.246 (LNG), 4.16-4.54 (LPG), 5.22-5.75 (LIN/LOX). Complaint Counsel represents that "Respondents conceded that the press releases and other so-called entry evidence would be admitted solely for proof of the state of mind of CB&I." (CC Br. at 2). *This statement is false*. During the trial, Respondents presented extensive evidence regarding the entry efforts of foreign companies. While Respondents did offer testimony for the limited purpose of proving CB&I's state of mind as well as the state of mind of the declarant -- in most cases, the new entrant[11] -- most of this evidence, including press releases and promotional materials, was admitted without limitation as to its use. (*See* JX 11).[12] [13] Complaint Counsel's assertions that this evidence has "little value" ring hollow; this evidence is not only relevant, it is dispositive. The following list provides a few examples of the evidence from the LNG, LPG, and LIN/LOX markets that Complaint Counsel has apparently forgotten about: [14]the state of

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

- **ABB Lummus (LPG) -- [xxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Scorsone, Tr. 5039-43) (FOF 4.67-4.69).

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

- **BOC (LIN/LOX)** -- AT&V constructed two field-erected LIN/LOX tanks for BOC in

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

1.

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

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

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

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

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

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

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

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

[22] Complaint Counsel also relies on the testimony of Brian Price, who testified as to his personal views regarding the potential differences between those foreign bids and the bid that CB&I would have submitted. (CC Br. at 19-

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

In the face of this evidence, Complaint Counsel wrongly argues that CB&I and PDM were the low-cost suppliers of the relevant products. (CC Br. at 6, 20). This too is off-base. Prior to the Acquisition, Graver was the low-cost supplier in the LIN/LOX market, not CB&I or PDM. **[xxxxxxxxxxxxxxxxxxxxx]**. Post-Acquisition, AT&V has filled this role. (*See* **[xxxxxxxxxxxxxxxxxx]**; V. Kelley, Tr. 4599-4600, 5272; RX 208) (FOF 5.76-5.78). Further, AT&V has won three of the four competitively-bid LIN/LOX projects since the Acquisition. Customers have also found AT&V to be a low-cost supplier in the LPG market. (*See*, *e.g* market today, that he has no significant knowledge regarding LNG import terminals, and that he

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is not familiar with current competition in the LNG market today. (Hall, Tr. 1854-57). Further,

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

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

that it will take the alliance into account when pricing future LNG work. (*See* Glenn, Tr. 4224; Scorsone, Tr. 4850-52) (FOF 3.41-3.459). Further, *United Tote* implicitly rejected Complaint Counsel's proffered test for an entrant -- that it win every single bid contest that it enters. That court implicitly recognized that a new entrant could exert competitive pressure without even winning a job, provided that it had some impact on other competitors' pricing. 768 F. Supp. at 1081 (quoting *Baker Hughes*).

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

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

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

Finally, the evidence demonstrates that new entry in the LIN/LOX market has constrained CB&I's pricing behavior. Both **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Opening Br. at 111-13) (FOF 5.125, 5.157-5.158). **[xxxxxxxxxx]** BOC, and [x x x x x x 7 C c 0 T 7 T f ([

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

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

[27] Complaint Counsel argues that **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Opening Br. at 100-02).

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

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

Complaint Counsel mistakenly argues, as if this were a preliminary injunction hearing, that entry barriers will prevent CB&I's competitors from having "much of an impact." (CC Br. at 22; *see also* CC Br. at 4). However, entry has already occurred in the relevant markets, thus disproving Complaint Counsel's theoretical claims. (Opening Br. at 20-46, 89-90, 98-107). In a failed attempt to counter this evidence, Complaint Counsel has cobbled together a collection of half-truths and mischaracterizations. While this effort is erroneous in many specific ways, as discussed below, it suffers from one fundamental problem: *it fails to differentiate between different product markets*. Because the products at issue are built differently, have different customers, and cost different amounts, an entry barrier in one product market is not necessarily an entry barrier in another. For example, a patent regarding the door seal technology for a TVC may be an entry barrier for a TVC competitor.[29]

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

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

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

2.

