

PUBLIC VERSION

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

RESPONDENTS' CORRECTED POST-TRIAL BRIEF

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INTRODUCTION

On February 7, 2001, Chicago Bridge & Iron ("CB&I") acquired the Engineered Construction and Water Divisions of Pitt-

a showing that the prima facie case is not predictive of future competitive harm. Once Respondents make that showing, it is Complaint Counsel's burden to present additional evidence in support of its case.

Complaint Counsel has relied primarily on market concentration statistics to

In the face of this powerful rebuttal evidence, Complaint Counsel bears the heavy burden of presenting additional evidence showing that the Acquisition is likely to have an anticompetitive effect in the relevant markets. They have not done so, nor is it surprising that they have been unable to do so. Although Complaint Counsel has tried to show that entry in the relevant markets has not succeeded in constraining CB&I's pricing, the evidence conclusively demonstrates that customers who have participated in the relevant markets after the Acquisition have received pricing that is equal to or better than pricing received pre-Acquisition. The evidence also shows that current customers in three of the four product markets have seen no evidence of anticompetitive effect on the part of CB&I, and that many customers are unconcerned about the effect of the Acquisition on future competition. To circumvent this evidence, Complaint Counsel relies on speculation and conjecture to claim that CB&I has raised post-Acquisition prices in the relevant markets. However the evidence presented -- much of it from Complaint Counsel's own witnesses -- undercuts the validity of the claim.

Even if Complaint Counsel was able to meet its burden to present additional evidence regarding anticompetitive effects, it should not prevail. In order to properly evaluate whether a Section 7 violation has occurred, it is necessary to look at the markets as they would have existed today absent the Acquisition. If the Acquisition had never occurred, PDM EC would not have been an independent company operating in the relevant markets. Rather, PDM EC would have been liquidated, and its assets would have exited the market. Because this

I. APPLICABLE LEGAL STANDARDS

A.

B. COMPLAINT COUNSEL BEARS THE BURDEN OF PROOF IN A SECTION 7 CASE.

Complaint Counsel alleges that the Acquisition violates Section 7 of the Clayton Act, which proscribes acquisitions where the effect of such an acquisition "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. Complaint Counsel has the initial burden of proving a Section 7 violation, and the ultimate burden of persuasion in a Section 7 case "remains with the government at all times." *United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990); *see also United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 669 (1974); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 358-59 (S.D.N.Y. 1995).

This burden is not a trivial one. Complaint Counsel must show that the Acquisition is reasonably likely to have "demonstrable *and* substantial anticompetitive effects." *Kraft Foods*, 926 F. Supp. at 359 (emphasis added). A "mere possibility" of anticompetitive effect is not enough to win a Section 7 case; there must be a "reasonable probability" of such an effect. *Id.* (citing *Fruehauf Corp. v. F.T.C.*, 603 F.2d 345, 351 (2d Cir. 1979)). As one court explained, a showing of "reasonable probability" is required because Section 7 "deals in 'probability,' not 'ephemeral possibilities.'" *Id.* (quoting *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 (1974)).

Complaint Counsel must also prove that the commerce affected by the Acquisition is substantial. *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 9 (D.D.C. 1990). A showing of a "substantial" anticompetitive effect is required of the government in a Section 7 case. For example, in *Baker Hughes*, the district court noted that "[t]he miniscule size of the market creates problems for the government's case, because one element of a Section 7 violation

is that "[t]he market must be substantial." *Id.* (citing *United States v. Dupont & Co.*, 353 U.S.

concentration with evidence that suggests the statistics are not predictive of future competitive harm. *Id.*

A prima facie case based on concentration statistics alone is a thin case and may be misleading. The Supreme Court has instructed lower courts to look beyond market share

Trial courts hearing evidence of market concentration statistics have also recognized the limited utility of such evidence, holding that such statistics were not conclusive and that "the focus of a proceeding such as this should not be on numbers, but rather on commercial real

and "easily skewed." 908 F.2d at 986. The fact that the products at issue "were esoteric" and that the markets were small led the district court to believe that market concentration statistics did not accurately predict future competitive strength. *See id.*

b.

792-93 (2d Cir. 1987). Similarly, courts have held that locational disadvantages and business

market position was deteriorating both before and after an acquisition can rebut a prima facie case. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981). Similarly, weak market position of the acquiring company can rebut a prima facie case. *FTC v. National Tea Co.*, 603 F.2d 694, 699-700. (8th Cir. 1979). Financial weakness of the acquired company can also rebut a prima facie case. *United States v. International Harvester Co.*, 564 F.2d 769, 776-79 (7th Cir. 1977).

e. Evidence that the effect of the acquisition would have less than a risk of a substantial lessening of competition rebuts a prima facie case.

Evidence that an acquisition would have less than a risk of a substantial lessening of competition rebuts a prima facie case. Section 7 itself proscribes acquisitions that "may be *substantially* to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (emphasis added). For that reason, an acquisition that results in only trivial price increases or a loss of competition in a *de minimis* market does not violate Section 7. In *Baker Hughes*, the district court noted that "[t]he minuscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" 731 F. Supp. at 9 (citing *United States v. Dupont & Co.*, 353 U.S. 586, 595 (1957)). To read Section 7 as proscribing an acquisition that triggered only a trivial price increase or only a loss of competition in a *de minimis* market would be to ignore the substantiality requirement of the statute.

f. Post-Acquisition evidence is highly relevant to determining the validity of a prima facie case.

In attempting to predict whether a challenged acquisition will have an anti-competitive effect, review of post-acquisition evidence is often helpful. Courts have held that "[p]ost-acquisition evidence is admissible since the probability of anticompetitive effects is

burden when it challenges transactions between domestic competitors that face strong foreign competitors which have access to our domestic markets.

James R. Atwood, *Information from Abroad: Who Bears the Burden in an Antitrust Investigation*, 65 *Antitrust L.J.* 227, 238 (1996).

In its closing argument, Complaint Counsel contended that Respondents must show that "entry is not only timely but that these entrants would be able to be profitable at pre-acquisition prices." (Robertson, Tr. 8185). This position was flatly rejected by *Baker Hughes* as a "novel and unduly onerous standard." *Id.* at 987. In *Baker Hughes*, the government asserted that supposed ease of entry can only rebut the government's prima facie case by "clearly showing that entry will be both quick *and* effective at preventing supracompetitive pricing." *Id.* (emphasis added). The *Baker Hughes* court rejected this argument because it "would require of defendants a degree of clairvoyance alien to section 7, which, as noted above, deals with probabilities, not certainties." *Id.* It observed that the government's argument essentially imposed upon the acquiring party the burden to "disprove future anticompetitive effects," which would mean that respondents would be required to prove the ultimate issue. *Id.* at 990. The court noted that such a standard would be a "depart[ure] from settled principles." *Id.*

In an effort to shirk its burden during closing argument, Complaint Counsel cited the Merger Guidelines ("Guidelines") language stating that "the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern." *See* 1992 HORIZONTAL MERGER GUIDELINES § 0.2, *available at* <http://www.ftc.gov/bc/docs/horizmer.htm>. This reliance is misplaced for two reasons: First, while the Guidelines instruct the Agency to assess the "sufficiency" of entry in determining whether an action is necessary, it does not address which party bears the burden of proof

concerning any item of evidence in an actual court proceeding. In fact, the Guidelines do not even address the issue of burden in a judicial or administrative proceeding.

leader in the product markets at issue, with the exception of thermal vacuum chambers. (*E.g.* CX 832).

- *Baker Hughes* addressed a very thin product market. The overall size of the market ranged from 18 to 42 sales per year. 731 F. Supp. at 9. The case at bar also involves thin markets, far thinner in fact than those in *Baker Hughes*. For example, in the two years since the Acquisition, only one LNG Tank, one LPG tank, five LIN/LOX tanks and zero thermal vacuum chambers have been sold. (*See* Part VI, *supra*). The other markets at issue are far thinner. (*See* Parts III, IV, V, *supra*.)
- In *Baker Hughes*, the acquiring company was a "substantial business, doing business in many regions, including Europe, Africa, Asia, and Latin America." 731 F. Supp. at 9. Similarly, CB&I is a global business, with operations in many different countries. (Glenn, Tr., 4057-58).
- The *Baker Hughes* court examined acquiring and acquired companies that were both "already successfully established in the U.S., whose individual or combined shares measured over a period of years have Clayton Act significance." 731 F. Supp. at 9. Similarly, CB&I and PDM had a significant portion of pre-Acquisition market share in the relevant markets.
- In *Baker Hughes*, the acquiring and acquired companies followed each other's pricing closely. 731 F. Supp. at 9. In this case, prior to the Acquisition, CB&I and PDM followed each other's activities in the relevant markets. (*See, e.g.*, Simpson, Tr. 3773) (FOF 7.242).
- In *Baker Hughes*, competitors were global companies competing with the respondent on a world-wide basis. 731 F. Supp. at 9. As discussed extensively below, CB&I now competes in the U.S. with the same companies it competes with worldwide on a daily basis, particularly in the LNG markets. (*See* Part III, *supra*).
- *Baker Hughes* addressed the significance of failed past entry attempts. *See* 731 F. Supp. at 11. Similarly, the significance of foreign efforts to enter the LNG market in Memphis is at issue in this case.
- *Baker Hughes* addressed the legal significance of recent foreign entry and the threat of future entry. 731 F. Supp. at 11. These are also issues in the instant case. Foreign entrants have entered the U.S. LNG markets, and more companies are threatening to do so in the future. (*See* Part III, *supra*).
- Finally, *Baker Hughes* also addressed whether the government or the respondent bore the burden of proof regarding sufficiency of entry. *See Baker Hughes*, 908 F.2d at 983. As discussed above, this case presents the very same question.

In short, *Baker Hughes* provides the structural framework to analyze this Section 7 case. It addressed many of the legal and factual questions at issue in this case. As set forth below, *Baker Hughes* compels dismissals of the Complaint as to all four product markets.

II. COMPLAINT COUNSEL HAS FAILED TO MAKE A PRIMA FACIE CASE.

Complaint Counsel bases its prima facie case in each market on evidence of market concentration using statistics dating back to 1990. (*See, e.g., Simpson*, Tr. 3704-05) (FOF 7.237). For many reasons, market concentration statistics are unhelpful in analyzing the effect of this Acquisition and thus fail to establish a prima facie case.

A. COMPLAINT COUNSEL'S CONCENTRATION STATISTICS CANNOT BE USED TO PREDICT FUTURE COMPETITION.

Dr. Barry Harris, Respondents' expert, explained that market concentration statistics are useful only if predictive of the future:

The reason you would ever do any market share analysis as you go forward is to try to get a notion of what the world will look like going forward. It's not just, oh, I found a high number, that makes things bad. Market shares and concentration can be useful *if they help you predict as you go forward.*

(Harris, Tr. 7227 (FOF 7.237) (emphasis added). 129.75 -27 ou go ft share analyll 0 TD () Tj -243.numns

not reflect the fact that AT&V has won all three of the jobs it has competed on against CB&I, Praxair's spinoff of CB&I in the mid-1990s, and the exit of Graver from that market in 1999. (*See* Harris, Tr. 7307-08, 7311-12) (FOF 7.127, 7.130).

Second, since the Acquisition, LNG demand in the U.S. has generally shifted from single-containment to double- and full-containment tanks. (Harris, Tr. 7219-21). (FOF 7.108). This shift has changed the competitive abilities of CB&I relative to new entrants. Because foreign companies are more experienced in building full and double-containment tanks, they can be expected to have advantages relative to CB&I which Complaint Counsel's historical market concentration statistics do not measure. (*See* Harris, Tr. 7227) (FOF 7.115). Complaint Counsel's economist, Dr. Simpson, did not account for these changes in his market share analysis, which is significant because it affects Dr. Simpson's HHI analysis. (Harris, Tr. 7221-22) (FOF 7.114). Further, Dr. Harris noted that, since the Acquisition, CB&I has won only 17-18 percent of the dollar amounts awarded in the four markets combined. (Harris, Tr. 7223). (FOF 7.78). For these reasons, Complaint Counsel's structural analysis is not useful. (Harris, Tr. 7227-29) (FOF 7.115).

Third, in some cases, the market concentration statistics and other economic evidence presented by Complaint Counsel were misleading because they contained products different than the relevant products. For example, the LIN/LOX market included certain spheres. Because spheres serve different functions, and are constructed in a different manner, it is inappropriate to include spheres in this market. (*See* Harris, Tr. 7301-02) (FOF 7.123).

B. COMPLAINT COUNSEL'S CHOICE OF 1990 AS THE MEASURING DATE FOR ITS CONCENTRATION STATISTICS IS ARBITRARY AND SUBJECT TO MANIPULATION.

Even if market concentration statistics were somehow found to be helpful in this case, the statistics as presented by Complaint Counsel are flawed. Complaint Counsel chose to

calculate statistics in all four markets using data from the same starting point -- 1990 to the date of the Acquisition. Complaint Counsel's expert witness, Dr. John Simpson, acknowledged on cross-examination that he had no principled basis for choosing this date, other than the fact that 1990 was the earliest date he had available. (Simpson, Tr. 3704-05).

Although Respondents believe use of HHIs are not helpful in this case and are arbitrary, a more accurate basis for selecting a starting point for an HHI calculation is to select a date around which significant market changes occurred, such as rapidly rising or falling market shares. The validity of this approach has been recognized by a leading antitrust commentator relied on by Dr. Simpson (*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). There is no rational basis for selecting twelve years of data for purposes of concentration statistics as compared to fifteen or five. Sales in these markets are sporadic, and a single sale can represent a large percent of market share in any given year. Thus, as the Merger Guidelines note, "[t]ypically, annual data are used, but where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time." Merger Guidelines, §1.41. Nowhere do the Guidelines suggest going back twelve years.

For example, the arbitrary nature of the HHIs is underscored by the fact that choosing a different date achieves a completely different result; picking a different starting point of 1995 or 1996, vastly different concentration statistics emerge. CB&I did not build an LNG or LPG tank between 1995 and the date of the Acquisition, resulting in a change of zero in the HHIs in those markets, and the HHI in the LIN/LOX market is lowered. (*See*,

Tr. 3744) (FOF 7.236). In the thermal vacuum chamber market, CB&I has not built a thermal vacuum chamber since 1984. (Scorsone, Tr. 5055) (FOF 7.235). Thus, choosing to calculate HHIs beginning in 1996 results in an HHI change of zero in three of the four markets. Under *Baker Hughes* and the Section 1.5 Merger Guidelines, an acquisition resulting in zero change in the HHI fails to establish a prima facie case. In the LIN/LOX market, even Dr. Simpson admitted that CB&I's sale by Praxair in 1997 was a significant competitive change, a fact which would justify beginning the HHI calculation in 1997 after the date of the sale. (See Simpson, Tr. 3753) (FOF 7.236).

In short, using a 1996 start date for an HHI calculation would result in zero change in three of the four markets at issue in this case. To the extent that this Court finds HHI analysis to be helpful, using a 1996 date is supported by antitrust theory and the evidence in this case, and should be the preferred method should the Court decide that any HHI data is relevant in this case, as opposed to Complaint Counsel's 1990 starting point, which is arbitrary and appears chosen to manipulate the HHI results.

III. RESPONDENTS HAVE SUCCESSFULLY REBUTTED ANY PRIMA FACIE CASE IN THE MARKET FOR LNG TANKS AND FACILITIES.

A liquefied natural gas ("LNG") tank is designed to contain natural gas in liquid form. (Glenn, Tr. 4066; Price, Tr. 530) (FOF 3.5). There are various types of LNG tanks including single-containment, double-containment and full-containment tanks. (Scorsone, Tr. 4919; Glenn, Tr. 4108).

As set forth above, Complaint Counsel has failed to prove a prima facie case in the LNG markets. Assuming *arguendo* the existence of a prima facie case, Respondents have successfully rebutted it in several different ways. Evidence shows that timely entry has occurred and that new entrants are large, multinational corporations that have LNG experience and the

respect of U.S. customers. These new entrants do not face significant entry barriers in the U.S. Their presence in the market has successfully constrained CB&I's behavior in these markets and

Further, these entrants have successfully wrested LNG work from CB&I. This evidence of entry is far more compelling than that presented by the successful respondents in *Baker Hughes. Id.* at 988 (prima facie case rebutted by evidence that two companies entered the U.S. market for a particular type of heavy machinery, and were "poised for future expansion").

In addition, three other large foreign companies are poised to enter the U.S. market and in fact have already made efforts to enter. Like the new entrants already in the U.S. market, they have extensive experience in LNG internationally and are respected by U.S. customers.

- 1. Skanska/Whessoe is active in the U.S. market, and has the necessary experience and qualifications to be successful.**
 - a. Skanska/Whessoe has made significant efforts to enter the U.S. and North American markets.**

Skanska AB ("Skanska") is one of the world's largest construction groups and is a well-established Swedish based civil contractor that has operated internationally for more than 50 years. (RX 839 at 4; RX 870 at 25) (FOF 3.57). In terms of revenue, Skanska is the largest contractor in the world. Skanska has a significant presence in the U.S. In fact, it is one of the three largest contractors in the U.S. (RX 737) (FOF 3.57). In August of 2000, Skanska acquired Whessoe International ("Whessoe"), which is a 200-year-old engineering and construction firm with a well-established reputation in the international LNG business. (RX 770 at 33, RX 908 at 1) (FOF 3.57-3.58).

Skanska/Whessoe has already been successful in the LNG markets. In 2001, Skanska won the bidding to be the EPC contractor for Dynegy's Hackberry project, the largest such project in U.S. history. (Puckett, Tr. 4547) (FOF 3.68). Skanska beat several other major international engineering and construction firms, including CB&I. (*See* Puckett, Tr. 4545-46) (FOF 3.240). Dynegy chose Skanska because it had a demonstrated track record on similar

Skanska/Whessoe's marketing efforts; they have spoken with owners [xxxxxxx] regarding LNG activities in the U.S. [(xxxxxxxxxxxxxxxx)] (FOF 3.424).

