UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE PROPOSED FINDINGS OF FACT

Respondents' Motion is a meaningless diversion. Shortly after filing its initial brief, Complaint Counsel discovered that in over 2,650 citations to the record in its initial Post-Trial briefing, five exhibits were inadvertently omitted from the Joint Exhibit list – as were two of Respondents' exhibits (CX 1571 and DX 131) – which Respondents cite in their findings but fail to even mention to

None of these issues matter to this case. So it is unfortunate that the Tribunal has been diverted from the merits of this case with this meritless motion. However, Respondents' motion disingenuously asks for relief that goes far beyond the simple omission of these five exhibits and the correction of one typographical error – which is all we have here. Instead, they ask to strike dozens of key findings that are overwhelmingly supported by other substantial, admitted evidence that is cited to support these same findings. Thus, their motion should be denied.

1. <u>Findings with Exhibits "Cited" But Not Admitted Into Evidence</u>

Among the over 2,650 citations to exhibits and testimony in both the CCFFs and CC Post Trial Brief, Respondents identify 10 that they claim are not in evidence. This is not correct. CX 105 and CX 1572 were not cited by Complaint Counsel anywhere in the initial findings or brief. CX 823 is a typographical error; the proper cite is CX 832. CX 190, CX 822, and CX 1682 are single cites, which were inadvertently not admitted as evidence, but which were in a string of other citations to admitted exhibits and testimony. Disregard of these exhibits does not undermine the evidentiary foundation for any of the findings that cite to them.[2] CX 1591 was never offered for evidence in any finding; it is simply noted in CCFF 318 that Dr. Simpson cited it in his testimony. ***Only one*** statement in a finding (CCFF 416) (referring to an extremely minor point of the retirement of two employees) is supported by an exhibit that was inadvertently omitted from the record, CX 1685, and, as pointed out previously to this Tribunal should be disregarded.

[2] Table 1 attached hereto summarizes the relevant CCFFs and the citations therein.

CX 370 is the deposition transcript of Daniel Britton, an executive of Fairbanks Natural Gas. By letter dated December 1, 2002, attached hereto, Respondents agreed to the admissibility of Mr. Britton's deposition transcript (except for minor portions), and the parties understood and agreed that the deposition would be submitted in evidence. (Leon, Tr. 3112 ("the customer is **Dan Britton, whose deposition is going to be submitted**, not read, **tomorrow**. He's testified, he was deposed, and to the extent that they want to talk about what Mr. Britton

[5] *See, e.g.*, *e.g*

[6] Respondents assert that "Dr. Harris made numerous changes" to CX 1760, which Complaint Counsel did not use here, but

For example, CCFF 265 states: "There are no PDM documents that discuss any firm as a greater competitive threat than CB&I in the relevant markets." Complaint Counsel cannot cite to a document that does not exist. But of course this is the whole point of the finding, and Respondents, rather than pointing to evidence that would refute the finding, seek to have the Tribunal ignore the facts.

In an example of a summary sentence, CCFF 50 states that "The relevant product markets in which to analyze the acquisition are field-erected LNG storage tanks (individually, or as a component of an LNG import terminal or a LNG peak shaving plant), LIN/LOX storage tanks, LPG storage tanks and TVCs." From day one, Respondents have conceded the product market definitions in this case and yet they seek to have the Tribunal not make a finding on this issue. Moreover, in each case, Complaint Counsel then cites dozens of findings with dozens of admitted evidence to support this very statement.[8]

Finally, without any evidentiary support, Respondents challenge CCFF 29, which states: "By proposing a TVC remedy to the Tribunal during the trial, Respondents have conceded that this merger will will

[8] For the convenience of the Tribunal, Table 2 attached hereto identifies the summary findings objected to by Respondents and cross references their respective underlying findings.

Finally, Respondents incorrectly assert that the findings relating to Mr. Fan's testimony about CB&I's post-merger 8.7% price increase to his company (Linde BOC Process Plant LLC) should be stricken because the Tribunal "ruled that Mr. Fan's statistical analysis of CB&I's price was not admissible for the truth of the matter asserted" – although this Tribunal never said that at all. (Motion at 2). Respondents point to one page of the transcript, but ignore what this Tribunal actually said when referring to one piece of Fan's testimony, where this Tribunal stated: "I'm allowing this because you're telling me

higher by 8.7%. (Tr. 975 (Tribunal: "I find [CX1584] to be reliable based on his testimony, I don't see any evidence of untrustworthiness or unreliability, therefore 1584 is admitted")).