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

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

Complaint Counsel's citations to customers and competitors of AT&V and CB&I are misleading. For example, it cites to Hans Kistenmacher to support its criticism of AT&V, yetapacity, the

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

In its failed argument regarding alleged entry barriers, Complaint Counsel ignores the "stubborn fact" that AT&V is the low-cost competitor in the relevant markets. Victor Kelley testified that BOC was satisfied with AT&V's "low cost" price for LIN/LOX tanks and that BOC

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

Complaint Counsel mistakenly argues that testimony from **[xxxxxxxxxxx]** shows that AT&V cannot compete in the relevant markets. As an initial matter, the relevance of any testimony from **[xxxxxxxxxxx]** is limited to the LIN/LOX market. With respect to the LIN/LOX market, contrary to Complaint Counsel's claims, **[xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** Complaint Counsel mistakenly argues that AT&V cannot compete in the LIN/LOX market because **[xxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx[34]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (Opening Br. at 9-10).[35]

[34] In a comment unrelated to the issue of entry barriers, Complaint Counsel points out that **[xxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]** (*See* Scorsone, Tr. 5036) (FOF 5.140).

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

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

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

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In a strained attempt to support its entry barrier argument, Complaint Counsel cites testimony from

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

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

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

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

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

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

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

Of the dozens of misstatements and mischaracterizations made in Complaint Counsel's initial brief, one of the most egregious examples is its use of Brian Price to support its failed entry barrier argument. (CC Br. at 38-39). Mr. Price argued that foreign competitors *may*

Similarly, Complaint Counsel points to a few instances of alleged collusion, and jubilantly argues that "[a]ll that is required is a showing of likelihood of tacit or express considered the potential effect of a merger between two low-cost sellers. However, it did not address the effect of entry or potential entry on the competitive situation at issue in that case. *See* 246 F.3d at 717-19.

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

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

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

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

sign of vibrant competition in a tiny market. The other markets at issue in this case having some level of demand enjoy similar levels of competition. (*See* FOF 3.451-3.459, 4.10-

Acquisition, Howard had acted as a subcontractor to PDM on prior TVC projects. (Scorsone, Tr. 5060-61) (FOF 6.136).[47] In mid-meeting, Mr. Gill learned that Mr. Miles was discussing the TRW project. At that point, Mr. Gill told Mr. Miles that he had provided ROM pricing to TRW.

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

Complaint Counsel has attempted to show that CB&I has raised its prices on relevant products since the Acquisition. This effort relies chiefly on "budget

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

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

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

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

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

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

estimate" document, which shows an "as reviewed" price on November 1, 2000, and a slightly higher "as submitted" price on November 2, 2000. (

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

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

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

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

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

an effort to assist MLGW. (Hall, Tr. 1864-65) (FOF 3.608). Consistent with the inaccurate nature of budget pricing, Mr. Hall provided CB&I very little information regarding the proposed acknowledged that, apart from his 1994 experience, he was *not familiar* with the current capabilities of Skanska/Whessoe, Technigaz/Zachry, TKK/AT&V, or any other foreign tank builder. (Hall, Tr. 1843-54) (FOF 3.653-3.657). He also acknowledged that he had made no effort to search for an LNG tank builder since 1994, that competition in the LNG market could have increased since that time, and that he had no idea whether he could get a better deal from a foreign tank supplier than he could from CB&I. (*See* Hall, Tr. 1843-57) (FOF 3.653).

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

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

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

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

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

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

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

Complaint Counsel points to recent rough order of magnitude ("ROM") pricing given to **[xxxxxx]** by CB&I as evidence of anticompetitive effects. (CC Br. at 35). Specifically, it points out that PDM provided a **[xxxxxxxxxxx]** price to **[xxxxxx]** for a TVC **[xxxxxxxxxxxxxx**

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

Complaint Counsel contends that budget pricing provided to Fairbanks Natural Gas in 2002 is evidence of the Acquisition's anticompetitive effects. (CC Br. at 36; *see also* CC Br. at 6). This argument lacks evidentiary support, as it is based primarily on the deposition of Dan Britton, which is not in evidence.[55] Even worse, the consultant to which it refers is Zoher Meratla. Complaint Counsel unsuccessfully attempted to introduce Dr. Meratla's affidavit three separate times. (Tr. 3039-40, 3112-12, 5348-52). Complaint Counsel is attempting to skirt that ruling by citing to another inadmissible document. For this reason alone, Complaint Counsel's arguments regarding the Fairbanks project should be stricken *in toto* costs) would be the same as those on the Fairbanks job located deep in interior Alaska. In fact, Dr. Simpson -- acknowledged that these factors would be relevant in any comparison of the two projects. (Simpson, Tr. 5385). Yet, Complaint Counsel failed to discuss them in its allegations regarding anticompetitive effects. (CC Br. at 36).