Skanska/Whessoe has also been active in LNG activities elsewhere in North America. In 2001, after the Acquisition, Skanska/Whessoe bid on an LNG facility for Enron in the Bahamas. Enron solicited a bid from Skanska/Whessoe for this project because of Skanska/Whessoe's interest, and because of its proven track record with respect to LNG tanks. (Carling, Tr. 4480-81) (FOF 3.443).

b. Skanska/Whessoe is a capable, experienced, and qualified LNG contractor.

Past and current U.S. customers for LNG facilities believe that Skanska/Whessoe is a major competitor in the LNG markets. For example, Dynegy -- a company that recently went through an extended vendor pre-qualification process for LNG tanks and facilities -- had the opportunity to carefully examine the qualifications and capabilities of Skanska/Whessoe. In connection with its Hackberry project, Dynegy interviewed Skanska and found that it was qualified to be an EPC contractor. (Puckett, Tr. 4550, 4547) (FOF 3.68, 3.264, 3.267). In fact, Dynegy selected Skanska over several other major EPC candidates, including CB&I. (Puckett, Tr. 4545-46) (FOF 3.263).

With respect to the tank portion of the Hackberry project, Dynegy interviewed Skanska/Whessoe during its pre-qualification process. (Puckett, Tr. 4552-54) (FOF 3.277). During this process, Dynegy examined previous LNG tank projects performed by Skanska/Whessoe (the Dabhol, India project), and learned that they were well-done. (Puckett, Tr. 4565) (FOF 3.272). As a result of its due diligence, Dynegy was satisfied that Skanska/Whessoe had the necessary reputation and ability to perform the fabrication, field erection and construction of LNG tanks for this project. (Puckett, Tr. 4557-58) (FOF 3.278,

3.279, 3.280, 3.281). Accordingly, Dynegy

financial strength and brings the logistical experience." (Carling, Tr. 4481) (FOF 3.84). Carling

plans to consider pre-qualifying Skanska/Whessoe for this job. (Andrukiewicz, Tr. 6452-54)

2. **TKK/AT&V is active in the U.S. market and has the necessary experience and qualifications to be successful.**
 - a. **TKK/AT&V has made significant efforts to enter the U.S. and North American markets.**

Established in 1941, Toyo Kanetsu K.K. ("TKK"), is a Japanese constructor of low temperature and cryogenic tanks. (RX 872 at 2) (FOF 3.99). TKK has successfully constructed some of the largest above-ground storage tanks in the world and is recognized as a leader in tank construction. (RX 872, at 5; RX 186, at TWC 000084) (FOF 3.99). TKK has completed over 200 low temperature tanks throughout the world, including 72 LNG tanks in locations such as Malaysia, Brunei, Oman, Nigeria, Australia, Indonesia, Algeria, and Korea. (RX 772 at 2-21; RX 818) (FOF 3.100). TKK is the "world's leader" in constructing double-containment and full-containment LNG tanks; it has built more of these tanks than anyone else in the world. (Cutts, Tr. 2572-73) (FOF 3.101).

American Tank & Vessel, Inc. ("AT&V") is an engineering and construction firm based in Mobile, Alabama with extensive experience in the engineering, design, and fabrication of tanks, vessels and spheres. (RX 818; RX 31 at 9; Carling, Tr. 4489) (FOF 3.102). AT&V has engineering and fabrication facilities throughout the southern U.S., and owns a wide variety of equipment necessary for tank construction. (RX 31) (FOF 3.103). AT&V maintains global operations in Mexico, Argentina, Brazil, Ecuador, Trinidad, Philippines, Indonesia, and Thailand; it has worked on "hundreds and hundreds" of projects overseas. (RX 31 at 19; Cutts, Tr. 2476-77) (FOF 3.104).

In November 2001, AT&V entered into an agreement with TKK to jointly supply large-scale LNG tanks to the U.S. market. (RX 250; RX 818; Cutts, Tr. 2437-38) (FOF 3.105). TKK and AT&V have also "developed an understanding and general relationship" to jointly pursue projects outside of North America. (Cutts, Tr. 2444) (FOF 3.105). TKK will carry the

lead responsibility for doing the engineering and design work for LNG tanks. (Cutts, Tr. 2327) (FOF 3.105). TKK will provide a track record, engineering expertise, management expertise, and welding technology to the TKK/AT&V partnership to build large cryogenic tanks in the U.S. (Cutts, Tr. 2376-77) (FOF 3.106). AT&V will provide field labor and field erection services. (Cutts, Tr. 2328) (FOF 3.105).

TKK and AT&V have already begun to put plans into action. TKK personnel have come to AT&V's offices to train employees. (Cutts, Tr. 2441) (FOF 3.109). TKK has already trained AT&V employees on estimating, scheduling, construction techniques, welding, operation of welding equipment, and coordinating. (See Cutts, Tr. 2324-26) (FOF 3.109). TKK is also assisting AT&V in developing technical specifications for LNG tanks. (Cutts, Tr. 2564-65) (FOF 3.111). TKK plans to train AT&V employees in the welding technology and fabrication necessary for an LNG tank. (Cutts, Tr. 2326, 2442, 2565-66) (FOF 3.110, 3.111).

AT&V has expended capital associated with the TKK/AT&V joint venture in connection with estimating, drafting, design, coordinating, bidding, and "all sorts of miscellaneous things." (Cutts, Tr. 2341-42) (FOF 3.109). It has already undertaken steps to research, design, and perform, "such as thermal performance, steps associated with scheduling, welding technology, and general construction sequencing" for LNG tanks. (Cutts, Tr. 2440) (FOF 3.108). Further, employees of AT&V have experience building LNG tanks in the U.S., and AT&V its

profitability or almost none at all. . . ." (Cutts, Tr. 2461) (FOF 3.107). For example, TKK has a greater ability to obtain bonding at higher amounts than AT&V for LNG projects. (Cutts, Tr. 2556-57) (FOF 3.107). Customers have been satisfied that TKK is large enough to provide a financial guarantee for an LNG project. (Cutts, Tr. 2557-58) (FOF 3.107).

TKK and AT&V have already been making plans to work together on a specific LNG project. As discussed more fully below, TKK/AT&V bid on the Dynegy project, and have made plans to execute the project if they are successful. (See Cutts, Tr. 2468-69) (FOF 3.115, 3.116). TKK will have lead engineering responsibility for the entire project. (Cutts, Tr. 2484-85) (FOF 3.118). Engineering will be done in Japan and electronically transmitted to AT&V.

its relationship with TKK with respect to its LNG marketing effort. (Cutts, Tr. 2439) (FOF 3.112). In fact, AT&V and TKK jointly make sales calls to customers. (Cutts, Tr. 2440) (FOF 3.113).

Like Skanska/Whessoe, TKK/AT&V was pre-qualified by Dynegy and submitted a bid to Dynegy for the Hackberry project. (Puckett, Tr. 4552-54). The TKK/AT&V partnership has bid on a total of three LNG projects during the past year, and has submitted budget pricing for three other projects. (Cutts, Tr. 2447, 2464-65) (FOF 3.114). TKK/AT&V has also provided pricing to Williams for a proposed expansion of the Cove Point LNG facility. (RX 185) (FOF 3.120). With respect to this expansion, Williams has plans to add between four and six new LNG tanks to the Cove Point facility. (Scorsone, Tr. 4987-88) (FOF 3.428). It has hired Halliburton/KBR to do a feasibility study for this expansion. (Scorsone, Tr. 4987-88) (FOF 3.429).

TKK/AT&V has also been pursuing other opportunities in the U.S. For example, representatives from TKK and AT&V (W.T. Cutts) contacted Freeport LNG to discuss the consortium's capabilities and to discuss contracting strategies. (Eyermann, Tr. 7000-01) (FOF 3.121). They indicated that AT&V has the "welder base" and "quality welders" to handle the Freeport project. (Eyermann, Tr. 7001-02) (FOF 3.130). Further evidence of the consortium's effort to enter the U.S. market is its effort to secure a U.S.-based process firm. AT&V, with Dywidag and TKK, recently approached Linde to form an alliance to build import terminals and peak-shaving plants. (Kistenmacher, Tr. 902-03, 915) (FOF 3.113).

TKK/AT&V has also been active elsewhere in North America. In conjunction with AT&V, TKK recently won a bid for a field-erected LNG tank in Trinidad. (Carling, Tr. 4488-89) (FOF 3.122, 3.326). CB&I is aware of this:

Q. And how are you familiar with that?

A. Recently CB&I lost a project there for another -- for a fourth tank at Trinidad to TKK and ATV, and CB&I is also in the final stages of

such as Indonesia, Egypt and Ras Laffan. (Carling, Tr. 4488, 4522; *see also* Izzo, Tr. 6499) (FOF 3.127). They are also familiar with AT&V as a tank maker in the U.S. and know it to employ many ex-CB&I workers. (Carling, Tr. 4489) (FOF 3.127). For example, Nigel Carling believes that TKK/AT&V can be competitive in the U.S. because of its success in remote locations such as Indonesia. (Carling, Tr. 4522-23) (FOF 3.127). As further support for the viability of TKK/AT&V in the U.S., Carling pointed to its recent win in Trinidad. (Carling, Tr. 4488-89) (FOF 3.122). Carling would prequalify TKK/AT&V for a future LNG tank job in the U.S. (Carling, Tr. 4485-87, 4489, 4491) (FOF 3.127).

U.S. customers with LNG projects on the drawing board have similar views. For example, Calpine knows that AT&V has capabilities to build LNG tanks and is known as a capable tank contractor with cryogenic capabilities. (Izzo, Tr. 6499) (FOF 3.127). Calpine believes that TKK/AT&V has the experience and the balance sheet necessary to construct a large LNG project and plans to prequalify it for the Humboldt Bay EPC and LNG tank jobs (Izzo, Tr. 6495) (FOF 3.129). Similarly, Freeport LNG is aware that TKK has successfully built LNG tanks in Japan and other countries and that TKK is "flexible enough to work in different countries . . . and can adapt to the locations and can successfully complete a project." (Eyer mann, Tr. 7000) (FOF 3.130). Freeport LNG and its predecessor Cheniere Energy has received a variety of documents and materials from the TKK/AT&V consortium and met with its representatives regarding the Freeport LNG project. (Eyer mann, Tr. 7002-04) (FOF 3.130). Based on this information, Freeport LNG believes that "TKK is a very qualified supplier, and ATV is a good partner in the United States" and that "they are very strong competitors." (Eyer mann, Tr. 7004-05) (FOF 3.130). Although TKK and AT&V have never constructed a

field-erected LNG tank in the U.S., Freeport LNG plans to solicit bids from TKK/AT&V for this. (Eyermann, Tr. 7005) (FOF 3.130).

Other U.S. customers and competitors with North American LNG projects also believe that TKK is a viable competitor. For example, El Paso has pre-qualified TKK for LNG projects in Altamira and Rosarito, Mexico. (Bryngelson, Tr. 6125-26) (FOF 3.372, 3.374). The fact that TKK is prequalified means that El Paso believes it has sufficient financial stability and technical capabilities to execute the project. (Bryngelson, Tr. 6128-

LNG to discuss the alliance's capabilities and to express interest in its LNG project. (See [xxxxx
xxxxxxxxxxxxxxxxxxxxxxxx] 1668; Eyermann, Tr. 6994-96) (FOF 3.174, 3.175, 3.394). Technigaz's
sales representative provided literature to Freeport LNG regarding the alliance's capabilities,
indicating that "Technigaz is keenly interested in working" on this project. (Eyermann, Tr. 6996-
98). [xx
xx]

[xx
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b. Technigaz/Zachry is a capable, experienced, and qualified LNG contractor.

U.S. customers view Technigaz/Zachry as a viable competitor in the U.S. For example, Dynegy interviewed Technigaz/Zachry as part of the pre-qualification procedure. (Puckett, Tr. 4552-54) (FOF 3.277). Dynegy sought a bid from Technigaz/Zachry for the LNG tanks because it believed the alliance had the reputation and ability to do the requisite fabrication, field erection and construction of the LNG tanks. (Puckett, Tr. 4552, 4554, 4557-58) (FOF 3.279, 3.280, 3.281).. Other U.S. customers with LNG projects on the drawing board have similar views. For example, Freeport LNG knows that Technigaz has a reputation for building LNG projects around the world and that Technigaz was recently awarded projects in Egypt and Portugal. (Eyermann, Tr. 6994-95). Freeport LNG also knows that Zachry is a "big contractor in Texas" that focuses in concrete work and that it has joined forces with Technigaz to compete

in the U.S. market. (Eyermann, Tr. 6995). Freeport LNG believes that "Technigaz is keenly interested in working" on the Freeport LNG project. (Eyermann, Tr. 6996-98) (FOF 3.175). Although the Technigaz alliance has never built an LNG facility in the U.S., Eyermann considers the alliance to be viable and plans to solicit bids from it for the Freeport project. (Eyermann, Tr. 6998-99) (FOF 3.182).

Similarly, Calpine plans to consider prequalifying the alliance for its Humboldt Bay facility. (Izzo, Tr. 6496, 6501) (FOF 3.404). Calpine is familiar with Technigaz's record of building LNG facilities around the world and with Zachry's abilities as a U.S. contractor. Calpine believes that the alliance has the experience and the balance sheet necessary to construct a large LNG project. (Izzo, Tr. 6495, 6501, 6505) (FOF 3.403). In connection with its planned peakshaving facility, Yankee Gas has received preliminary information, including pricing, from Technigaz and will consider prequalifying Technigaz for this project. (Andrukiewicz, Tr. 6445-46, 6453) (FOF 3.342, 3.357).

Other U.S. customers have invited Technigaz/Zachry to bid on LNG projects in North America and believe that the alliance can be competitive on U.S. projects as well. For example, Bechtel believes that the alliance can effectively compete for LNG jobs in the U.S., and [xx] (Rapp, Tr. 1325; [xxxx xxxxxx]) (FOF 3.184, 3.334). xxxxxxxxxxxxxxxxxxxxxxx

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These customer relationships have informed Dr. Harris' view of Technigaz/Zachry as a competitor. Dr. Harris sees Technigaz/Zachry as a viable entrant because it has worldwide expertise in LNG, a clear intent to enter the U.S. market, vast experience in concrete construction, and perhaps most importantly, good reputations among customers. (Harris, Tr. 7242-43) (FOF 7.99).

4. Daewoo/S&B is active in the U.S. market and has the necessary experience and qualifications to be successful.

Daewoo Engineering & Construction Co., Ltd. ("Daewoo") of South Korea boasts revenues exceeding \$2.3 billion. (RX 736, at 6) (FOF 3.195). Daewoo is a world leader in the

In mid-2002, Daewoo and S&B publicly announced a joint effort to pursue LNG receiving terminals in North America. (RX 10) (FOF 3.198) (state of mind). They also told the public that S&B, Daewoo, and specialized LNG consultants have formed teaming agreements to provide a complete range of services for LNG projects throughout North America, including fast track regulatory and insurance approvals, financial guidance, developmental and detailed engineering, material procurement, and construction and commissioning services. (RX 10) (FOF 3.198) (state of mind). According to the alliance, S&B's project execution, construction management skills and knowledge of the U.S. EPC market, along with Daewoo's international experience in LNG technology, form a strong competitor in the North American LNG market. (RX 10) (state of mind) (FOF 3.198).

(FOF 3.206). Further, [xxxxxxxxxxxxx] F

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Tractebel has recently become involved in the North American LNG market. In late 2001, Tractebel approached Enron regarding an LNG facility in the Bahamas. Based on Tractebel's past record in building LNG facilities, and its interest in the project, Enron permitted Tractebel to bid on the project. (Carling, Tr. 4480-81) (FOF 3.443). Post-Acquisition customers believe that Tractebel is a willing and viable player in the North American LNG market. In fact, Tractebel representatives have told Nigel Carling that it is interested in US. LNG projects. (Carling, Tr. 4514) (FOF 3.216). Based on his experience and Tractebel's interest, Carling would prequalify Tractebel for a future U.S. LNG job. (Carling, Tr. 4485-87, 4489, 4491) (FOF 3.216).

Other customers see Tractebel as a competitive force in the U.S. and North American markets.⁵ El Paso has pre-qualified Entrepouse/Tractebel for Mexican LNG projects in Altamira and Rosarito because it has, in El Paso's view, sufficient financial stability and technical capabilities to execute the project. In fact, KBR has specifically examined Tractebel's technical capabilities and found them to be sufficient. (See Bryngelson, Tr. 6125-26, 6129-30) (FOF 3.317, 3.379). El Paso would prequalify Tractebel/Entrepouse to build tanks in the U.S. and believes that they have the capability to do so at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.381). Economic testimony also supports these customers' views. Dr. Harris noted that Tractebel is a potential new entrant with the ability to constrain CB&I's prices. (See Harris, Tr. 7245-47) (FOF 7.100).

6. IHI is poised to enter the U.S. market for LNG facilities.

Ishikawajima-

all LNG terminals in Japan. IHI is capable of constructing double and full-containment LNG tanks. (RX 764 at 6, 22) (FOF 3.223). Recently, IHI has begun to enter the U.S. market. Representatives of IHI have discussed its capabilities with Freeport LNG and have provided extensive literature regarding its capabilities. (Eyermann, Tr. 7015-16; RX 931 (FOF 3.225) U.S.-based customers recognize IHI as a company with experience in constructing LNG storage tanks on an international scale. (Rapp, Tr. 1309, 1316) (FOF 3226). Volker Eyermann of Freeport LNG is aware that IHI has built 23 LNG terminals in Japan, with each terminal containing between four and six LNG tanks. (Eyermann, Tr. 7015-16) (FOF 3.225). [xxxxxxx] also familiar with IHI and believes that it can construct LNG tanks and import terminals in the U.S. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] (FOF 3.224)

Customers consider IHI to be a potential competitor in the U.S. [xxxxxxxxxxxxx
xx] (FOF 3.224) Freeport LNG also considers IHI as a potential supplier for its LNG tanks. However, because IHI does not yet have a local partner, Freeport LNG would require IHI to team up with an American partner -- the type of partner that TKK, Technigaz, and Daewoo, for example, have already found. (See, e.g., Eyermann, Tr. 6995, 7004-05, 7014) (FOF 3.224). Economic testimony also supports customers' views of IHI. Dr. Harris noted that IHI is a potential new entrant with the ability to constrain CB&I's prices. (See Harris, Tr. 7245-47) (FOF 7.100).