Respondents are free to argue that this one piece of evidence might not be clear enough. But other admitted evidence corroborates Mr. Fan's precise observation. As Complaint Counsel has already

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a corporation,	)	
	)	Docket No. 9300
and	)	
PITT-DES MOINES, INC.	)	
a corporation.	)	

ORDER

On March 10, 2003, Respondents filed a Motion to Strike certain exhibits and Complaint Counsel's Findings of Facts. On March 12, 2003 Complaint Counsel filed an Opposition to Respondents' Motion to Strike. Having fully considered Respondents' Motion and Complaint Counsel's Opposition thereto, the Court finds that Complaint Counsel's proposed findings, identified in Respondents' Motion to Strike, are supported by the record. Complaint Counsel has identified the following exhibits that were not admitted into evidence but inadvertently cited in their proposed findings of fact: CX 190, CX 370, CX 822, CX 1682, and CX 1685. Complaint Counsel has withdrawn any reference to these inadvertently included exhibits. Because these exhibits were not admitted into evidence, they will be disregarded. CCFF 416, which relies on CX 1685 has been withdrawn as well

and thus both will be disregarded. All other of Complaint Counsel's findings are supported by evidence in the record and will be considered by this Tribunal in its review of the findings in this case. Accordingly,

IT IS HEREBY ORDERED that, except as stated above, Respondents' motion is denied.

_____

D. Michael Chappell
Administrative Law Judge

Date: March , 2003

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the public record version of Complaint Counsel's Opposition to Respondents' Motion to Strike Proposed Findings of Fact to be delivered by hand to

The Honorable D. Michael Chappell
Federal Trade Commission
H-104
6th and Pennsylvania Ave. N.W.
Washington D.C. 20580

Administrative Law Judge

and by first-class mail to:

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

Dated: March 19, 2003

_____
Rhett R. Krulla

December 1, 2002 Letter Agreement signed by Eric M. Sprague and Jeffrey A. Leon

Figure 1 as presented in Complaint Counsel's Appeal Brief in
Schering-Plough Corporation, F.T.C. Docket No. 9297

Table 1
CXs Inadvertently Cited by Complaint Counsel

Table 1 – CXs Inadvertently Cited by Complaint Counsel

CX	Finding	Response
105	Not Cited by Complaint Counsel	Complaint Counsel did not use this document in either its findings or its

	job. (RX 407 at 6666 ("includes 20% margin" plus "30%" for location). Yet, on a recent LNG tank project in nearby British Columbia before the acquisition, PDM had offered a price that was comparable to the estimated price of $2.2 million for the tank – demonstrating that if PDM had not been eliminated from competition, Fairbanks could have received a substantially lower price. (*See* CX791 at 260; CX370 at 94-97) (Complaint Counsel Corrected Post-Trial Brief at 36-7). Several witnesses testified as to the desirability of Complaint Counsel's proposed remedy. (Neary, Tr. 1489, 1502) (Reestablishing PDM would give his company the "competition" they're "looking for"); CX 370 at 89 (Britton Dep.) (better to have competition); (Simpson, Tr. 3606-09 ("PDM EC was as strong a competitor as it was because it possessed certain tangible and intangible assets. For a reconstituted firm to be as strong a competitor, it, too, would have to possess similar assets like the fabrication plants..., its work force, its engineering staff and its intangible assets, such as its learning by doing, enabled it to compete as a very strong competitor in this marketplace.") In short, as Dr. Simpson testified, the remedy would "restore the competition that existed prior to the acquisition." (*Id.* at 3608-09) This is exactly what the law requires. *Olin*, 113 F.T.C. at 619. (Complaint Counsel's Post-Trial Brief 52).	This paragraph of Complaint Counsel's Post-Trial Brief is supported by the testimony of Mr. Neary (Neary, Tr. 1489, 1502), by the testimony of Dr. Simpson (Simpson, Tr. 3606-07, 3611), and by the Commission's decision in *Olin*.
370	957. Fairbanks retained the services of CDS Research, an LNG consulting firm, to assist in the project. CDS Research helped prepare a budget for the project. CDS Research's methodology consisted of taking the "industry standard for benchmarking at costs per gallon and then factored in an adjustment factor for size of the tank and referred back to ... recent projects to kind of do a comparison ... " (**CX 370 at 97 (Britton, Dep.**)). 958. CDS Research's analysis included a "15% adjustment factor on the	Complaint Counsel has no objection to striking these particular findings. Complaint Counsel has acknowledged its error in its Response to Respondents' Findings of Fact and apologizes for any inconvenience to the Tribunal. Complaint Counsel asks that the Tribunal note the attached agreement made by Respondents and