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

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

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

In a throwaway sentence devoid of explanation, Complaint Counsel asserts that customers are unable to force CB&I to negotiate lower prices post-Acquisition. (CC Br. at 35). As sole support for this statement, Complaint Counsel cites the testimony of **[xxxxxxxxxxxxxx xxxxxxxxxx]**

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]

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

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

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

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

(Andrukiewicz, Tr. 6451-52). It plans to pre-qualify firms in January of 2003 and receive bids in spring of 2003. (Scorsone, Tr. 4989). As Complaint Counsel's own ci

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

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

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

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

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

A.

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

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

Complaint Counsel also argues that "if Byers had convinced the board to liquidate the EC division, his plan was to sell the current contracts, the plant, and the engineering and intellectual property assets to another competitor who would carry out the current business." (CC Br. 43) This statement is blatantly false. Mr. Byers simply testified that he would try to assign the ongoing contracts to third parties who would finish the work that PDM was

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

[60] Complaint Counsel argues that Gerald Glenn "admitted that PDM could have sold the EC and Water

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

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

While Complaint Counsel argues that PDM did not engage in a sufficiently detailed search for alternative buyers, its argument is inconsistent with the uncontradicted testimony of PDM's professional investment banker. (Opening Br. at 138-44; FOF 8.45-8.82). Further, contrary to Complaint Counsel's assertion that an "exhaustive marketing effort" must occur, this is not the applicable standard. The selling company need only make a "*good faith* effort to seek offers from other potential purchasers." *California v. Sutter Health Sys.*, 130 F. Supp.2d 1109, 1136 (N.D. Cal. 2001)(emphasis added). *See also Dr. Pepper/Seven-Up_Cos. v. FTC*, 991 F.2d 859, 865 (D.C. Cir. 1993) ("the proponent of the acquisition must demonstrate that it has made a reasonable, good faith attempt to locate an alternative buyer"). PDM's effort more than met the good faith requirement. PDM relied on a well-established investment banking strategy for the sale of EC and Water divisions which involved wide dissemination of a press release which led to a large list of interested purchasers contacting PDM and/or Tanner & Co. (Opening Br. at 141-42; FOF 8.49-8.54). Peter Scheman used his experience to analyze the list of interested purchasers to determine whether they could consummt. Pu financial abilities. Such an evaluation is essential, as it can be quite damaging to proceed with a buyer that turns out to be incapable of consummating a deal. (Opening Br. 151; FOF 8.54).[62]

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

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

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

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

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

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

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

A. A PUNITIVE REMEDY IS NOT APPROPRIATE.

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

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

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

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

Complaint Counsel has not cited a *single case* holding breakup by divestiture to be an automatic remedy robbing this Court of equitable discretion. While it claims *United States v. E.I. DuPont de Nemours,* 366 U.S. 316 (1961) supports its position (CC Br. at 47), *DuPont* actually reached a different conclusion, finding that "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition." *DuPont* explained that courts are authorized and required to decree relief "*effective to redress the violations*," whatever that remedy may be. *Id.* at 326 (emphasis added). The Court explained that the trier of fact has "large discretion to model their judgments to fit the exigencies of the any way. Complaint Counsel incorrectly argues that *Greater Buffalo Press*, 402 U.S. 549 (1971) identifies breakup by divestiture as a mandatory Section 7 remedy. (CC Br. at 46). In fact, the *Greater Buffalo Press* Court found that no violation occurred; it did not reach the question of divestiture. 402 U.S. at 556. *Ford Motor Co. v. United States*, 405 U.S. 562, 578 (1972) (CC Br. at 47) is similarly unhelpful to Complaint Counsel. In fact, *Ford Motor* reiterated *Du Pont's* holding that courts have "large discretion to fit the decree to the special needs of the individual case" in order to create a remedy that will be "effective to redress the violations and to restore competition." 405 U.S. at 573 (citing *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586, 607) (internal quote marks omitted). Further, *Ford Motor* explained that courts must review record evidence and "consider[] all aspects of [the] case, including the nature of relief" when fashioning a remedy. 405 U.S. at 578.[66]

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

[66] Complaint Counsel's reliance on *California v. American Stores*, 495 U.S. 271 (1990) (CC Br. at 44-45) is unavailing. There, the Court reviewed Section 16 of the Clayton Act, and only tangentially discussed Section 11 in order to determine if divestiture was a remedy contemplated by Congress in the def

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

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

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

Id.