7. MHI is poised to enter the U.S. market for LNG facilities.

Mitsubishi Heavy Industries ("MHI") is well-renowned for its LNG cryogenic technology; it has an excellent history of performance in the design and production of transportation and storage facilities. (RX 767 at 16) (FOF 3.217). MHI has been active in the field of cryogenic storage tanks for many decades, and is capable of constructing single-containment and full-containment tanks. (RX 767; RX 875 at 2) (FOF 3.217). MHI has built a

variety of LNG tanks, including a full-containment LNG tank for Oasaka Gas Co., Ltd. in 2000, the world's largest class membrane LNG tank for Toho Gas Co., Ltd. in 2001, and three full-containment tanks at Ras Laffan, Qatar. (RX 875 at 5-7, 9) (FOF 3.217).

Customers are aware of MHI as an international player in the LNG industry. Errol Rapp, of Bechtel, noted that MHI has experience in constructing LNG storage tanks on an international scale. (Rapp, Tr. 1309, 1316) (FOF 3.220). Nigel Carling, formerly of Enron, knows that MHI is "one of the big players" in Japan, and has built tanks in Ras Laffan, Qatar, Taiwan, and Indonesia. (Carling, Tr. 4492) (FOF 3.221). In recent years, MHI has entered the North American LNG market. El Paso has pre-qualified MHI for Mexican LNG projects in Altamira and Rosarito because it has the financial stability and technical capabilities to execute these projects. Notably, El Paso's technical adviser -- KBR -- has found MHI to be technical capable. (Bryngelson, Tr. 6125-26, 6128-29) (FOF 3.219). El Paso would prequalify MHI to build tanks in the U.S. and believes that MHI can do so at a competitive price. (Bryngelson, Tr. 6131-32) (FOF 3.219). Similarly, [xxxxxxxxxxxx] that MHI has the technical capabilities and skills to construct LNG tanks and import terminals in the U.S. and will consider MHI as a potential bidder on its various LNG projects. [xx] (FOF 3.218). Nigel Carling, formerly of Enron, would also consider using MHI as an LNG tank contractor in the U.S. if it had a domestic partner. (Carling, Tr. 4492) (FOF 3.221). Economic testimony also supports these customers' views. Dr. Harris noted that MHI is a potential new entrant able to constrain CB&I's prices. (See Harris, Tr. 7245-47).

B. SIGNIFICANT ENTRY BARRIERS DO NOT EXIST IN THE LNG MARKETS.

Under *Baker Hughes*, a respondent can rebut a prima facie case by showing "ease of entry." See 908 F.2d at 983-84. In this case, it is undisputed that four large multinational

This trend is not without explanation. Applicable codes and regulations (NFPA 59A) require a builder to leave a certain amount of land around an LNG tank. This spacing requirement is less stringent for double and full-containment tanks, allowing for construction on smaller parcels of land. Space considerations were one of the factors which led Dynegy to select full-containment tanks and to rule out the use of single-containment tanks. (Puckett, Tr. 4541-42, 4585) (FOF 3.260). Similarly, Freeport LNG plans to build a double-containment tank because of its own safety concerns and because it will have to acquire less land. In fact, Freeport LNG searched the entire state of Texas to find a parcel of land that would accommodate a single-containment tank, but was unsuccessful. (Eyermann, Tr. 6969-71) (FOF 3.387). According to Volker Eyermann of Freeport LNG, it is "difficult to find enough land to build a single-containment tank. . . . If you build -- try to find a new site, you are going to have a hard time finding one that will allow you to construct a single-containment tank." (Eyermann, Tr. 7054-55; *see also* Scorsone, Tr. 4922, 4988) (FOF 3.11, 3.387).

Other factors have contributed to this changing trend in the U.S. market. Tank

To be sure, some single-containment tanks are still being planned in the U.S. Expansions of the Cove Point, Lake Charles, and Elba Island facilities will all involve single-containment LNG tanks. (J. Kelly, Tr. 6260; Bryngelson, Tr. 6214) (FOF 3.469, 3.484). Because these tanks involve expansions of existing facilities with single-containment tanks, construction of new single-containment tanks is "grandfathered." (Eyermann, Tr. 7054) (FOF 3.14).

2. Specific evidence supports the conclusion that entry barriers do not exist in the LNG markets.

a. Reputation is not a barrier to entry in the LNG markets.

Reputation is not a barrier to entry. As discussed in Section A, *infra*, new entrants have the necessary reputation to construct LNG tanks and facilities in the U.S. Most current customers are familiar with many (if not all) of these entrants and would permit them to bid on future LNG projects in the U.S.

b. U.S. construction standards are not barriers to entry in the LNG markets.

Complaint Counsel has argued that foreign companies cannot effectively compete in the U.S. LNG market because they are unfamiliar with applicable codes and standards, such as American Petroleum Institute ("API") standards. This argument misses the mark for two reasons. First, standards applicable to building LNG facilities in the U.S. are often used internationally. (Scorsone, Tr. 4924-25; Rano, Tr. 5950, 5891; Bryngelson, Tr. 6147) (FOF 3.512, 3.513). Second, new entrants in the U.S., such as Technigaz, TKK, and Skanska/Whessoe have all built LNG tanks overseas to API and other standards used in the U.S. (Scorsone, Tr. 4926-27; Rano, Tr. 5890-91; Rapp, Tr. 1332; Carling, Tr. 4463, 4479; Izzo, Tr. 6488) (FOF 3.515, 3.516).

c. Engineering is not a barrier to entry in the LNG markets.

Complaint Counsel argues engineering capability is an entry barrier. This argument lacks merit, as new entrants already possess engineering capabilities necessary to design LNG facilities. (*See* Harris, Tr. 7249-51). Further, this knowledge is not particularly secret; engineering of an LNG tank does not differ much from engineering of any cylindrical flat-bottom tank. (Scorsone, Tr. 4886-87; Rano, Tr. 5894-95) (FOF 3.28, 3.29). In fact, CB&I itself does not have a team of LNG-only tank engineers. Engineers that would work on an LNG project also design foundations and structural steel components on many other structures. (Glenn, Tr. 4114-15; Scorsone, Tr. 4887-88) (FOF 3.29).

d. Procurement of raw materials is not a barrier to entry in the LNG markets.

Complaint Counsel has argued that CB&I has superior access to raw materials for LNG projects in the U.S. This claim lacks merit, as the procurement process is simple and does not provide any advantage to CB&I over its foreign competitors. (Scorsone, Tr. 4892; [oc8 matetry

able to use its fabrication shops, it would gain only a minor advantage because fabrication is simple and not a major part of LNG tank construction. (See [xxxxxxxxxxxxx]; Glenn, Tr. 4117,

Third, all competitors will have equal access to U.S. laborers. The fact that CB&I has U.S. field crews provides no advantage, as those workers are paid on an hourly basis and free to work for other tank constructors. (Rano, Tr. 5952-53) (FOF 3.550, 3.552). Further, CB&I does not plan to use a large contingent of core field workers for future U.S. LNG projects. The bulk of the labor force will be locally recruited. (Rano, Tr. 5917-18, 5952-53) (FOF 3.39). Like foreign companies, CB&I will need to pay transportation, room, and board costs for its key management and supervision. Like foreign companies, CB&I will hire the great majority of its laborers from the local labor pool and will pay them consistent with applicable regulations in the area. (See Rano, Tr. 5906-07) (FOF 3.556). In fact, some customers expect CB&I to be at a disadvantage because it uses large numbers of traveling field crews. (See, e.g., Bryngelson, Tr. 6150) (FOF 3.556).

h. Welding is not a barrier to entry in the LNG markets.

Complaint Counsel has repeatedly asserted throughout this litigation that welding skills are a barrier to entry. The evidence presented at trial undercuts this position. Welding processes used on an LNG tank are not specific to those types of tanks. They are also used for LPG tanks, water tanks, and oil tanks. (Rano, Tr. 5931) (FOF 3.48). Further, welding 9 percent nickel steel is not particularly difficult or special. It involves the exact same processes and techniques used to weld carbon steel and is much easier to weld than stainless steel or aluminum. (Rano, Tr. 5872-73, 5947) (FOF 3.532).⁷

CB&I has no special access to experienced welders; it does not have permanent salaried welders on its payroll. It is unnecessary to find such welders, because new welders can

⁷ Gerald Glenn noted that 9 percent nickel welding is a little more sophisticated in that the metallurgy would take a different kind of welding rod and a little different technique. (Glenn, Tr. 4120-21) (FOF 3.532). Similarly, Luke Scorsone noted that although the welding techniques used on a cryogenic tank can differ than those used for an ambient temperature tank, the welding processes used are the same. (Scorsone, Tr. 4899) (FOF 3.532).

j. FERC is not a barrier to entry in the LNG markets.

Owners generally must receive approval from the Federal Energy Regulatory Commission ("FERC") in order to build an LNG import terminal in the U.S. (*E.g.*, Scorsone, Tr. 4930) (FOF 3.519).⁹ Complaint Counsel has contended that new entrants cannot compete in the U.S. because they are not familiar with FERC requirements. This argument lacks merit. Tank contractors are not responsible for coordinating FERC filings; owners are responsible for this function. Tank contractors only provide technical data to assist in this filing. (*E.g.*, Carling, Tr. 4480; Izzo, Tr. 6492-93; Eyermann, Tr. 6975; Cutts, Tr. 2500; Bryngelson, Tr. 6148; *see also* Scorsone, Tr. 4931) (FOF 3.406, 3.520, 3.522, 3.524). Many owners have experience with FERC permitting issues, such as El Paso, CMS, Williams, and Tractebel. (Bryngelson, Tr. 6149) (FOF 3.523). Further, tank contractors do not participate in most of the FERC application process, consists of preparing 13 so-called "resource reports." (*See* Eyermann, Tr. 6972) (FOF 3.523). Only Resource Report Number 13 involves tank contractor input. (Eyermann, Tr. 6972-75; *see also* Scorsone, Tr. 4931) (FOF 3.521). Owners have many sources of input for these reports. (Eyermann, Tr. 6973-74) (FOF 3.389). In fact, two recent entrants have provided this support to LNG customers. Daewoo/S&B has provided this assistance to Freeport LNG. (Eyermann, Tr. 6974-76, 7048-49) (FOF 3.392, 3.525). Dynegy has successfully obtained FERC approval for its technical application with Skanska/Whesoe's assistance. (Puckett, Tr. 4551-52; *see also* RX 926) (FOF 3.311, 3.525).

⁹ Owners who build peakshaving facilities do not have to gain approval from FERC if the facility does not involve interstate commerce. (*See* Scorsone, Tr. 4930). For example, the Memphis peakshaving facility was not subject to FERC regulation, nor does MLGW expect any future projects to be subject to FERC regulation. (Hall, Tr. 1842-43) (FOF 3.519).

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l. Subcontracting is not a barrier to entry in the LNG markets.

Complaint Counsel argues that new entrants will incur higher costs than CB&I because they will need to subcontract more phases of the project. This argument is unsupported by the evidence. All LNG tank builders subcontract out portions of an LNG tank job. (Bryngelson, Tr. 6143) (FOF 3.542). For example, CB&I subcontracted the foundation and concrete work for a recent project to a contractor with no prior LNG experience. (Rano, Tr. 5950-51) (FOF 3.43). In fact, CB&I has never self-performed the construction of concrete walls for field-erected LNG tanks; it has always subcontracted this function to "competent concrete people." (Rano, Tr. 5923-24) (FOF 3.546).¹¹ Further, there is no evidence that CB&I would need to subcontract fewer functions than foreign companies. For example, with respect to fabrication, all companies operating in the U.S. would need to subcontract out steel fabrication to a facility in Europe or Japan. (See Subsection III.B.2.d, *infra*). Even if such evidence existed, subcontracting does not always raise costs. In fact, subcontracting can result in lower prices because it reduces overhead costs and may take advantage of certain efficiencies possessed by the subcontractor. (Bryngelson, Tr. 6143-44; Cutts, Tr. 2472; *see also* Harris, Tr. 7253-54) (FOF 3.543).

m. "Learning by doing" is not a barrier to entry in the LNG markets.

Complaint Counsel argues that new entrants will have cost disadvantages -

projects around the globe, often with local partners with no prior experience in the LNG industry.

n. The U.S. political climate is not a barrier to entry in the LNG markets.

The political situation in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. In the U.S., this does not pose an entry barrier because "laws are stated and understood and applied equally." (Rano, Tr. 5974-76) (FOF 3.568).

o. Weather is not a barrier to entry in the U.S. LNG markets.

Weather in a particular country can affect the ability of a contractor to construct a field-erected LNG facility. Because U.S. weather is relatively temperate, weather patterns do not pose a barrier to entry. (Rano, Tr. 5978-79) (FOF 3.569).

p. Communications and infrastructure are not a barrier to entry in the LNG markets.

Available communications and infrastructure can affect the ability of a contractor to construct a field-erected LNG facility. Communication is important for many reasons, such as problem solving and informing management of developments. Because of the developed communication infrastructure in the U.S., it is easier to construct LNG facilities in the U.S. than in other, less developed parts of the world. Accordingly, the communications and infrastructure system in the U.S. is not an entry barrier. (Rano, Tr. 5986-87) (FOF 3.570).

3. The Trinidad bid contest shows that entry barriers do not exist in the LNG markets.

Neither Dr. Simpson nor Complaint Counsel has conducted any experiments to validate their allegations regarding entry barriers. The recent bidding contest in Trinidad provides a natural market experiment that sheds light on whether such entry barriers actually exist.

In the fall of 2002, TKK/AT&V won a project to build a single-containment tank for Atlantic LNG in Trinidad by undercutting CB&I's price by approximately 5 percent. (Glenn, Tr. 4095, 4105; Carling, Tr. 4488-89) (FOF 3.326, 3.327, 3.329). This project was managed by Bechtel on behalf of Atlantic LNG in three phases. (Rapp, Tr. 1286; Glenn, Tr. 4138-39) (FOF 3.316). The original tanks were constructed by Whessoe; CB&I won and executed the subsequent LNG tank expansion. (Rapp, Tr. 1286; Glenn, Tr. 4139) (FOF 3.316).¹² CB&I executed its portion of the project within the last two or three years; it is currently on site completing the tanks. (Rapp, Tr. 1287; Glenn, Tr. 4139) (FOF 3.332). CB&I bid on the next phase of this project. However, it was not the low bidder. (Carling, Tr. 4488-89; Glenn, Tr.

D. EVIDENCE SHOWS THAT ENTRY IN THE LNG MARKETS IS SUFFICIENT.

As discussed in Part II, *supra*, Complaint Counsel's prima facie case in the LNG markets is very weak. *See Baker Hughes*, 908 F.2d at 986. Accordingly, Respondents need only make a minimal showing to rebut this case. *See Baker Hughes*, 908 F.2d at 983. Despite this slight burden, Respondents have presented compelling evidence that new entry will constrain CB&I's pricing in the LNG markets. Accordingly, Complaint Counsel must present additional evidence showing that lessening of competition is likely, including evidence regarding the sufficiency of entry outlined by Respondents. *See Baker Hughes*, 908 F.2d at 984-86.

Although it is not Respondent's burden to do so, it has presented evidence demonstrating that new entry has created competition sufficient to ensure that the Acquisition will not have an anticompetitive effect. The evidence shows that CB&I is aware of (and fears) the new entrants in the LNG market, that customers receiving post-Acquisition pricing are satisfied with that pricing, and that current customers for LNG facilities are not concerned by the Acquisition.

In attempting to meet its burden, Respondents expect Complaint Counsel to argue that none of the new entrants could replace PDM as a competitor on its own. This is simply not the standard. New entrants need not replicate PDM for entry to be sufficient because there are different ways of providing the same service, and the entrants can collectively prevent CB&I from exercising market power. (Harris, Tr. 7255-56) (FOF 7.92). Consistent with this view, Dr. Harris believes that new entrants can compete or are already competing in the market and that they are preventing CB&I from unilaterally exercising market power. (Harris, Tr. 7244-45) (FOF 7.93). As Dr. Harris noted, "there's no harm to competition from the acquisition in the LNG market" because the new entry has created competition that is "quite robust." As Dr. Harris

CB&I has been told by the customer that [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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XXXXXXXXXXXXXXXXXXXX] (*See also*

worldly competition." (Scorsone, Tr. 4858; *see also* Scorsone, Tr. 4862) (FOF 3.210). CB&I has experience competing against Daewoo in the LNG markets, and is aware of Daewoo's ScoFOF 3.

CB&I believes that KBR will be the EPC contractor for this project. (Glenn, Tr. 4151-52) (state of mind) (FOF 3.438).

Finally, prior to its financial difficulties, Enron planned an LNG import facility in the Bahamas to serve southern Florida via sub-sea pipeline. (Glenn, Tr. 4149; Scorsone, Tr. 4997) (FOF 3.442). CB&I submitted pricing to Enron around the time it went into bankruptcy. (Glenn, Tr. 4149-50) (FOF 3.442). At that time, CB&I believed Skanska/Whessoe and TKK were competitors for the project. (Glenn, Tr. 4150) (state of mind) (FOF 3.443). Enron sold this project to Tractebel. (Scorsone, Tr. 4998) (FOF 3.446). CB&I expects Tractebel to build the project utilizing its own forces. (Glenn, Tr. 4151; *see also* Scorsone, Tr. 4998) (state of mind) (FOF 3.446).

2. Post-Acquisition transactions show that CB&I's behavior has been constrained by new entrants.

Current customers for LNG facilities are satisfied with the firm, fixed pricing they have received since the Acquisition.¹³ This fact, combined with other post-Acquisition transactions occurring in the LNG market, shows that CB&I has been constrained by new entry.