	industry standard for size of the facility ... the industry standard budget pricing for the size." (**CX 370 at 98 (Britton, Dep.)**). 959. Based on CDS Research's analysis, Fairbanks concluded that a one-million gallon field-erected LNG tank would cost approximately $2.2 million dollars. (**CX 370 at 18, 19, 21 (Britton, Dep.)**). Fairbanks further concluded that the total cost of the LNG tank and the necessary systems would be approximately $5 million. (**CX 370 at 46-8 (Britton, Dep.)**). 960. CDS Research contacted multiple tank suppliers in order to create a competitive bidding situation for Fairbanks. CDS Research found that suppliers were unwilling to provide budgetary pricing information. (**CX 370 at 33 (Britton, Dep.)**). 964. CBI's $3.6 million price was $1.4 million higher than Fairbanks' estimate of $2.2 million based on its consultant's analysis. (RX 407 at CBI 066666; **CX 370 at 19 (Britton, Dep.)**). 965. Fairbanks expected "margina[l]" cost increases between 1999 and 2002, but saw no reason that such increases would be "significant" enough to raise the tank price by more than 60%. (**CX 370 at 21 (Britton, Dep.)**). 971. PDM's $2.6 million price to BC Gas was only $400,000 more than the $2.2 million estimate CDS Research provided to Fairbanks, which was based on "industry standard for benchmarking at costs per gallon" and "recent projects." (**CX 370 at 97 (Britton, Dep.)**). 1286. Customers would benefit from the increased competition resulting from	Complaint Counsel regarding the Deposition of Daniel Britton.

	an effective divestiture. (Neary, Tr. 1502 (TVC; competition would be restored if PDM EC were returned to the marketplace); **CX 370, 89 (Britton, Dep.)**	

		document in either its findings or its post-trial brief.
1591	318. An entrant would need a large engineering staff to design LNG tanks. (Simpson, Tr. 3156 (citing CX 258 at 1794; **CX 1591 at 15262**). Dr. Harris agreed that an entrant must have engineering capability. (Harris, Tr. 7249).	The cited authority in CCFF 318 is Dr. Simpson's testimony (Simpson, Tr. 3156). CCFF 318 notes that Dr. Simpson cited CX 258 and CX 1591 as useful to forming his expert opinion. Accordingly, Complaint Counsel respectfully requests that this finding not be stricken from the record.[1]
1682	744. Shortly after the "brainstorming" session, Scorsone and other members of the integration team held an "Integration Kick-off Meeting." (CX 1544 at CBI 057915; **CX 1682 at CBI/PDM-H 4005307**).	Complaint Counsel respectfully requests that the Tribunal only disregard the document that is not in evidence, and consider CX 1544 at CBI 057915, the other document cited in support of Complaint Counsel's Finding.
1685	416. PDM gained efficiencies and reduced costs by assigning experienced employees on TVC projects. In an e-mail written relating to the Spectrum Astro TVC project, Mr. Scorsone wrote that "[t]he retirement of Fred Dilliott will hurt our ability to manage [ ]" and "Bob Watson has left the company and this will hurt our ability to manage the engineering and startup program." (44152 4equoD03kTc 0 9052u5793 Tc 0.0712 Tc rtu	04ur abili04ur aff t3- 0 -1f0.5

	were the two strongest suppliers of LPG tanks in the United States. (Simpson, Tr. 3400). Dr. Simpson testified that the skill set required to build field-erected ammonia tanks is very similar to the skill set required to build field-erected LPG tanks (Simpson, Tr. 3398 (**citing CX 1615 and interviews with industry participants**)). Nineteen projects for field-erected LPG tanks and field-erected ammonia tanks were awarded between 1990 and early 2001 in the United States. (Simpson, Tr. 3400 (referencing CX 1660 (demonstrative))). CB&I won twelve of these projects, PDM won five of these projects, Morse won one of these projects, and AT&V won one of these projects. (Simpson, Tr. 3400 (referencing CX 1661 (demonstrative))). Dr. Simpson testified that the probability of observing CB&I and PDM win seventeen of nineteen projects if	