Far from holding itself obligated to impose complete divesture in every case in which a violation is found, the Commission has recognized that "practical difficulties" may militate against divestiture or other types of structural relief in particular cases and that a court should not "minimize2 TwiOponplete dc Tw se in hardship." *Id.* It also made clear that it "would not attempt to apply remedies so drastic, or inequitable, *that the cure would be worse than the disease*," and that as a result, it was important that the Commission have "a range of alternatives in its arsenal of remedies." *Id.* (emphasis added).

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

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

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

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

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

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

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

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

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

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

[68] Complaint Counsel cites *Ford Motor* for a similar purpose. (CC Br. at 49-50) (citing *Ford Motor,* 405 U.S.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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proposed relief. Customers for LNG import terminals have explained that the financial size of an LNG tank maker is a critical consideration, and that CB&I is barely large enough to compete for LNG projects. (*See* Opening Br. at 57; FOF 3.230). The evidence simply does not support the notion that a divestiture could create *two* companies large enough to compete. In fact, it is much more likely that a complete divestiture could actually reduce the number of available contractors to owners such as El Paso, Calpine, and Marathon. (*See* Opening Br. at 166-68; FOF 9.24, 9.26, 9.9).

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

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

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

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

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

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

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

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

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

Complaint Counsel argues that Respondents must divest their intangible assets to the divested company, including "the PDM name."[73] Yet, it has presented no evidence that required intangible assets could be supplied to a divested company. In arguing that a divested company would require such intangible assets, Complaint Counsel cites W.T. Cutts of AT&V, who testified regarding his "wish list" of assets. (CC Br. at 55-56). Yet, Mr. Cutts' testimony actually contradicts Complaint Counsel's argument. He acknowledged that AT&V already had access to customer lists for the LIN/LOX market, and that CB&I's lists would not assist AT&V.

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

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

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

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

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

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

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

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

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

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

Fifth, many of the provisions of the Proposed Order are extraordinarily vague. For example, if customers do not permit assignment of their contracts to New PDM, the Proposed Order directs CB&I to "enter into such agreements, contracts, or licenses as are

Proposed Order says nothing about how CB&I might do this. Similarly, the Proposed Order decrees that CB&I provide "sufficient" working capital to maintain its "Tank Business." (Prop. Order III.B.(4)). Yet, Complaint Counsel does not define the term "sufficient," nor is there any evidence in the record to assist this Court or the Compliance Division in determining what a following unadmitted evidence in its findings of fact and conclusions of law: CX 105; CX 190; CX 370; CX 822; CX 823; CX 1572; CX 1591; CX 1682; and CX 1685. Complaint Counsel also cited unadmitted and unidentified "interviews with industry participants." (*E.g.*, CCFF at 177). For these reasons, all argument regarding these exhibits should be disregarded and stricken

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

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

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

In its findings of fact and conclusions of law, Complaint Counsel improperly cites the testimony of Dr. Simpson -- its expert witness -- to create findings of fact. Expert economic witnesses provide testimony regarding economic issues, and should not be used to shovel in factual evidence that is inadmissible by other means. Complaint Counsel repeatedly attempted to do just that. For example, it submits: "Prior to the Acquisition, CB&I and PDM had a competitive advantage over other firms because they had an efficient core group of workers for projects, and other workers that repeatedly interacted with those other workers and were familiar as witnesses in their case-in-chief. The significance of each witness' testimony is set forth in detail in Respondents' Opening Brief. Each of these witnesses is currently participating in the U.S. LNG market and has current knowledge regarding the market. The foundation for each witness' testimony is contained in Respondents' Findings of Fact. For the convenience of the Court, a list of witnesses and relevant citations are set forth below.

- **Nigel Carling (Chevron Phillips/Enron)**

CONCLUSION

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

Dated: March 18, 2003

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

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

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