Each instance is discussed below:

a. Dynegy is satisfied with prices received by foreign competitors.

The Dynegy project is going forward. Dynegy "will award the tank very soon and . . . as part of that process they will award the tank and then will begin the EPC project after the first of the year." (Price, Tr. 619-20) (FOF 3.310). In 2002, Dynegy accepted bids from

¹³ Because it cannot present favorable evidence regarding firm, fixed price bids, Complaint Counsel relies instead on "budget pricing" or "budget estimates." For numerous reasons, budget pricing cannot be used as an accurate depiction of what customers have been paying, or will pay in the future, for LNG projects. This issue is fully addressed in Section VIIA, *supra*.

Skanska/Whessoe, Technigaz/Zachry, and TKK/AT&V and was satisfied with the bids received. (Puckett, Tr. 4556, 4587-88) (FOF 3.287, 3.309).

Q. And at this point in the process, speaking for Dynegey now, you are satisfied with those bids at this time?

A. Yes.

(Puckett, Tr. 4587-88) (FOF 3.309).

Complaint Counsel makes much of the fact that CB&I did not initially bid on the Dynegey LNG tanks, arguing that: 1) CB&I's refusal to bid on these tanks was an exercise of market power; and 2) the fact that CB&I was not present in the Dynegey bidding process rendered the bids received useless in assessing the competitive impact of the Acquisition. These arguments ignore the facts surrounding CB&I's activities with respect to this project. These facts are briefly discussed below:

CB&I did submit a proposal to become the EPC contractor for the Hackberry project. (Glenn, Tr. 4128-29) (FOF 3.270). Dynegey notified CB&I that it had not been chosen as EPC contractor, and that Skanska/Whessoe won the job. (Glenn, Tr. 4129; RX 142) (FOF 3.272). Skanska/Whessoe hired Black & Veatch to evaluate bids for the tank portion of the project. (Glenn, Tr. 4130) (FOF 3.273). Dynegey offered CB&I the opportunity to bid on the tank portion of the project, asking CB&I to submit its drawings, technical information and firm price to Black & Veatch, a competitor, for evaluation. (Glenn, Tr. 4130-31) (FOF 3.297). Because of its concerns regarding Black & Veatch's competitive position relative to it, CB&I initially refused to bid. (Glenn, Tr. 4411; RX 143) (FOF 3.300, 3.301).¹⁴ In February of 2002, Dynegey again asked CB&I to submit a bid for the tanks. To accommodate CB&I's security

concerns, Dynegy invited CB&I to submit its bid directly to Dynegy, rather than Black & Veatch. (Puckett, Tr. 4578; Glenn, Tr. 4134-35; RX 144) (FOF 3.302).

Internally, CB&I decided that if Dynegy would accept and evaluate its bid directly, it would submit a tank bid. (Glenn, Tr. 4136) (FOF 3.303). Within two to three weeks of receiving Dynegy's invitation, CB&I indicated interest in submitting a bid for the LNG tanks. (Glenn, Tr. 4136-37; *see also* Puckett, Tr. 4559) (FOF 3.303). Puckett's response was a surprise: "Mr. Puckett responded that they had received three bids for the tank and that they were satisfied with the pricing and conditions on those three bids and that they therefore did not need nor would they accept a bid from CB&I." (Glenn, Tr. 4137; *see also* Puckett, Tr. 4559-60). Mr. Puckett's testimony is corroborative:

Q: And did you tell them that you were satisfied with the bids that you had and that their bid was not necessary at that time?

A. We told them that we had received three bids, that we were satisfied with the three bids, and that they were just too late in the process to come back in.

(Puckett, Tr. 4559-60) (FOF 3.304). In an effort to get Dynegy to reconsider, Gerald Glenn contacted Dynegy's CEO, Chuck Watson. (Glenn, Tr. 4137) (FOF 3.305). Based on his conversation with Mr. Watson,¹⁵ Mr. Glenn concluded that Dynegy would not permit CB&I to bid on the project. Accordingly, CB&I did not submit a bid. (Glenn, Tr. 4138; *see also* Puckett, Tr. 4573) (FOF 3.305).

In addition, expert testimony presented by Respondents shows that the Dynegy bidding is relevant, especially to rebut the "critical loss" theory of Complaint Counsel's expert -- Dr. Simpson. Dr. Harris pointed out that, if CB&I truly was the low cost supplier, they should

¹⁵ Glenn, Tr. 4137; Puckett, Tr. 4559-60.

have been able to win this job. Critical loss theory, as applied by Complaint Counsel's own expert witness, suggests that the loss of this job cost CB&I \$21 million. Dr. Harris concluded that this was not a plausible result if CB&I truly had good information regarding its competitors' costs. (Harris, Tr. 7263-65). (FOF 7.82).

b. [xx]

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[xxxxxx] understanding regarding its contracting options is consistent with CB&I's. The tradeoff between time and money is often one that CB&I's customers examine when deciding whether to enter into a sole-source arrangement. An owner may choose to sole-source because it does not have the in-house staff available to manage a bid process or because its schedule does not allow sufficient time for such a process. (Glenn, Tr. 4124; *see also* Scorsone, Tr. 4959) (FOF 3.462, 3.463). Conversely, an owner may solicit bids because of a company policy or a loose schedule. (Glenn, Tr. 4124) (FOF 3.463). In the end, the owner decides what format the contracting process will take. Owners often choose to sole-source

the Acquisition. (Harris, Tr. 7350-51) (FOF 7.103). He also pointed out that TKK's ability to win this project from CB&I "tells you something about the ability of the other companies to compete and to compete with a cost structure similar or better than CB&I." (Harris, Tr. 7350-51).

d. Enron received a band of tight pricing for a recent job in the Bahamas.

Further evidence of vibrant competition in post-Acquisition bidding can be found

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(Eyermann, Tr. 7024) (FOF 3.397). Freeport LNG "is comfortable with the options that it currently has available for builders of field-erected LNG tanks for the Freeport project." (Eyermann, Tr. 7019) (FOF 3.398).¹⁶

Other current U.S. customers agree. Larry Izzo testified that Calpine needs four bidders to "get a very good competitive bid" and that Skanska/Whessoe, Technigaz/Zachry,

(FOF 3.251). Further, El Paso does not believe that CB&I has any competitive advantage over other companies in providing turnkey LNG facility services: "It's a very competitive global market and we haven't seen them exert dominance in any of our bid -- our one bid process to date or any other information I have from KBR or any of the four advisers." (Bryngelson, Tr. 6146) (FOF 3.251).

Even Complaint Counsel's own witnesses, to some degree, agree that the Acquisition has not substantially harmed competition. For example, Errol Rapp of Bechtel believes that Bechtel can get a "reasonable price" as a result of bidding between CB&I and Technigaz for U.S. LNG projects and that Technigaz/Zachry can effectively compete for LNG jobs in the U.S. (Rapp, Tr. 1325, 1333-34) (FOF 3.184, 3.249). Similarly, Clay Hall of MLGW agreed that he has seen no evidence to date that CB&I has the ability to control a market as a result of the Acquisition. (Hall, Tr. 1858-59) (FOF 3.255). Further, Hall believes it is possible that there may be more competition for LNG tanks in the U.S. today as compared to 1994-95. (Hall, Tr. 1860-1861) (FOF 3.255).

E. RESPONDENTS' WITNESSES HAVE PROVIDED MORE CREDIBLE EVIDENCE THAN COMPLAINT COUNSEL'S WITNESSES.

Respondents presented numerous customers, both live and via deposition, who have been directly involved in the post-Acquisition LNG market. Each of these witnesses has knowledge regarding the current market and the competitors who participate in that market. Many of these witnesses work for companies with a strong incentive to complain about an acquisition that has affected their ability to obtain LNG tanks, as such tanks often cost hundreds of millions of dollars. These witnesses have not complained. Instead, they have testified that the Acquisition has not substantially lessened competition and that it may have actually improved competition.

By contrast, Complaint Counsel presented a variety of witnesses who generally lack foundation for their views, as they are unfamiliar with current LNG market developments. In particular, they lack knowledge regarding experience and capabilities of new entrants. For example, Eckhard Blaumueller has not been involved in the purchase or construction of an LNG facility since 1973 -- a time when LNG tanks were built of aluminum, rather than 9 percent nickel steel. (Blaumueller, Tr. 286) (FOF 3.642). Mr. Blaumueller retired from Peoples' Energy Resources Corporation in December of 2001. Since then, he has not been involved in, or done research regarding, the LNG industry. (Blaumueller, Tr. 279, 325, 329) (FOF 3.643). Further, he has no current knowledge regarding any foreign LNG tank suppliers or their efforts to enter the U.S. market. (Blaumueller, Tr. 321, 332-35) (FOF 3.644, 3.645).

Clay Hall of MLGW also lacks current information regarding the LNG industry. MLGW searched for LNG tank builders in 1994. Since that time, neither Mr. Hall nor MLGW have conducted such a search. (Hall, Tr. 1843-45) (FOF 3.653). MLGW has not received firm bids on such a tank since 1994, nor does it plan to purchase another until at least 2006. (Hall, Tr. 1832-33) (FOF 3.650). Further, Mr. Hall was not familiar in any significant way with LNG import terminals, current competition for LNG tanks in the U.S. today, or pricing submitted by any foreign company for an LNG tank in the U.S. over the last five years. (Hall, Tr. 1854-57) (FOF 3.652, 3.653).

Other witnesses involved in the Memphis project admit to having virtually no current knowledge regarding the LNG markets. Robert Has extanks in-(57)) TpTj 4.5 h0Od Tlved in the Ove

constructing LNG tanks in the U.S. or worldwide, and is not familiar in any specific way with LNG import terminals. (Davis, Tr. 3177-79, 3187-88) (FOF 3.666, 3.668). Similarly, Dr. Hans Kistenmacher of Linde has not bid on a peakshaving facility since Memphis. (Kistenmacher, Tr. 890) (FOF 3.671). He has been involved with "very, very few LNG tanks," and his experience is limited to the bidding of those tanks. (Kistenmacher, Tr. 888; *see also* Kistenmacher, Tr. 887) (FOF 3.669, 3.671). Specifically, Dr. Kistenmacher is unfamiliar with the activities of TKK/AT&V, Technigaz/Zachry, Daewoo/S&B, or Skanska/Whessoe in the U.S. market for LNG facilities. (Kistenmacher, Tr. 937, 941-42) (FOF 3.672).

Even Complaint Counsel's witnesses with current involvement in the LNG industry know very little. For example, Brian Price of Black & Veatch has not received any fixed, firm price bids from CB&I or PDM on an LNG tank since 1990. (Price, Tr. 644) (FOF 3.665). Although Black & Veatch is a subcontractor on the Dynegy job and has access to the bid pricing for that job, Price himself has not seen that pricing. (Price, Tr. 609-10, 625) (FOF 3.314, 3.660). Price was also unaware that Dynegy itself was satisfied with that pricing:

Q. Are you familiar, sir, since you claim to be a person who communicates with the client, that they are satisfied with the bids that they have for the tanks? Are you familiar with that?

A. No.

* * *

Q. Are you familiar or do you have knowledge based on your communications with the client that they have found the budget pricing on the tanks to be within their estimated price range?

A. No.

Q. You're not familiar with that?

A. No.

3.679). Titan is not a current entrant in the LNG market, nor is there a shred of evidence suggesting that any current entrant would incur the same costs, or require the same profit margin that Titan did at Memphis.

Second, the willingness of foreign bidders to participate in the Memphis project is far less than the willingness of current entrants to participate in the market. Complaint Counsel's own witnesses acknowledge that Whessoe was reluctant to bid on the Memphis project in 1994. (Kistenmacher, Tr. 939-40) (FOF 3.497). Dr. Kistenmacher "had difficulties" getting Whessoe to provide the engineering quotation for the project. (Kistenmacher, Tr. 940) (FOF 3.497). Whessoe requested to be paid for its quote because it did not want to take the risk of bidding. (Kistenmacher, Tr. 940) (FOF 3.497).

Third, unlike the current entrants in the U.S. LNG markets, the foreign bidders involved in Memphis did not have a prior relationship with its joint venturers. For example, Brian Price noted that TKK's participation in the Memphis project was a "one-shot deal in 1994". (Price, Tr. 650) (FOF 3.508). By contrast, current market entrants have all announced their entry into the U.S. market and have made efforts to win work in several areas of the U.S. (*See* Section III, *infra*).

Fourth, to the extent Complaint Counsel has used the Memphis bidding contest to show that PDM and CB&I both had lower costs than their competitors, such an effort is misplaced. PDM's bid was disqualified because it did not comply with MLGW's bid requirements. (Davis, Tr. 3196; Hall, Tr. 1823-24) (FOF 3.505). In fact, PDM's bid had approximately 157 shortcomings that were out of line with the request for proposal. (Hall, Tr. 1823-24) (FOF 3.505). Because of these differences, it is difficult to accurately compare PDM's

bid to CB&I's bid on this project because the two bids were "not quoted on the same item." (Hall, Tr. 1839-40) (FOF 3.505).

Fifth, Complaint Counsel's effort to show that foreign bidders had higher tank prices has failed. In many cases, it is not possible to determine tank prices associated with each bid. Although MLGW requested a specific breakout of the price for the LNG tank, both PDM and Lotepro ignored this requirement. (RX 888) (FOF 3.502). Further, attempting to provide a tank-only price for this project is difficult. (Scorsone, Tr. 5011-12) (FOF 3.506). The evidence reflects this difficulty. One Black & Veatch document pegs CB&I's tank price at \$10.5 million, while another puts it at \$13.5 million. (*Compare* RX 888 to CX 1571) (FOF 3.502). The same documents also compare tank prices secured by Black & Veatch; a similar discrepancy can be found. One document estimates the tank price at \$13 million, while another estimates it at \$16.7 million. (*Compare* RX 888 to CX 1571) (FOF 3.502).

Sixth, and perhaps most importantly, there is no evidence to support the view that a bidding contest from 1994 will shed light on bidding contests a decade later. Differences between 1994 and 2003 are numerous. For example, technologies have changed, financial conditions are different, and the types of LNG projects built today are larger and more complex. To rely solely on evidence of Memphis, without examining current market conditions, is extraordinarily myopic.

2. Many of Complaint Counsel's witnesses are CB&I's competitors.

Brian Price of Black & Veatch offered wide-ranging views on his perceptions of competition in the market and the ability of foreign companies to effectively compete in the U.S. Mr. Price's testimony should be given little or no weight, as he has a personal stake in the outcome of this litigation. Black & Veatch is a head-to-head competitor of CB&I on

IV. RESPONDENTS HAVE SUCCESSFULLY R, 745.5 TD Tw () Tj -234 -13.5s31 C

reasonable to expect additional companies to enter the market if sufficient demand for LPG tanks exists. Evidence shows that this entry and potential entry threat has constrained CB&I's behavior, and that customers are receiving competitive prices on LPG tanks.

A. A.

7130-31) (FOF 4.38, 4.42). ITC believes AT&V has an excellent reputation, and will consider AT&V for its next LPG tank. (N. Kelley, Tr. 7090, 7130-31).

Matrix has also entered the U.S. LPG market. Along with AT&V and CB&I, Matrix bid on ITC's Deer Park LPG tank. ITC permitted Matrix to bid on the Deer Park project because they were "good reputable contractors that have the capability of building the tank." (N. Kelley, Tr. 7083-84) (FOF 4.34). ITC perceives Matrix as "a large contractor, and quite capable." (N. Kelley, Tr. 7085) (FOF 4.44). ITC's confidence in Matrix is growing, because they have done a good job on a variety of tank repairs. (N. Kelley, Tr. 7109) (FOF 4.45-4.46). For its next LPG project, ITC will solicit a bid from Matrix. (N. Kelley, Tr. 7090).

Chattanooga Boiler & Tank ("CB&T") has not yet entered the U.S. market.

Morse Tank ("Morse"), a relatively small tank builder based in Washington State, successfully entered the market in 1994 when it built a large LPG tank for Texaco in Ferndale, Washington. Morse completed this "highly visible" project for Texaco in a timely manner and to Texaco's great satisfaction. (Crider, Tr. 6714-16; *see also* Maw, Tr. 6560-63, 6586) (FOF 4.84, 4.86, 4.87). Further, Morse made a significant profit on this job -- over \$1 million. (Maw, Tr. 6586, 6690).

The story of Morse's successful entry shows "ease of entry" in the LPG market, which squarely rebuts Complaint Counsel's prima facie case. *Baker Hughes*, 908 F.2d at 984. Further, customers support Respondents' contentions regarding ease of entry. According to customers, any tank builder with experience in building API 620 and API 650 tanks has the ability to build LPG tanks. (N. Kelley, Tr. 7091-92) (FOF 4.127). The construction of an LPG tank requires the same type of equipment used for standard flat-bottom tanks -- welding machines, cranes, and rigging equipment. Further, the same people that build API 650 tanks also build API 620 tanks. (N. Kelley, Tr. 7091-92) (FOF 4.127). The same skills are used to build an API 650 as an API 620 tank. All you have to do is read the code, find out what the differences are, use the right metal and the right welding rods, the right welding procedures, and anybody can build either tank." (N. Kelley, Tr. 7103) (FOF 4.120). The fact that entry is easy in the market makes it unlikely that the Acquisition will have any anti-competitive effects. (*See* Harris, Tr. 7285-97, 7300).

1. Reputation is not an entry barrier to the LPG market.

Complaint Counsel has argued that reputation is a barrier to entry. This is wrong. Prior to constructing the Ferndale facility, Morse had never constructed an LPG tank before. In fact, Morse told Texaco that it had no LPG experience. Nonetheless, Texaco asked Morse to bid the Ferndale project. (Maw, Tr. 6550) (FOF 4.90). Lack of experience was not a concern for

Texaco because companies hire people to do the job; Morse's personnel sold the project. (Crider,
Tr. 6713-

doing, Morse did not incur any additional expenses than it does on any other tank project. Further, no additional salaried employees were hired to prepare the bid. (Maw, Tr. 6556-57).