Table 2
Summary Findings Objected to by Respondents

752	"The evidence of actual anticompetitive effects further belies Respondents' argument that entry by foreign and domestic firms will deter or counteract any anticompetitive harm that may flow from the merger."	753-1220
776	"Respondents' argument to the Tribunal – that ["vicious"] competition from foreign and domestic firms restrains CB&I – is a claim that CB&I has chosen to share with the Tribunal but not with the SEC or the investment community."	753-775
777	"The LNG project at Cove Point, Maryland ("Cove Point") illustrates two important themes of this case. (1) Prior the merger, CB&I and PDM competed vigorously to win this project, and Cove Point benefitted in the form of lower prices. (2) Since the merger, the elimination of PDM as CB&I's closest competitor and the inability of other firms to replace PDM as a price constraint has permitted Respondents to raise prices and margins markedly. On at least four occasions, Respondents implemented price increases that raised the current price of the Cove Point tank by more than 60% from pre-merger levels, with a nearly five-fold increase in the dollar margins that the combined entity expects to earn."	778–830
810	"Steimer's prediction that the margins realized on Cove Point would greatly exceed the November estimates proved correct."	806, 811
816	"A CB&I "Tank Estimate Summary Sheet," dated February 21, 2001, immediately following the CBI/PDM merger, shows that CBI, as an independent competitor, could have significantly undercut PDM's bids on Cove Point. The estimate may have been prepared before this date."	817-821
822	"If CB&I and PDM had not merged, the customer at Cove Point could have avoided these price increase, and may have been able to reduce prices even further by leveraging CB&I and PDM against each other."	778-830

831		

885	"There are three sections of the Cove Point/[ ] comparison. Part I of the comparison demonstrates the similarities between CB&I's and PDM's bidding practices in 2000 for the Cove Point project and in 1998 for the [ ] project. Part II of the comparison details PDM and CB&I's behavior after the letter of intent was signed, and illustrates that currently, CB&I pricing deviates from any price curves that existed prior to the acquisition because, in the competitive void that exists post-acquisition, CB&I has no price constraints (other than the significantly higher prices of Whessoe). Part III examines the comparison and relevant calculations on a demonstrative aid.	886-928
906	"PDM's [ ] adjustment for the difference in tank size does not explain the movement of PDM's entire price curve after the letter of intent was signed nor other subsequent price increases post-acquisition."	903-905
912	"The following graph shows the history of PDM's and CB&I's prices for the Cove Point LNG tank, from early 2000 through December 2002, as well as the price quotations submitted to [ ] by CB&I, PDM and Whessoe for various size single containment LNG tanks. Trend lines show approximate prices for CB&I, PDM and Whessoe for intermediate tank sizes. "	886-910
913	The most important point made by the graph is that PDM and CB&I's pricing after the letter of intent was signed *does not fall within a range of any price curve.* CB&I's current pricing, reflected on the graph, shows the lack of TD /F1esfter the let5 TD -0.doe he The most important point TD /F1esfter the letter of intent was signed, PDM's pricing December	