5.

Kelley, Tr. 7093-94) (FOF 4.27). During his 25 years at ITC, Mr. Kelley has procured LPG tanks over 23 of those 25 years. Tank procurement is Mr. Kelley's area of responsibility. (N. Kelley, Tr. 7079-80). Mr. Kelley regularly sorts confidential bids from multiple tank suppliers. (N. Kelley, Tr. 4.159, 4.160).

D.

1. Customers are satisfied with the prices received, and are not concerned that the Acquisition has affected their ability to obtain competitive pricing.

ITC was satisfied with the price that it received on the Deer Park LPG tank. (N. Kelley, Tr. 7088-89) (FOF 4.38, 4.55). As Norman Kelley noted, "AT&V beat the socks off of CB&I. AT&V can definitely do it cheaper." (N. Kelley, Tr. 7137) (FOF 4.56). Mr. Kelley observed that the competition provided by AT&V, Matrix, and CB&I gives ITC the competition that it needs to obtain a competitive price. ITC does not need to research additional tank suppliers in order to find additional competition. (N. Kelley, Tr. 7091, 7134) (FOF 4.60, 4.61). Further, ITC does not believe that the Acquisition has hindered ITC's ability to obtain competitive pricing for LPG tanks. (N. Kelley, Tr. 7092, 7135, 7137) (FOF 4.56, 4.58). The following quote is illustrative:

Q. And just to sort of sum up, do you believe that the merger between CB&I and PDM has had the -- has hindered ITC's ability in any way to obtaining any of those types of products at a competitive price?

A. No. I don't think it's hurt us in any way.

(N. Kelley, Tr. 7135; *see also* N. Kelley, Tr. 7090-91, 7137-38) (FOF 4.62, 4.55-4.62). In fact, Mr. Kelley noted that CB&I has trouble competing in the LPG tank market because of its large overhead costs. (N. Kelley, Tr. 7122).

Complaint Counsel's evidence is not to the contrary. Amy Warren of Fluor was Complaint Counsel's only witness regarding the LPG market. While Ms. Warren and Fluor were involved in a project involving LPG tanks, they were not responsible for selecting a tank supplier. Sea-3, the customer, had that responsibility. Ms. Warren had virtually no information regarding pre-Acquisition competition. She did not know whether Fluor received a lower price as a result of Sea-3's bidding process, nor could she say whether the prices received on Sea-3 projects were competitive. (Warren, Tr. 2299-2300, 2302, 2303-07) (FOF 4.158). Ms. Warren

has no knowledge regarding post-Acquisition competition. She has not been involved in buying an LPG tank since 1998. She has no knowledge regarding any field-erected LPG tanks currently planned by anyone anywhere, nor does she have current knowledge regarding companies that currently have the ability to construct LPG tanks. She has no knowledge regarding which companies are currently prequalified by Fluor, or which companies Fluor would prequalify in the future. (Warren, Tr. 2309, 2318).

2. Entry has disciplined CB&I's behavior in the LPG market.

CB&I perceives competition from AT&V, Matrix, TKK/ATV, Skanska Whessoe, Technigaz/Zachry, and any other flat bottom tank manufacturer. (Scorsone, Tr. at 4850) (FOF 4.64). CB&I does not believe it can impose a price increase in this product area without losing work to competitors. (Scorsone, Tr. 5043) (FOF 4.70). Recent events have confirmed this view. CB&I last won a LPG project in 2001 for ABB Lummus, involving a \$1.5 million LPG tank.

E. SUMMARY: DISMISSAL OF THIS CASE WITH RESPECT TO THE LPG MARKETS IS APPROPRIATE.

Applicable law compels dismissal of this action with respect to the LPG market. As discussed in Part II, *supra*, Complaint Counsel's prima facie case is virtually nonexistent. Accordingly, Respondents need not present an extensive showing. *Baker Hughes*, 908 F.2d at 991. Nevertheless, Respondents have presented evidence on numerous fronts to rebut Complaint Counsel's case. Respondents have proven that actual entry has occurred, that entry barriers are nonexistent, that potential entrants are eyeing the market, and that customers in this market are sophisticated. *See Baker Hughes*, 908 F.2d at 988-89. Further, while not required to do so, Respondents have presented compelling evidence regarding the sufficiency of entry in this market. Current customers are satisfied with prices received and choices available to them, and evidence shows that new entrants are severely disciplining CB&I's activities. Complaint Counsel has not carried its ultimate burden of persuasion in this case. Accordingly, the Complaint as it relates to the LPG market must be dismissed.

V. RESPONDENTS HAVE SUCCESSFULLY REBUTTED COMPLAINT COUNSEL'S PRIMA FACIE CASE IN THE LIN/LOX MARKET.

Field-erected LIN/LOX/LAR tanks store liquid nitrogen, liquid oxygen, and liquid argon at cryogenic temperatures. (Patterson, Tr. 340-41; V. Kelley, Tr. 4596; Stetzler, Tr. 6312) (FOF 5.1). These tanks consist of an outer carbon steel shell and an inner tank, with insulation between the two shells. (Stetzler, Tr. 6312; Kistenmacher Tr. 833-34) (FOF 5.3). The outer shell is generally made from A-36 carbon steel, while the inner shell of a LIN/LOX/LAR tank is generally made from 304 stainless steel. (Stetzler, Tr. 6315) (FOF 5.4).

The market for field-erected LIN/LOX tanks in the U.S. is extremely small and in decline. The average price of a LIN/LOX tank is approximately \$1 million. (Scorsone, Tr. 5016). In the two years since the Acquisition, the total value of all commerce in this market has

been just \$5.8 million. (*See, e.g.*, Harris, Tr. 7308). Only five such tanks have been awarded during this time: Midland, North Carolina (BOC); Hillsboro, Oregon (BOC); Freeport, Texas (Air Liquide); New Johnsonville, Tennessee (MG Industries); and Kirkland, New Mexico (Praxair). (Scorsone, Tr. 5017) (FOF 5.77). Because of this low demand and the relatively small

plans. (Cutts, Tr. 2501-02, 2503-04) (FOF 5.33). AT&V has a good reputation for quality and schedule. AT&V's quality in construction (as measured by ATV's extremely low x-ray rejection rate) is far superior to CB&I and other U.S. tank vendors. (Cutts, Tr. 2491-93) (FOF 5.38). AT&V also has one of the best completion schedules in the industry. Last year, it completed 163 of 164 projects on time. (Cutts, Tr. 2510-12) (FOF 5.39).

AT&V is committed to pursuing LIN/LOX tanks in the U.S.; it believes that it has an advantage over CB&I and can sell those tanks at a lower price. (Cutts, Tr. 2332, 2572) (FOF 5.35). Prior to entering the market, AT&V spent an initial \$50,000 on marketing to LIN/LOX purchasers. (Cutts, Tr. 2429-30, 2502) (FOF 5.36). After this initial effort, AT&V won and constructed two LIN/LOX tanks for BOC in Midland, North Carolina. (Cutts, Tr. 2330, 2435-36) (FOF 5.31). While AT&V did not make a significant profit on this job, it viewed this opportunity as a long-term investment in the market. (Cutts, Tr. 2429-30) (FOF 5.36). AT&V continues to pursue LIN/LOX work in the U.S. (Cutts, Tr. 2533) (FOF 5.35, 5.37). It has submitted budget pricing to approximately six customers, and has been prequalified by several

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(FOF 5.149). Air Liquide also believes that Matrix is a qualified supplier. It has accepted LIN/LOX bids from them in the past, and would consider hiring Matrix on future jobs. (Kamrath, Tr. 2005-06) (FOF 5.53). Despite their lack of recent activity in the market, Linde is familiar with Matrix. Linde believes that Matrix is a qualified tank supplier, and has accepted bids and budget pricing from Matrix "many" times. For example, Linde recently sought pricing from Matrix for jobs in the Gulf Coast area and in New Mexico. (Kistenmacher, Tr. 857-58; Fan, Tr. 1018).²¹

3.

fact, it has superior quality field crews with productivity as good as or better than most of its

Acquisition despite having no prior experience. As this entry occurred within two years of the Acquisition, there should be no dispute that entry is "timely" in this market. (See 1922 Horizontal Merger Guidelines, RX 844 at 11-21). With respect to potential future entry, companies capable of building standard flat-bottom storage tanks are capable of building field-erected LIN/LOX tanks. (Hilgar, Tr. 1520-21 (FOF 5.221)).

1. Subcontracting is not an entry barrier to the LIN/LOX tank market.

Complaint Counsel has argued that subcontracting is an entry barrier. For the reasons discussed in Part III, *supra*, this argument is generally flawed. Further, LIN/LOX tank construction does not require a significant number of subcontractors. For example, AT&V used only three subcontractors for BOC's Midland job. (Cutts, Tr. 2521-22) (FOF 5.219, 5.220).

2. Welding is not an entry barrier to the LIN/LOX tank market.

Complaint Counsel has argued that welding is an entry barrier. The evidence presented is to the contrary. For example, AT&V was able to hire experienced welders merely by placing newspaper ads. (Cutts, Tr. 2427-28) (FOF 5.221). Further, AT&V's welding systems were sufficient to successfully construct LIN/LOX tanks for BOC. (Cutts, Tr. 2565) (FOF 5.31).

3. Assembling of sales staff and engineering forces is not an entry barrier to the LIN/LOX tank market.

The ability to hire necessary sales staff and engineers is not an entry barrier. AT&V's current sales staff enabled it to sell the LIN/LOX projects to BOC and Air Liquide. (Cutts, Tr. 2568-69) (FOF 5.222). Further, AT&V has developed its own technical specifications for LIN/LOX tanks which enabled AT&V to suc

Although Respondents are under no duty to do so, they have presented evidence regarding

respond to certain jobs. It has a lower overhead structure, and can respond to immediate market conditions more quickly and efficiently than CB&I. (Stetzler, Tr. 6369) (FOF 5.67).

Linde Process Plants has expressed some concerns regarding the effect of the Acquisition on the LIN/LOX tank market. However, Linde does not have recent experience in this market; it has not purchased a tank since 1999. (Kistenmacher, Tr. 927-28) (FOF 5.176). Further, Linde is not familiar with pricing of any LIN/LOX tanks purchased since the Acquisition, nor has it seen any evidence that CB&I has raised its prices on LIN/LOX tanks post-Acquisition. (Kistenmacher, Tr. 931-32; Fan, Tr. 1006) (FOF 5.181, 5.185).

2. Entry in the LIN/LOX market has constrained CB&I's behavior.

CB&I perceives current competition in LIN/LOX as "very intense," and does not believe that CB&I can implement a price increase post-Acquisition. (Scorsone, Tr. 4881-82, 5038-39) (FOF 5.212, 5.213, 5.216). CB&I believes that if it increases prices on field-erected LIN/LOX tanks, it will lose work to its competitors. In fact, CB&I sees a need to cut its prices in order to remain competitive in this market. (*See* Scorsone, Tr. 5030-31) (FOF 5.217). Other evidence corroborates Mr. Scorsone's view of the market and shows that CB&I has been disciplined by AT&V, Matrix and CB&T. The following e-mail is illustrative:

To follow-up on LOX/LIN competitors, I just spoke to BOC and they have awarded the Midland, NC to ATV out of Houston. BOC says . . . ATV has picked up Graver and Brown Minny people over the last couple of years with the experience to do the work. Our final price to BOC was \$1,520,000 at 2% profit and they bought the tank for approximately \$1,325,000 which is about 2% below our total flat cost.

(RX 273) (FOF 5.72, 5.213). From this information, CB&I concluded that AT&V had a "very strong commitment to entering into this market and that they made the proper new move to gain

experience in the market" and that they have lower costs than CB&I. (Scorsone, Tr. 5026) (FOF 5.40, 5.72).

In fact, after CB&I learned that CB&I lost the LIN/LOX project for BOC in Midland, North Carolina to AT&V despite bidding at a margin level of negative 5 percent, a company document concluded CB&I has "a very hard time competing on these [LIN/LOX] tanks." (RX 208) (state of mind) (*See also* Scorsone, Tr. 5029-30) (FOF 5.212). Company documents show that CB&I was learning about its new LIN/LOX competitors, stating that CB&T may "have picked up Rex Robinson who ran the LOX/LIN group for Graver and has been in the business for many, many years. Lud says that along with Rex, CBT has picked up enough other engineering project management and field people from Graver to give them 'credibility' in this market." (RX 273) (FOF 5.59, 5.73). This information warned CB&I that CB&T planned to enter the market. (Scorsone, Tr. 5026-28) (state of mind) (FOF 5.59, 5.72, 5.73). RX 273 also contained recent intelligence that Matrix was also entering this market: "I also asked about Matrix, as I knew they had build [sic] the Kingsport, TN for them in 1999. He says they did a good job for Air Products and they definitely consider them a player in the market . . . Based on this, it appears that Air Products considers CBT and Matrix viable competitors in the LOX/LIN tank market." (RX 273) (FOF 5.54). Because Air Products is a sophisticated customer, and because they are apparently considering these companies, CB&I believes that they are real competitors. CB&I makes pricing decisions on LIN/LOX tanks with this in mind. (Scorsone, Tr. 5028-29) (state of mind) (FOF 5.72, 5.216, 5.217).

In connection with the New Johnsonville job, CB&I realized that it had competition and acted accordingly. MG made CB&I aware that there was competition for the New Johnsonville tank. [XX]

XX] (XXXXXXXXXXXXXXXXXXXXXXXXXXXX)

(FOF 5.153). Awareness of this competition caused CB&I to drop its price. Originally, CB&I submitted a bid with a 4 percent margin. (Scorsone, Tr. 5022-23) (FOF 5.151). MG "said that [CB&I's] price was a little high. There was another tank that he wanted to award. He asked for a combined price from us, and we subsequently submitted that price and reduced our margin on the job." (Scorsone, Tr. 5023) (FOF 5.151). CB&I cut its margin to approximately .5 percent and won the job. CB&I cut its margin because it was threatened by competition. (Scorsone, Tr. 5023-24) (FOF 5.151, 5.152).

Evidence regarding Air Liquide's Freeport project further corroborates CB&I's state of mind. CB&I originally bid on this job at a 2 percent margin. (Scorsone, Tr. 5032-33; *see also* RX 627 at 2) (FOF 5.128). Steve Knott -- a CB&I sales executive -- related a conversation with an Air Liquide purchasing employee who informed CB&I that they were "in a 'competitive situation' (Scorsone, Tr. 5033-34; RX 627 at 2) (FOF 5.129). To deal with this competitive situation, Mr. Knott proposed the following:

We would like to contract for this work. In order to avoid a loss of this work to the competition, we should be prepared to cut the Florida margin to 1% and but leave the Texas margin the same as a first response to their pressure. In the end, in order to get both jobs, it may be necessary to go to 0% margin on both. That would be as low as we would go on this work unless you and I talk again.

(RX 627 at 2) (FOF 5.130). In response, CB&I lowered its margins to zero percent on both tanks. (Scorsone, Tr. 5033-36) (FOF 5.130). Despite this move, CB&I lost the Freeport job to AT&V. (Scorsone, Tr. 5034-35) (FOF 5.130). The AT&V/Air Liquide dispute has not affected CB&I's state of mind regarding AT&V, because "CBI was conf3 Tce, Tr-0.de of mind regarding AT&V8iF

decided, maybe rightly so, that this is a project that they shouldn't be pursuing." (Scorsone, Tr. 5038) (FOF 5.131, 5.136).

Other pricing contests have given CB&I additional evidence regarding the viability of its competitors. CB&I submitted budget pricing for a BOC LIN/LOX project in Oregon. (Scorsone, Tr. 5031) (FOF 5.116). CB&I never had an opportunity to submit a firm fixed bid to BOC for this project because it was awarded to AT&V. (Scorsone, Tr. 5031) (FOF 5.120). Since AT&V has been awarded a second LIN/LOX tank by BOC, CB&I has concluded that BOC is pleased with AT&V's performance as a LIN/LOX tank supplier. (Scorsone, Tr. 5032) (state of mind) (FOF 5.121).

E. SUMMARY: APPLICABLE LAW REQUIRES DISMISSAL OF THE COMPLAINT AS IT RELATES TO THE LIN/LOX MARKET.

Applicable law compels dismissal of this action with respect to the LIN/LOX market. As discussed in Part II, *supra*, Complaint Counsel's prima facie case is weak. Accordingly, Respondents need not present a strong showing to rebut it. *Baker Hughes*, 908 F.2d at 991. Nevertheless, Respondents have aker Hugnlf3,iKET.

VI. RESPONDENTS HAVE SUCCESSFULLY REBUTTED COMPLAINT COUNSEL'S PRIMA FACIE CASE IN THE TVC MARKET.

A field-erected thermal vacuum chamber ("TVC") is a stainless steel pressure vessel used to test satellites and satellite components prior to launch. (Gill, Tr. 179-83; Neary, Tr. 1423-24) (FOF 6.1). TVC's simulate the atmospheric and thermal conditions found in space. (Gill, Tr. 183; Proulx, Tr. 1722-23; Thompson, Tr. 2039-40; Higgins, Tr. 1264) (FOF 6.2). A TVC has two basic components. First, a TVC has a large vacuum envelope (or chamber) constructed of stainless steel shaped roughly like a horizontal cylinder with a front door that may swing on a hinge or slide laterally on a rail. (Scully, Tr. 1098-99) (FOF 6.4). Second, a TVC contains a "thermal vacuum system," which is the process equipment that goes inside a thermal vacuum chamber to simulate extreme heat and cold. (Higgins, Tr. 1263) (FOF 6.5). The thermal vacuum system includes one or more shrouds, vacuum insulated pipe, and cryo pumps or other pumping equipment, which are all controlled by a thermal control unit. (Higgins, Tr. 1263) (FOF 6.5). CB&I is not capable of designing or building the thermal vacuum system portion of a TVC. (Scully, Tr. 1225) (FOF 6.53, 6.56).

Complaint Counsel has failed to make a prima facie case with respect to the TVC market. The market concentration statistics on which it relies are virtually meaningless, as they were generated using a total of two data points over an eleven-year period -- one of those two data points was for a project never built -- and cannot dislodge the fact that CB&I has not built a field-erected TVC since the first Reagan administration. The failure of market concentration statistics to provide any meaningful information regarding the competitiveness of the TVC market is a symptom of a greater problem -- there is virtually no demand for thermal vacuum chambers. Because of a lack of demand, there is no way that the Acquisition could have substantially affected competition in this case. Even if Complaint Counsel did make a prima

district court noted that "[t]he minuscule size of the market creates problems for the government's case, because one element of a Section 7 violation is that '[t]he market must be substantial.'" *Id.* (citing *United States v. Dupont & Co.*, 353 U.S. 586, 595 (1957)). The size of the *Baker Hughes* market is instructive; the district court was concerned about a market in which 20-45 items were purchased each year. 908 F.2d at 986. As noted above, one TVC is purchased approximately every five to ten years, making this market *less than 1 percent* of the size of the *Baker Hughes* market. To call this a substantial effect on commerce would be to read the word "substantial" out of Section 7 itself. Second, as discussed in Part II, *supra*, Complaint Counsel's market concentration statistics are virtually meaningless. Over an 11-year period, the statistics as presented by Complaint Counsel's expert witness contain *two* data points. (*E.g.*, Simpson, Tr. 3493). There can be no inference drawn from this analysis, other than that market concentration statistics are meaningless.

B. CB&I IS NOT A PLAYER IN THE TVC MARKET.

Even if the TVC market were a viable line of commerce, there is no evidence that the Acquisition has substantially lessened competition. Indeed, there is a substantial question whether CB&I would have the necessary expertise to construct TVCs absent the Acquisition. (Scully, Tr. 1214) (FOF 6.36). CB&I is not particularly experienced as a fabricator of TVCs. It last constructed a TVC in 1984. (Scully, Tr. 1187-89, 1193; Scorsone, Tr. 5055-56; Higgins, Tr. 1276-77; Glenn, Tr. 4089, 4160) (FOF 6.26). On its second-to-last TVC job in 1981, the chamber was so flawed that it was never put into operation. (Thompson, Tr. 2113; Scully, Tr. 1188) (FOF 6.45). Importantly, CB&I has never constructed a mailbox-shaped TVC -- the type that customers currently prefer. (Higgins, Tr. 1277-

more costly to build than traditionally-shaped TVCs. (Scully, Tr. 1106-07; Higgins, Tr. 1277; Neary, Tr. 1467) (FOF 6.28)..

actually built one since 1984. (Scully, Tr. 1231) (FOF 6.107). Customers would consider using a TVC supplier that had gained its experience by working as a joint venture partner with CB&I on each phase of the construction process of a TVC project. (Proulx, Tr. 1756-57) (FOF 6.109).

D. ANY COMPETITIVE PROBLEM CAN BE SOLVED WITH A REMEDY OTHER THAN A BREAKUP OF CB&I.

Respondents contend that the Acquisition has not substantially affected competition in TVC market. This market is virtually nonexistent, and CB&I is not a player in the market. To the extent this Couari-tractioOF 6.1097.tr5.5 TD /F1 94rtu0.0164 Tc 4.65 0 TD -0.Tc 0.0

company such as Matrix would help Matrix become a properly qualified field fabricator of TVCs. (Higgins, Tr. 1275-76) (FOF 6.107). Similarly, Greg Proulx of Boeing agreed that competition would benefit if CB&I licensed this technology to others. (Proulx, Tr. 1755) (FOF 6.106).

Similarly, CB&I's offer to provide free mentoring to companies such as Matrix, Nooter or PSF on CB&I's next TVC project by integrating that company's engineering, fabrication and field-erection crews into the entire process has met with approval. (Scully, Tr. 1230-31; Higgins, Tr. 1275-76) (FOF 6.107). In fact, the newly-mentored company would possibly have more current experience in constructing a TVC than CB&I had as a competitor prior to the Acquisition. (Scully, Tr. 1231) (FOF 6.107). Importantly, customers would consider using such a newly-trained supplier. For example, Boeing would consider using a TVC supplier possibly

that this sale is "better for business," and that it would help competition if CB&I were to promise not to purchase another company such as XL for a period of five to seven years. (Gill, Tr. 258-60) (FOF 6.112).

E. SUMMARY: THE COMPLAINT AS IT RELATES TO THE TVC MARKET MUST BE DISMISSED.

Dismissal of the Complaint as it relates to TVCs is required. Because there is no substantial market for TVCs, Complaint Counsel cannot, under any circumstances, make a prima facie case. Complaint Counsel's effort to do so emphatically drives home this point. As discussed above, its market concentration statistics contain two data points in 11 years; one of those points relates to a project that will never be built. Accordingly, Respondents need not make any showing. Assuming *arguendo* that Complaint Counsel has established a prima facie case, Respondents have presented compelling evidence that CB&I is not a player in the market, that there is a significant question as to whether it could even participate in this market, and that entry barriers to this market are minimal. Even if, despite all this evidence, this Court finds a competitive problem in the TVC market, CB&I has prepared a remedy package that will resolve any concerns without imposing the draconian remedy advanced by Complaint Counsel.

VII. COMPLAINT COUNSEL HAS NOT MET ITS BURDEN TO SHOW THAT ANTI-COMPETITIVE EFFECT IN ANY MARKET IS LIKELY. 70Tj 371.25 0 T66-0.081

also alleged that CB&I has implemented price increases in the relevant products post-Acquisition, and that the Acquisition has created opportunities for use of market power. Finally, in an effort to support its claims of anticompetitive effects, Complaint Counsel presented extensive expert testimony. As discussed below, these efforts are misguided and insufficient to carry Complaint Counsel's ultimate burden of persuasion.

A. BUDGET PRICING DOES NOT CONSTITUTE EVIDENCE OF POST-ACQUISITION PRICE INCREASES.

Complaint Counsel relied heavily on "budget pricing" to demonstrate that CB&I has raised its post-Acquisition prices in the relevant markets. (*E.g.*, Robertson, Tr. 8218-19). Such reliance is misplaced, as it ignores the nature and the accuracy of budget prices. Evidence presented at trial conclusively demonstrates that "budget pricing" is not reflective or predictive of firm, fixed price bids that customers have received or will receive in the future. Customers simply do not purchase products based on budget prices. For example, Jerry Stetzler of CB&T explained that a budget price is "not anything you are submitting a bid that you are going to select a contract from" (Stetzler, Tr. 6380) (FOF 7.9). Nigel Carling, formerly of Enron, testified similarly and added that a firm, fixed price (unlike a budget price) is based on detailed designs. The company providing a firm, fixed price is expected to "stand up to their price and do the work for that price." (Carling, Tr. 4472) (FOF 7.3).

When a company such as CB&I gives a customer a budget price, it does so without information regarding many aspects of the particular job. For example, the following information is not usually made available by the customer to a tank vendor at the budget pricing stage:

- An actual design of the tank or structure to be built. (Scorsone, Tr. 4999; Hall, Tr. 1868) (FOF 7.15).

- The actual construction schedule. (Scorsone, Tr. 5000-01) (FOF 7.20, 7.21).
- Whether the construction schedule will be a regular work week or require overtime. (Scorsone, Tr. 5000).
- Actual pricing provided by subcontractors. (Scorsone, Tr. 5000) (FOF 7.17)
- The exact location of the project at issue, including information regarding site conditions. (Scorsone, Tr. 5001-02; Stetzler, Tr. 6351-53) (FOF 7.22, 7.24)
- Intelligence regarding competitors. (*See* Hall, Tr. 1869-70).

These unknowns make it impossible to provide pricing with any level of precision. Further, such precision is not required or even desired at the early stages of a project characterized by budget pricing. Complaint Counsel's own witnesses have recognized this fact. For example, Brian Price of Black & Veatch explained that "we would certainly expect early on getting budget pricing that they would be more conservative. At that point we're not looking for the lowest number we could conceive of." (Price, Tr. 604) (FOF 7.4).

Other customers recognize that budget prices do not accurately represent the price that they will pay for a project. For example, Michael Patterson of MG Industries noted that with respect to formulating budget pricing, a company is "not going to put a lot of time or effort into it." (Patterson, Tr. 374) (FOF 7.25). Patterson also compared budget pricing to fixed, firm price bids, explaining that "those are two different kinds of numbers. One is what you pay for a tank. The other is just putting a quick number together for you." (Patterson, Tr. 374) (FOF 7.12). Similarly, Hans Kistenmacher referred to budget prices as an "orientation," or "numbers that are being used maybe by a client to set up an investment budget." (Kistenmacher, Tr. 925) (FOF 7.2).

Customers recognize that budget pricing is often a "guess." For example, Clay

called "margin." Complaint Counsel attempts to compare margins on post-Acquisition budget prices to margins on fixed, firm price bids given several years prior to the Acquisition. (*See* Robertson, Tr. 8218-19). This attempted analysis fundamentally ignores the purpose of a margin calculation. Margin is not designed, especially at the budget pricing stage, to predict profits or losses. Margin calculations are prepared for internal use only, and in the case of budget pricing cover the many contingencies and unknown risk factors that always exist at the early stages of a project. (*See* Price, Tr. 608-09; Simpson, Tr. 5366; Scorsone, Tr. 5252) (FOF 7.26). When the number of contingencies and risk factors is great, the margins on budget prices are high. (Scorsone, Tr. 5003) (FOF 7.26). In short, high budget prices are an indication of high risk jobs, not of anti-competitive effects, as Complaint Counsel contends.

B. COMPLAINT COUNSEL HAS FAILED TO SHOW THAT PRICES IN THE RELEVANT MARKETS HAVE INCREASED.

In attempting to carry its burden of proof, Complaint Counsel did not present evidence showing that actual transaction prices in the relevant product markets have gone up. Complaint Counsel never presented this evidence, because it simply does not exist. In fact, the evidence is squarely to the contrary. Respondents' expert, Dr. Harris, reviewed pricing in the relevant markets post-Acquisition and found that it has not risen since the Acquisition. In support of his conclusion, Dr. Harris pointed to the LNG bid contest in Trinidad and recent activity in the LIN/LOX market. He also noted that most customers who have received pricing post-Acquisition were satisfied with prices received.

Instead, Complaint Counsel has attempted to piece together documents to develop a story of increased prices. These efforts have failed. For example, Complaint Counsel argues that PDM increased its price to Williams in connection with the Cove Point expansion in November 2000 in anticipation of the Acquisition. However, there is not a shred of evidence

supporting that assertion, only speculation and conjecture. Similarly, Complaint Counsel also makes much of price changes associated with the Spectrum Astro TVC that was recently cancelled. These changes have nothing to do with competition; or the Acquisition. (Scorsone, Tr. 5048-49; Scully, Tr. 1123-24) (FOF 6.188). Notably, Spectrum Astro did not testify to a belief that the Acquisition caused a higher price for its proposed job. In several instances, such as alleged price increases in connection with the proposed Spectrum Astro and Boeing thermal vacuum chamber, the customer never paid the allegedly higher price. A price never paid is not a relevant price increase in a Section 7 case.

C. THERE HAVE BEEN NO STRUCTURAL CHANGES IN THE

more likely the Acquisition. No one company is likely to have an ability to exercise market power. The Merger Guidelines recognize that impediments to exercising market power include product heterogeneity, inability to access incomplete information about rivals' businesses, and differences in vertical integration. These characteristics are hallmarks of the industrial tank business. It is undisputed that each of the relevant products is designed and built on a custom basis. Further, competitors in this industry have highly imperfect knowledge regarding each other's pricing, a fact recognized by both expert economists. (See Simpson, Tr. 3073, 3771; Harris, Tr. 7264, 7273, 7358-59) (FOF 7.82, 7.83). There are also differences in vertical integration among the various competitors in this industry, making exercise of market power more difficult. The Acquisition has done nothing to change these industry characteristics. Further, this is not a market that is replete with a history of bid rigging or coordination, unlike the paving contracting industry or bidding on school milk contracts. Customers have testified that they have gained very competitive pricing from bidding to just two or three firms. These are not the types of conditions in which coordinated interaction is likely to occur.

D. ECONOMIC THEORY DOES NOT SUPPORT A CONCLUSION THAT THE ACQUISITION SUBSTANTIALLY THREATENED TO LESSEN COMPETITION IN ANY RELEVANT MARKET.

This Court heard extensive economic testimony from Drs. John Simpson and Barry Harris, expert economists presented by Complaint Counsel and Respondents, respectively. While these gentlemen testified for eleven days, their testimony boils down to three basic economic theories which were applied by Dr. Simpson and criticized by Dr. Harris. Each theory is discussed below.

1. Application of critical loss theory shows that the Acquisition does not threaten to substantially lessen competition in any of the relevant markets.

While Dr. Simpson attempted to apply critical loss theory to define the scope of the relevant product markets in this case, Dr. Harris used it to assist the Court in determining whether the Acquisition can be expected to have any anticompetitive effects. (Simpson, Tr. 3525; Harris, Tr. 7256) (FOF 7.59, 7.60). Critical loss theory holds that the greater the percentage of a company's price represented by fixed costs, the less that company can afford to lose business in order to obtain revenue to cover those costs. (Simpson, Tr. 3529-30). Economists have developed a formula establishing what percent of business lost represents a company's critical loss at various price increase points. (See Simpson, Tr. 3529-30) For example, if a company attempted a price increase of five percent, and that price increase is expected to result in a loss of business greater than the maximum critical loss identified by the formula, the company would not be expected to attempt a price increase. (See Simpson, Tr. 3529-30). The two critical components of critical loss analysis are the state of mind of the company being analyzed and whether that company believes it can impose a price increase without losing sales exceeding its critical loss. (See Simpson 3865; Harris Tr. 7260-61).

The first step in a critical loss analysis is to calculate the contribution margin, which is the difference between fixed and average variable costs, stated as a percentage of price. (Harris, Tr. 7249) (FOF 7.63) In evaluating CB&I's conduct, Dr. Simpson assumed that its variable contribution margin was no greater than 15 percent. (Simpson, Tr. 3017) (FOF 7.67). In formulating this estimate, Dr. Simpson assumed that engineering, drafting, fabrication, project management and field-erection components of CB&I's price are entirely variable. (Simpson, Tr. 3003-17; CX 1641) (FOF 7.67) When the contribution margin is 15 percent, the critical loss formula identifies a critical loss of 25 percent. This means that CB&I could afford to lose up to

25 percent of its business in each relevant market after a 5 percent price increase in each relevant market before any of these increases would become unprofitable. With a 15 percent contribution margin, a loss in excess of 25 percent would exceed CB&I's critical loss and make the imposition of a 5 percent price increase unprofitable for CB&I. (Simpson, Tr. 3003-17; CX-1641; *see* Harris, Tr. 7342) (FOF 7.78).

Dr. Simpson's assumptions are flawed. Engineering, drafting, fabrication, project management and field erection are not entirely variable costs. Each item has a cost that CB&I carries on its books regardless of whether or not a project is built. (Scorsone, Tr. 4902-17; Harris, Tr. 7341-42) (FOF 7.68, 7.71). For all products except for LNG tanks, engineering, drafting, fabrication and project management costs are almost entirely fixed. Further, approximately 20 to 30 percent of field construction costs are fixed costs. (Scorsone, Tr. 4902-17) (FOF 7.72).²⁵

In determining whether a cost is variable, it is relevant to consider how the company actually treats these costs, not how they should be treated or would be treated by an economist. In this case, whether CB&I's costs are variable depends on whether CB&I would vary the number of engineers, draftsmen, fabrication personnel, project management personnel and field erection personnel, as well as associated property and equipment, based on a decline in sales. (Simpson, Tr. 3870-72) (FOF 7.246). Dr. Simpson himself acknowledged that whether a cost is variable or not depends on how that cost would be varied in response to a loss of the amount of sales equal to the critical loss. (Simpson, Tr. 3870-72) (FOF 7.247).

²⁵ Although costs of the fabrication shop are carried whether or not CB&I subcontracts fabrication, fabrication can be considered a variable cost for U.S. LNG projects because fabrication is so frequently subcontracted to overseas mills that make the nine percent nickel steel used in constructing LNG tanks. (Scorsone, Tr. 4891). Fabrication is not so easily subcontracted for the other relevant products.

The evidence shows that CB&I would not vary the number of personnel or the amount of equipment or property in the above categories if it lost 25, 50, or even 100 percent of its work in the four relevant product areas. (Glenn, Tr. 4159-60; Scorsone, Tr. 4902-17). Moreover, CB&I's executives have explained why this is the case. Sales in all four of the relevant products are small. There are no CB&I employees who work only on the relevant products. All employees are trained to work on a wide variety of products, allowing CB&I to have a more flexible workforce, able to deal with both high and low demand for products. (Glenn, Tr. 4058; Scorsone, Tr. 4887; CX 497 at 363 (Leventry Dep.)) (FOF 7.75).

The actual critical loss in this case is small. If costs are properly accounted for as fixed, consistent with the above facts, the applicable contribution margin would be 30 to 33 percent. (Harris, Tr. 7341-44, 7900) (FOF 7.68, 7.69). This means that CB&I can now only afford to lose 12-13 percent of its business as a consequence of attempting a 5 percent price increase. Because CB&I would lose more than 25 percent of its business in any of the relevant product markets by losing just one sale in a given year or two-year period, the real question is

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The evidence demonstrates that CB&I's state of mind would preclude any price increase in the relevant markets. This state of mind is informed by current market developments. CB&I is aware that Dynegy was satisfied with pricing received from new entrants, and that TKK beat CB&I by 5 percent, despite CB&I's advantage in that region. (*See Part III, supra*). Given this knowledge, CB&I knows that it cannot successfully impose a price increase for LNG tanks without losing business. (Glenn, Tr. 4093-4109 (state of mind); Scorsone, Tr. 4872) (FOF 3.453). Similarly, CB&I has lost all three jobs it has bid against AT&V in the LIN/LOX market since the Acquisition and has specifically noted in a company e-mail that "we are having a really hard time competing for these types of tanks." (*See RX 208, discussed at Part V, supra*). CB&I perceives that it cannot impose a price increase in the LIN/LOX market, and that it must sharpen its pencils for future pricing in that market. (Scorsone, Tr. 4881-82, 5030) (FOF 5.216, 5.217). In the LPG market, CB&I bid on the only post-Acquisition job available and was in last place in the initial bidding round. CB&I won this job only after cutting its costs and margin levels. (*See Part IV, supra*). Simply put, CB&I does not possess a state of mind which would lead it to believe it can impose a price increase in any relevant market.²⁶

In short, Dr. Simpson makes critical errors in calculating critical loss, and ignores the overwhelming evidence of CB&I's state of mind which indicates that, applying the critical loss formula, CB&I will be constrained in the future from attempting price increases in the relevant markets.