981	"In order to minimize competition and obtain the highest margin, CB&I attempted to force Dynegy to accept CB&I as a turnkey contractor so that it could supply the LNG tanks as well as facilitate the other portions of the project."	982, 984, 985
997	"Dynegy is likely to pay a higher price for the LNG tanks supplied by TKK, Whessoe or Technigaz than it would if CB&I had bid."	359, 979-1006
1006	"The teaching of the Dynegy project is that CB&I attempts to leverage its dominant position against customers in order to extract higher prices and margins. In order to avoid CBI's stranglehold, some customers perceive no other choice but to seek inferior alternatives. This is neither competition nor sufficient entry. It is an anticompetitive effect."	978-1006
1007	"The LNG project for Yankee Gas is similar to the themes of the Dynegy project, except that with Yankee Gas, CBI's strong-arm tactics have achieved considerable success."	1008-1026
1012	"As with the Dynegy project, CB&I did not want to deal with a middleman. CB&I wanted the owner's ear alone and refused to submit pricing information unless it was selected as the turnkey contractor."	1013-1020
1053	"Since the merger, CB&I has implemented the same 8.7% price increase on at least three different occasions: (1) to Linde BOC Process Plants LLC in April of 2002; (2) to Praxair in April of 2002; and (3) to Praxair again in June of 2002."	1058-1086
1056	"A fourth example of the anticompetitive effects of the merger involves MG Industries. This situation highlights how customers are handicapped by the absence of PDM as a leverage point against CB&I."	1078-1086
1057	"These four instances illustrate that, since the merger, CB&I recognizes that the elimination of PDM as its closest competitor and the inability of other firms to replace PDM as a price constraint provide CB&I with the opportunity to raise prices and earn significantly higher margins."	1058-1107
1075	"The difference in CBI's price to Praxair and CBI's price to Linde – for the virtually the same-sized tank and same location – is only [ ], or less than [ ]."	1072, 1074
1076	"CBI implemented the same [ ] price increase to Praxair as it did to Linde."	1070, 1072-1074

1085	"The increase in price from $850,000 to $924,000 is precisely 8.7%, the same price increase observed by Fan of Linde and Praxair on the Praxair-New Mexico Project 1."	1070, 1072-4
1086	"After years of intense head-to-head competition between CB&I and PDM, three separate instances of 8.7% price increases shortly after the merger cannot be coincidental."	1058, 1072-4
1087	"The experience of MG Industries, a subsidiary of Messer, ("MG Industries") is an example of how the elimination of PDM has reduced the ability of customers to obtain lower prices from LIN/LOX tank suppliers."	1078-1086
1091	"In most of the competitive bidding situations, PDM was either the lowest or second lowest priced bidder, followed by Graver, and finally CB&I."	1094-1097
1099	"Because PDM had merged with CB&I and Graver went out of business, MG Industries had to look for alternative suppliers besides CB&I."	1100
1165	"Having eliminated its only competitor in the TVC market, CB&I continued, following the acquisition, to attempt to coordinate on making a TVC bid or price quote with the next closest alternative available to TVC customers."	1166-1180
1180	"In the post-acquisition competitive environment, CB&I, a large, unopposed firm with low costs and efficient practices is in a position of power over other, smaller firms. These smaller firms know that they	1166-1180

1221	"Respondents assert an "exiting assets" defense that has never been recognized by any court as an antitrust defense, and rejected by the few courts that have addressed it. In essence, Respondents claim that had the merger not occurred, PDM would have made a business decision to liquidate the firm, thereby eliminating PDM from the competitive landscape."	1222, 1224
1223	"The defense recognized by courts and the *Merger Guidelines* which most closely resembles Respondent's asserted "exiting assets" defense is the failing firm defense."	1224
1225	"Respondents failed to prove each element of the defense."	1226-1281
1226	"Pitt-Des Moines's regular course of business documents reflect a strong and profitable firm."	1227-1237
1281	"Respondents have failed to show that PDM EC would have been an exiting asset if PDM were not acquired by CB&I."	1263-1280
1289	"As the viability of PDM EC depended upon the viability of the PDM Water division, both must be included in an order for complete divestiture."	1290-1296
1327	"An effective divestiture would need to include resources necessary to make flat bottom tanks, gravel tanks, and other tanks outside of the relevant market."	1328-1338
1347	"In order to provide New PDM with a backlog of work, CB&I will have to obtain its customers' approvals to transfer the work to the acquirer of New PDM."	1348-1349
1351	"In order to be an effective competitor, New PDM will need personnel with experience in the relevant product markets."	1352-1359

1. FRE 703: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." There is no reason why Complaint Counsel, in the interest of thoroughness, should not be permitted to disclose that Dr. Simpson used CX 1591 in forming his expert opinion. Complaint Counsel also respectfully requests that the Tribunal note that Respondents' expert is in agreement with Dr. Simpson on this particular point.

2. FRE 703: There is no reason why Complaint Counsel, in the interest of thoroughness, should not be allowed to acknowledge that Dr. Simpson relied upon his interviews with industry participants in forming his expert opinion. *See fn 1*.