²⁶ Nor can CB&I get away with a price increase in the thermal vacuum chamber market because it has voluntarily restricted itself to seeking no more than a four percent margin on jobs performed for the private sector and a zero percent margin for jobs performed for the government. *See Part VI, supra*.

2. Auction theory does not support Complaint Counsel's position that the Acquisition of PDM EC assets threatens to substantially lessen competition in any of the relevant product markets.

Dr. Simpson also argues that "auction" or "bid model" theory predicts that competition will be substantially reduced in the relevant markets as a consequence of CB&I's acquisition. Dr. Simpson posits that PDM and CB&I were low cost bidders relative to other actual and potential entrants, and that the exit of PDM from the market leads CB&I to believe it can impose a price increase. (*See* Simpson, Tr. 3077, 3085-90). As discussed above, critical loss theory rebuts this analysis. Further, there is no evidence that PDM and CB&I were the two lowest cost suppliers in the industry. Dr. Simpson conducted no study to ascertain whether this was in fact true. In fact, the evidence presented shows that AT&V is the low-cost producer in the LIN/LOX and LPG market, and that AT&V/TKK is possibly the low-cost supplier in the LNG market. (*E.g.*, RX 208; RX 627 (state of mind); N. Kelley, Tr. 7088; *see also* Part III, *supra*).

Furthermore, the markets at issue are not oral auction markets as at a live auction where the auctioneer tells the participating bidders what price they have to beat. (*See* Simpson, Tr. 3767). The evidence is to the contrary. Competitors in the relevant markets rarely know the prices of the competition, as customers generally do not provide this information. (*E.g.*, Patterson, Tr. 359-64; Scorsone, Tr. 5010; Jolly, Tr. 4761-62; Simpson, Tr. 3073, 3771) (FOF 7.87-88). To the extent this information is available, it is provided by customers in the hopes of gaining leverage. In fact, in some cases, customers provide incorrect pricing information to gain concessions from suppliers. (*See, e.g.*, Patterson, Tr. 359-60) (FOF 7.87, 7.88). In the context of sealed or closed bid auctions where there is imperfect information, a company's state of mind

PDM would have won all the jobs prior to the Acquisition, given only a 2/9 chance of winning those jobs. (Simpson, Tr. 3400, 3663-64).

Dr. Simpson's analysis is seriously flawed, as he assumes that each of the seven new entrants discussed above were in the U.S. market between 1990 and the Acquisition. This simply is not the case. The evidence demonstrates that these companies entered the market in the past two years. With one exception, they never participated in pre-Acquisition jobs in the U.S. To accept Dr. Simpson's analysis would be to blindly accept market concentration statistics and ignore the possibility that entry could ever occur in the U.S. market. (See Simpson, Tr. 3665; Harris, Tr. 7363-64) This would essentially read the relevance of entry out of the antitrust laws. Such an approach stands in stark contrast to *Baker Hughes* and other cases discussing the importance of analyzing entry in a Section 7 case.

VIII. THE ACQUISITION CANNOT SUBSTANTIALLY LESSEN COMPETITION IN A RELEVANT MARKET BECAUSE PDM WOULD HAVE LIQUIDATED THE EC DIVISION ABSENT THE ACQUISITION.

The evidence shows that, absent the Acquisition, PDM would have liquidated its EC Division. (Scheman, Tr. 6952) (FOF 8.115). There is no evidence to suggest that PDM would have taken any other course. No witnesses have testified that they would have purchased the PDM EC Division at pricing above liquidation value, that PDM had sufficient time to find another willing buyer, that different marketing tactics would have found a willing buyer, or that the marketing tactics of PDM's experienced and qualified investment banker were improper. All of the contrary arguments made by Complaint Counsel are completely unsupported by the evidence.

In evaluating whether PDM would have liquidated the EC Division absent the Acquisition, this Court must evaluate two questions: First, is there a high probability that the EC Division would have been shut down? Second, does it have relevance to the current litigation?

The evidence, the law, the economic testimony as well as common sense require a finding that the assets would have been liquidated. This fact is dispositive of this case.

A.

(FOF 8.1) By the 1990s, PDM operated four lines of business with five divisions: PDM Strocac, PDM Water, PDM EC, PDM Bridge and PDM Steel Distribution. (Byers, Tr. 6731; Scorsone, Tr. 4778-79). The Water and EC Divisions were closely related and shared some assets and personnel. (Scorsone, Tr. 4779) (FOF 8.5). The remaining divisions were wholly separate from each other. (Byers, Tr. 6731).

By the standards of publicly traded companies, PDM was a small company. In fact, PDM stock was very thinly traded and was not attractive to investors, many of whom preferred the high-tech stocks popular in the late 1990s. On some days no shares of stock were traded, while on other days only 100 to 200 shares of stock moved on a given day. (Byers, Tr. 6732-33; Scorsone, Tr. 4791-92) (FOF 8.3). Therefore, an effort to sell even a small quantity of stock could negatively impact share value. (Scheman, Tr. 2916-17, 6909-10) (FOF 8.11). In fact, PDM employees often joked that they needed to make an appointment to sell their PDM stock. (Scorsone, Tr. 4791).

The age of the Jackson Family's patriarch was of growing concern by the end of the 1990s. (Scheman, Tr. 6909-10, 2916-17) (FOF 8.11). There was substantial concern that if

last remaining division would be sold to an investment company who would, simultaneously at closing, resell it to a third-party purchaser while retaining the PDM corporate structure with no assets except for its reserves. (Byers, Tr. 6759-61) (FOF 8.24). The evidence demonstrates that such a transaction would be made far more difficult if the EC Division's assets were still within the company at the time of the final transaction. (Byers, Tr. 6759-61) (FOF 8.24). PDM and its investment banker were in a race against the clock to sell all of the divisions prior to that final transaction.

into a letter of intent to sell the EC and Water Divisions to CB&I for \$94 million. (Byers, Tr. 6764-66) (FOF 8.105).

Although the letter of intent was signed in August 2000, the transaction did not close until February 7, 2001. (Byers, Tr. 6764-66) (FOF 8.105). What happened in the interim is very telling and important in evaluating whether PDM would have liquidated the EC division. PDM actually was confronted with the prospect of making that choice as a business matter and not in a theoretical context in response to the antitrust issues in the case. (Byers, Tr. 6769-70, 6773) (FOF 8.118). The original letter of intent assumed a year-end 2000 closing. (Byers, Tr. 6765) (FOF 8.105). This time would be sufficient to allow CB&I to perform its due diligence. However, shortly after the letter of intent was signed, it became clear that the PDM EC Division was having a poor year. (Byers, Tr. 6763-64) (FOF 8.83). Losses wiped out a projected \$2 million profit, leading to projected losses in the \$9 million range by the end of the year.

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In December of 2000, CB&I's efforts to substitute stock for nearly half of the purchase price reached a crisis proportion. (Byers, Tr. 6767, 6768-69) (FOF 8.108). Tanner met with senior PDM management, including Mr. Byers, to discuss PDM's alternatives if the CB&I transaction were to fall apart. (Byers, Tr. 6770, 6773) (FOF 8.118). The parties knew that the clock towards the ultimate disposition transaction was ticking, and that CB&I was in the best position of any interested party to deliver consideration in the form of cash. (Scheman, Tr. 6913-16, 6924-26; Byers, Tr. 6773-74) (FOF 8.35, 8.36, 8.119). Tanner actually wrote down liquidation scenarios reaching a valuation range for liquidating the company. (Byers, Tr. 6877-78) (FOF 8.123).

In December 2000, Mr. Byers became convinced that there would be no other purchaser for the EC division. (Byers, Tr. 6776-77) (FOF 8.55). He was prepared to recommend to the board that the Water division be sold via a leveraged buyout to the management of the Water Division, and that the PDM EC Division be liquidated out of existence by selling off its assets in individual pieces, should the CB&I transaction fall apart. (Byers, Tr. 6769-70, 6773) (FOF 8.118). Mr. Scheman felt that the liquidation of the EC Division was a significant probability given its financial circumstances and the lending environment prevailing at the time. (Scheman, Tr. 6952-53, 6924-26) (FOF 8.115, 8.116).

While PDM EC's financial performance was collapsing, so were the credit markets. (Byers, Tr. 6763-64) (FOF 8.83). In the latter half of 2000, credit markets tightened substantially. (Byers, Tr. 6763-64, 6750) (FOF 8.29, 8.83). Mr. Scheman concluded that asset-based lending was not likely to deliver a purchase price in excess of liquidation value. (Scheman, Tr. 6924-26, 6933-37) (FOF 8.71, 8.116). Lending based on cash flow had been cut from multiples of three to four times cash flow to no more than two times cash flow. Based on

this development, Mr. Scheman determined that an alternative purchaser in the tank construction industry would not be able to finance a transaction on an all-cash basis above liquidation value. (Scheman, Tr. 6934-37) (FOF 8.68).

At this point, PDM's board was forced to consider whether it wanted to proceed with CB&I at a reduced purchase price because of the poor performance of the EC Division and with consideration being paid with a significant amount of CB&I stock, or to explore alternative transactions. The Board convened on December 19, 2000 to consider this question. Mr. Bill McKee, the CEO of PDM, told the Board that "there is a thin market and no other serious potential purchaser was identified." (RX 28 at 2) (FOF 8.122). According to the meeting minutes, Mr. Scheman stated "lending standards have tightened considerably in

markets were significantly tightening their credit standards. The un rebutted testimony of the key participants, Mr. Byers and Mr. Scheman, is that there was a very high probability that PDM EC would have been liquidated. (Byers, Tr. 6774-75; Scheman, Tr. 6952-53) (FOF 8.115, 8.126).

2. **It was highly unlikely that there would have been another purchaser for the PDM EC division at a price greater than liquidation value.**

Complaint Counsel argues that another buyer would have purchased the EC Division at a price greater than liquidation value absent the Acquisition. However, this argument

make a purchase. (Scheman, Tr. 6930) (FOF 8.61). Mr. Scheman based this conclusion on his many years of experience in buying and selling businesses, as well as on the facts surrounding the sale. (Scheman, Tr. 2910, 6906, 6941-43) (FOF 8.17-8.18). In arriving at this conclusion, Mr. Scheman determined that financial buyers would have been deterred by PDM EC's poor performance in 2000. (Scheman, Tr. 6920, 6929-31). Complaint Counsel argues that PDM was projected to post modest profits in fiscal years 2001-2003. However, this does not mean that PDM EC was not a highly damaged asset. (Scheman, Tr. 6917-18) (FOF 8.88). Mr. Scheman noted that a company that suffers an 80 percent drop in profits from the previous year would be very difficult to sell to a financial buyer. (Scheman, Tr. 6917-18) (FOF 8.88). Further, it is unlikely that financial buyers would give credence to PDM's profit projections, since PDM projected a \$2 million profit in 2000 when it lost \$30 million. (Scheman, Tr. 6920-21) (FOF 8.84, 8.87).

All available evidence indicates that financial buyers would not have purchased the PDM EC Division, let alone at a price greater than liquidation value. (Scheman, Tr. 6929-31) (FOF 8.88). Notably, none of the major financial buyers contacted Tanner after the intention to sell PDM EC was made public. (Scheman, Tr. 6929) (FOF 8.61). Based on these facts, Mr. Scheman concluded that "the EC business was a very -- would have been a difficult and probably impossible sale to a financial based buyer." (Scheman, Tr. 6930).²⁸

b. There were no strategic buyers for the EC division.

Strategic buyers are buyers who are in the same or similar line of business and could potentially make use of assets in a synergistic manner. (Scheman, Tr. 6914) (FOF 8.60). The planned sale of the EC Division was well known throughout the industrial tank industry.

²⁸ Mr. Scheman did discuss financial buyers who did contact Tanner, and explained in great detail why they would not have been interested in consummating a transaction. (Scheman, Tr. 6929-30).

Knowledge of these basic financial facts would be critical to any purchaser. Further, Mr. Vetel was not interested in purchasing the package of assets that PDM was selling. Matrix did not want to purchase PDM's Water Division. (Vetal, Tr. 419) (FOF 8.64). However, PDM was selling the Water Division and the EC Division as a single unit. (Byers, Tr. 6754-55, 6757-58; Scheman, Tr. 6912) (FOF 8.33, 8.34, 8.38, 8.70). Similarly, Mr. Vetel was interested in purchasing fabrication facilities located in Clive, Iowa and Warren, Pennsylvania as part of a purchase of PDM EC, but was not interested in purchasing the Provo, Utah facility. (Vetal, Tr. 441-42) (FOF 8.69). However, the Clive and Warren fabrication facilities were controlled by the Water Division. The Provo facility was under the control of the EC Division. (Byers, Tr. 6781-82) (FOF 8.69). To work with Mr. Vetel, PDM would have had to essentially liquidate the Water Division because it would be taking away the assets that the Water Division used to perform its work. PDM would not have sold the EC Division to Matrix in this manner and configuration. (Byers, Tr. 6780-82) (FOF 8.70). The Water Division was consistently earning a 10 percent annual profit, even in fiscal year 2000. (Byers, Tr. 6786) (FOF 8.89). It would have made no sense to sell the foundering EC division and then liquidate the Water Division.

Further, the evidence shows that Matrix could not have engineered a purchase of PDM EC. Mr. Scheman analyzed this possibility in August of 2000 after speaking with Matrix's financial advisor. (*See, e.g.*, Scheman, Tr. 6931-39) (FOF 8.67). Mr. Scheman noted that Matrix had stock even more illiquid than PDM's, a limited cash flow for purposes of borrowing, and was itself a participant in an industry severely hurt by the same economic circumstances that were holding down the profits of both CB&I and PDM in fiscal year 2000:

I don't see how Matrix could have financed, even in -- even in July, let alone February 2001, but even in July, August of 2000, I don't see how they could have financed a good purchase price. I don't think they had neither the earnings or necessarily the balance sheet to do it, number one, and number two, if they

(*E.g.*, Scheman, Tr. 6931-32, 6934-38, 6780-82) (FOF 8.67, 8.68, 8.70). Mr. Scheman also discussed some smaller tank manufacturers such as Pasadena Tank, another company that had contacted Tanner to inquire about the availability of the EC division. (Scheman, Tr. 6939-40)

have ultimately been damaging to the shareholders and to the assets' value to engage in such a quixotic effort.

The above evidence is compelling, and more than meets a preponderance of the evidence standard. It is telling that, despite over two years of investigation and discovery, Complaint Counsel could not find anybody other than Mr. Vetal to testify about their interest in purchasing the EC Division. If there were purchasers out there, Complaint Counsel would have found them. Given the strong un rebutted evidence put forth by CB&I concerning the lack of alternative available purchasers, it would be incumbent upon Complaint Counsel to produce other such purchasers to establish that there were in fact other purchasers.

3. The liquidation of Graver constitutes a natural experiment which supports the evidence that PDM EC would have been liquidated.

One way to test Complaint Counsel's hypothesis that there would have been another purchaser for PDM EC is to examine what happened to other businesses similar to PDM EC when they were for sale. Graver was a very experienced tank manufacturer with decades of experience. It had constructed 40 percent of the LIN/LOX tanks built in the U.S. from 1997 to 2001, and was marketed to be sold in 1999 and early 2000 -- at a time when the credit markets were much more liberal. (Simpson, Tr. 5673; Harris, Tr. 7312; Byers, Tr. 6750, 6763-64) (FOF 8.29, 8.83). Despite Graver's valuable experience, employees, and its U.S.-based fabrication shop, Graver was unable to find another purchaser to buy it as a going concern. (Simpson, Tr. 5672-74) (FOF 8.131). Accordingly, its assets were liquidated out of the market. (Simpson, Tr. 5673, 5674; Kamrath, Tr. 1991) (FOF 8.129, 8.130).

In analyzing the facts of this case, it is instructive to note that Graver was not able to find a purchaser even at a time when credit was more readily available and companies had more money to spend. Graver thus constitutes a natural market experiment of what would

happen if a tank construction company similar to PDM EC were to be sold. (Harris, Tr. 7335) (FOF 7.140). The answer to the experiment is entirely consistent with the testimony of Mr. Byers and Mr. Scheman in this case: liquidation of PDM EC was the only alternative to the Acquisition. (Byers, Tr. 6770; Scheman, Tr. 6952-53) (FOF 8.118, 8.115).

B. EXITING OF THE PDM ASSETS VIA LIQUIDATION IS RELEVANT BECAUSE PDM EC WOULD NOT HAVE BEEN A COMPETITOR TO CB&I EVEN IF CB&I HAD NOT PURCHASED THE PDM EC DIVISION.

Both economists who testified in this case agree that, in order to determine whether the Acquisition has anticompetitive effects in violation of Section 7 of the Clayton Act, post-Acquisition Competition must be compared to competition as it would have been had the Acquisition not been consummated. (Simpson, Tr. 5677; Harris, Tr. 7186-87) (FOF 7.255). Thus, competition is not compared to what it was before the Acquisition.

In many merger cases, competition before the acquisition is the same as competition would have been had the acquisition not taken place. The selling company typically either continues to operate the assets or finds another buyer. However, this is a unique case because PDM was irrevocably committed to selling all of the assets. (Byers, Tr. 6742, 6762-63) (FOF 8.20). It was not going to continue to operate the EC Division. (Byers, Tr. 6757-58) (FOF 8.38). Thus, the only way PDM EC could have continued as a competitive force would have been for it to have been sold to another purchaser. (Simpson, Tr. 5675). As indicated above, there was no other purchaser to buy the PDM EC Division. (Scheman, Tr. 6952-53, 6924-26) (FOF 8.55, 8.106). Under these unique circumstances, competition if CB&I had not bought PDM EC is exactly the same as competition after CB&I's actual Acquisition of PDM EC. By itself, these facts establish that there has been no risk of substantial lessening of competition as a result of the Acquisition. *See U.S. v. General Dynamics*, 415 U.S. 486, 507 (1974) ("the effect

the answer to the first prong question as to whether there was a "grave possibility of business failure." Under circumstances such as those presented by this case, "the financial condition of a firm is neither necessary nor sufficient for a *per se* defense for a merger. Rather, analysis should . . . presume that preservation of the assets in the market, even by a leading firm, is preferable to exit from the market." Kwoka and Warren-Boulton, *Efficiencies, Failing Firms, and Alternatives to Merger: A Policy Synthesis*, 31 Antitrust Bull. 431, 450 (Summer 1986).²⁹

Complaint Counsel's position is form over substance and ignores the evidence in this case. It is not the typical case that a conglomerate, multi-division company is liquidating all of its assets, has to do so quickly, has to do so in a tightened lending environment, and has to sell the assets that are the subject of the antitrust complaint at a time when those assets are having a year in which they lost \$30 million. The relevant question is not whether PDM EC would have been a viable ongoing business if PDM had continued to operate, because the evidence is undisputed that PDM would not have continued to operate the PDM EC Division. That fact, entirely unrebutted, renders superfluous Complaint Counsel's argument that CB&I must first establish that PDM EC would not have been viable in the long run. This is a unique circumstance, and it requires a recognition of the unique facts of this case.

To do otherwise would allow Complaint Counsel to reap a windfall. As logic and economics dictate, this Court has to compare competition as it was after the Acquisition to

²⁹ Complaint Counsel has argued that a "failing firm" defense such as that proposed by Messrs. Kwoka and Warren-Boulton has been previously rejected by the FTC in *In the Matter of Olin Corporation*, 113 F.T.C. 400, (1990). Complaint Counsel's argument is a bit of an overstatement. In *Olin* the Commission held that the selling company FMC had not "made the decision to close the isos business in the near future" and that there was no evidence of an effort to find other purchasers. *Id.* Based on these factual findings, the Commission concluded "[i]n short, the facts would not support the description of the proposed defense, even if we adopted the defense, and we decline to do so in this case." *Id.* That is the full extent of the Commission's analysis, and no elaboration was provided. This hardly constitutes the rejection claimed by Complaint Counsel. Further, and more operatively, the Commission said it declined to adopt the defense "in this case" which was decided twelve years ago. It does not mean that the Commission would not adopt this defense in a more appropriate case, and there has been no case since Olin asserting the defense until this case was tried.

competition *as it would have been* absent the Acquisition in order to determine whether the Acquisition threatens to substantially harm competition. Complaint Counsel would have this Court ignore the fact that PDM EC would not have been a competitor in the market if the Acquisition had not occurred. Complaint Counsel cannot escape this ineluctable fact by hiding among the weeds of the standards for a failing firm defense which is not directly applicable here.

**C. EVEN IF PDM EC HAD BEEN SOLD AS A GOING CONCERN, IT
WOULD NOT HAVE BEEN THE SAME COMPETITIVE FORCE**

Byers explained, the Bridge Division of PDM, the last division owned by PDM before the company was liquidated to its stockholders, had a harder time obtaining bonding because it was no longer associated with the larger revenue base of the four other PDM divisions which had already been sold. (Byers, Tr. 6738) (FOF 9.25).

The evidence is uncontradicted that the ability to obtain bonding is a function of the revenue base of the company. (Byers, Tr. 6738; Bryngelson, Tr. 6127-28; Izzo, Tr. 6511) (FOF 9.4, 9.22, 9.25, 9.26). A company such as Matrix would have a far more difficult time obtaining bonding or making parent company financial guarantees for larger projects as compared to PDM prior to the Acquisition. In fact, prior to the Acquisition, PDM was the smallest of the LNG tank competitors, and at least one witness testified that PDM had had trouble making parent company financial guarantees prior to the Acquisition. (Izzo, Tr. 6488-89). Given that the trend in the U.S. LNG projects is for larger and more expensive tanks and facilities, it is questionable whether PDM under the ownership of Matrix or an even smaller company would have been able to effectively participate in the LNG markets. (*See* Part III, *supra*). Had PDM EC been sold as a going concern, it is highly probable that it could not have bid for the majority of LNG and TVC projects. Accordingly, CB&I's acquisition of PDM EC can be adjudged to have had little competitive effect in those markets as compared to post-Acquisition competition.

Nor is bonding and the ability to make financial guarantees the only consequence this Court must consider in evaluating what sort of a competitor PDM EC would have been in the unlikely event that it had been sold as a going concern. For example, the acquiring company could be so burdened by debt that it could not afford to make necessary investments or pay vendors. The purchasing entity could have managed the assets in a manner that is less effective

than PDM's management. In fact, Graver's performance began to degrade along with its financial picture after it was purchased by ITEQ. (Kamrath, Tr. 1991, 2026-27) (FOF 8.128, 8.129). Although many of the same people may have gone to work for the acquiring company, there is little evidence to suggest that PDM EC would have been able to exert the same competitive influence as it did pre-Acquisition. In short, there would be little (if any) difference in competition between the world of today, when PDM EC does not exist as a competitor, as compared to the world that would exist with a PDM EC operating under different ownership.

IX. EVEN IF THE ACQUISITION HAS CREATED AN ISSUE REGARDING COMPETITION, A BREAKUP OF CB&I IS NOT AN APPROPRIATE REMEDY.

During trial and throughout the course of this litigation, Complaint Counsel has continually sought the most draconian of remedies possible -- a breakup of CB&I. During opening statements, Complaint Counsel requested that "[r]elief in this matter must re-establish two independent viable and competitive entities." (Krulla, Tr. 101) (FOF 9.2). Such a remedy is unnecessary under the law and unsupported by record evidence. In its pursuit of a breakup remedy, Complaint Counsel ignores substantial evidence in the record showing that its proposed remedy would: 1) be potentially harmful to consumers; and 2) not be successful in enhancing competition in the relevant markets.

A. COMPLAINT COUNSEL IS REQUIRED UNDER THE LAW TO SHOW THAT ITS PROPOSED RELIEF IS APPROPRIATE.

1. Complaint Counsel has a burden to present evidence regarding its proposed remedy.

Divestiture is effectively injunctive relief. In a Section 7 case, the plaintiff (in this case Complaint Counsel) bears the burden of proof regarding injunctive relief every bit as much as the plaintiff in a private damages proceeding bears the burden of proving the amount of damages. *See Blue Cross & Blue Shield United v. Marshfield Clinic*, 883 F. Supp. 1247, 1263

(W.D. Wis. 1995). In *Marshfield Clinic*, the district court found that, despite its findings that the acquisition at issue constituted an antitrust violation, the plaintiff had presented insufficient evidence to support its requested divestiture remedy. *Id.* at 1263-64. The court held that its liability finding, standing alone, did not meet the burden of proving a need for equitable relief. *Id.* at 1264. The district court did not order divestiture because it "would have a large impact on

(1964) (quoting *Associated Press v. United States*, 326 U.S. 1, 22 (1945)). In fact, the Court specifically noted that a "remedies decree must be vacated whenever there is "a bona fide disagreement concerning substantive items of relief which could be resolved only by trial." *Id.* at 46. In *Microsoft*, those issues included "the feasibility of dividing Microsoft, the likely impact on consumers, and the effect of divestiture on shareholders." *Id.* at 101. An inquiry concerning these issues is squarely a factual issue which requires informed speculation of future events based on the evidence:

A prediction about future events is not, as a prediction, any less a factual issue. Indeed, the Supreme Court has acknowledged that drafting an antitrust decree by necessity "involves predictions and assumptions concerning future economic and business events." *Ford Motor Co. v. United States*, 405 U.S. 562, 578, 92 S. Ct. 1142, 31 L.Ed. 2d 492 (1972). Trial courts are not excused from their obligation to resolve suc

It is. . . well settled that the normal remedy in cases where Section 7 violation is found is the divestiture of what was unlawfully acquired. . . . *This is not to say that divestiture is an automatic sanction*

In considering the subject ... three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.

Id. at 327-28 (quoting *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911)). Notably, the Court did not hold that divestiture is the only available remedy. In fact, it specifically rejected the Government's assertion to the contrary, reasoning that "Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent." *Id.* at 331 n.9.

The Commission has also recognized that Section 7 does not require divestiture as the only available remedy. It has observed that divestiture can be so drastic in some cases that "the cure would be worse than the disease," and that in such cases, it would not be an appropriate remedy. *See In the Matter of Ekco Prods. Co.*, 65 F.T.C. 1163, 126 (1964). This is especially true in a case involving multiple product markets. The Commission has noted that, "[i]n multiple market cases, this may result in all elements being proven as to all alleged markets, as to some markets but not to others, or as to none of the alleged markets. A case falling into the second category may entail more narrow relief (e.g., partial rather than complete divestiture). . . ." *In the Matter of The Grand Union Company*, 102 F.T.C. 812, 503 (1983).

B. COMPLAINT COUNSEL HAS NOT MET ITS BURDEN OF PROOF WITH RESPECT TO REMEDY.

During its case-in-chief, which lasted 18 trial days, Complaint Counsel presented testimony of 24 witnesses (live and by deposition) who are customers or competitors of CB&I.

Remarkably, Complaint Counsel failed to ask any of these witnesses questions regarding the feasibility, desirability or effectiveness of its proposed remedy, nor did any of these witnesses volunteer a shred of evidence regarding this issue. The only "testimony" presented by Complaint Counsel in support of its remedy was provided by their expert economist -- Dr. Simpson. Despite the fact that Dr. Simpson gave over 600 pages of testimony, he testified regarding the issue of remedy for only eight pages. This paucity of testimony is not surprising. None of the 24 witnesses on which Dr. Simpson relied for his opinions discussed this issue. Further, Dr. Simpson is not a fact witness, he has no background in breaking up companies, and did not have any fact evidence available to him to offer any opinions regarding remedy. (Simpson, Tr. 5715) (FOF 9.3).

In short, Dr. Simpson's testimony regarding remedy is conclusory and wholly unsupported by record evidence. It cannot carry Complaint Counsel's burden of proof as a matter of law. This case, should it ever get to the Court of Appeals, would surely be reversed if any remedy were to be imposed based upon the case put on by Complaint Counsel, which is as bereft of remedy evidence as was the initial decision in *Microsoft*. It is noteworthy that after remand from the D.C. Circuit, Judge Kollar-Kotelly held a hearing solely on the issue of remedy that lasted longer than this entire proceeding. *See New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 11ataIoA8D.. Cir26).

1.

(E.g., Izzo, Tr. 6511-12) (FOF 9.22). For many customers, financial viability of a prospective bidder is important to a pre-qualification process. (Rapp, Tr. 1313) (FOF 9.24).

Several customers have expressed concern that a divestiture could result in fewer qualified bidders for LNG projects. For example, Larry Izzo of Calpine noted that breaking up CB&I could result in two companies lacking the "bonding or guarantee ability to make our bid list." (Izzo, Tr. 6511-12) (FOF 9.24). Izzo explained that foreign companies, such as Skanska, Technigaz, and TKK had the financial strength to guarantee a large LNG project. (Izzo, Tr. 6511-12) (FOF 9.22). By contrast, the two "residual" companies left by a divestiture could have difficulty in this area:

I'd be concerned about whether either of the two residual companies would have the bonding or guarantee ability to make our bid list, and unless a company could guarantee what we were asking them to do, which I feel comfortable with with the Skanskas and Technigazes and TKKs, I don't know -- I seriously doubt PDM's ability being able to backstop a large enough project as we're talking about. I don't even think PDM would make my bid list, and whether a split company -- whether CBI would make it would depend on what was left of the company. I think they would be disadvantaged compared to the other companies I'm talking about from an ability to guarantee the work to the owner.

(Izzo, Tr. 6511-12) (FOF 9.24). Similarly, Rob Bryngelson explained that El Paso considers a company's ability to post performance bonds and provide necessary liquidated damages coverages in order to determine if "they're a strong enough company, [so that] we can go and get some money to cover our damages." (Bryngelson, Tr. 6127-28) (FOF 9.9, 9.26). Mr. Bryngelson added that the Acquisition has given "some comfort in the bid process" because CB&I is a "larger company now, with more assets to go after if they do fail in the process of constructing a tank." (Bryngelson, Tr. 6154) (FOF 9.9). Mr. Bryngelson noted that a breakup would rob El Paso of this comfort:

3. Evidence shows that Complaint Counsel's proposed breakup remedy would disrupt projects already in progress.

A breakup could result in disruption of projects already in progress. Some customers have expressed this concern. For example,

person in half when they may have one or two -- only have one or two people in certain disciplines.

Q. And I take it the same would be true for the other company that received the other half of the CBI design and engineering group, that the half that remained with CBI would give up PDM and that the half that would go would not be big enough to meet all of BP's needs either on its own?

A. Yeah, I would have to say we would have some concerns about that.

(Sawchuck, Tr. 6077-78) (FOF 9.9).

The same concern exists in the TVC market. Ron Scully of XL noted that the market for TVCs is not large enough to support the existence of two suppliers, and that a divestiture would only reduce the amount of competition available for these jobs. (Scully, Tr. 1226-27, 1236-39) (FOF 6.97). A breakup would result in two smaller companies that would each be substantially weaker than the current CB&I. (Scully, Tr. 1239-40) (FOF 6.96). Customers benefit from having a merged CB&I and PDM with the combined wisdom of CB&I and PDM employees working together. (Scully, Tr. 1240) (FOF 6.98).

5. Evidence shows that Complaint Counsel's proposed breakup remedy would affect several hundred pending projects.

A breakup would affect jobs in the relevant product areas, as well as hundreds, perhaps thousands, of other contracts between CB&I and its customers. During 2001, CB&I completed 700 contracts. Currently, CB&I has over 2,000 contracts. (Glenn, Tr. 4170) (FOF 9.27).

6. Expert economic testimony supports the conclusion that divestiture is not necessary and is ill-advised because it will not result in two lowest companies.

Unlike Dr. Simpson, Dr. Harris -- Respondents' expert-considered the testimony of customers regarding the potential effects of a divestiture on their businesses. Based on his review of the entire record, Dr. Harris concluded that divestiture is "unsupported in the record."

(Harris, Tr. 7375-76) (FOF 7.141, 7.143). Dr. Harris explained that the goal of any divestiture should be to create "two low-cost companies," and observed that a divestiture may well create higher-cost companies, which would "hurt competition in all four markets." (Harris, Tr. 7375-76) (FOF 7.143). Dr. Harris correctly observed that there is no evidence in the record to suggest that a divestiture could create two low-cost companies:

It does no good to create two new competitors with both of them having higher costs and it also does no good for one low cost and one higher cost. That's, according to the FTC, that's what we have now, we have a low-cost CB&I and a bunch of new competitors that are high cost. So for this relief to have any impact you must have confidence that the two firms that will be the result will both, not one but both, be low-cost producers in the markets. And you know, there's no evidence in the record that I've seen to suggest that's true.

(Harris, Tr. 7367-68).

D. SHOULD THE COURT FIND LIABILITY, OTHER REMEDIES SUPPORTED BY THE EVIDENCE ARE STILL AVAILABLE.

Should the Court find liability in one or more of the markets at issue in this case, it is not powerless to solve competitive problems. The record contains ample evidence that any competitive problems in the markets at issue can be solved through remedies short of divestiture. For example, if the Court were to find that the LIN/LOX market has been affected by the Acquisition, there are many ways to encourage competition. For example, a current or potential competition could receive assistance from CB&I in entering the LIN/LOX market.

W.T. Cutts of AT&V, indicated that he could fully compete against CB&I on all fronts and, if he were able to obtain the following: CB&I's customer lists, technical specifications of LNG applications, cryogenic welding systems, CB&I's name and reputation, and a few of CB&I's cryogenic marketing employees, employees and equipment for four

additional field crews, more financial strength and bonding capacity, and CB&I's standard operating procedures. (Cutts, Tr. 2371-74, 2391) (FOF 9.36).

E. CB&I HAS OFFERED A SOLUTION TO ANY COMPETITIVE ISSUE ASSOCIATED WITH THE TVC MARKET.

Even if this Court finds that the Acquisition has substantially lessened competition in the TVC market, Respondents have proposed a remedy that would resolve any concerns associated with this reduction. The Court has the power to impose remedies such as this proposed remedy, as opposed to ordering a divestiture. *See In the Matter of Retail Credit Company*, 92 FTC 1, 258-59 (1978). This remedy, and the ramifications of divestiture in this market, are discussed more fully in Part VI, *supra*.

F. SUMMARY: A BREAKUP OF CB&I IS NOT APPROPRIATE IN THIS CASE.

Because Section 7 has not been violated, this Court need not impose any remedy. Should the Court find that a violation has occurred, it should not order a breakup of CB&I as Complaint Counsel has requested. Complaint Counsel bears the burden of proving that its proposed remedy is appropriate. It has not done so; in fact, Complaint Counsel has made no significant effort to address the issue of remedy in its case-in-chief. The evidence in this case demonstrates that a breakup of CB&I would not assist competition in any of the relevant markets, and would in all probability harm competition in some or all of those markets. In the face of this possibility, it would be irresponsible to order a breakup of CB&I, especially when other, less drastic means of encouraging competition in the relevant markets are available.

CONCLUSION

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

Dated: March 19, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Greg J. Miarecki, hereby certify that on this 19th day of March, 2003, I served a true and correct copy of Respondents' Correct Post-Trial Brief -- Public Version, by hand delivery upon:

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