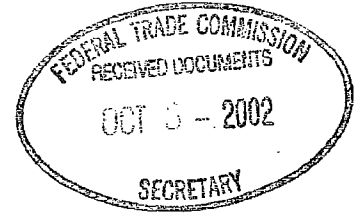


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
CHICAGO BRIDGE & IRON COMPANY N.V.,)
)
a foreign corporation,)
)
CHICAGO BRIDGE & IRON COMPANY,)
)
a corporation,)
)
and)
)
PITT-DES-MOINES, INC.,)
)
a corporation.)

PUBLIC VERSION

Docket No. 9300

To: The Honorable D. Michael Chappell
Administrative Law Judge

RESPONDENTS' MOTION FOR LEAVE TO MODIFY THEIR WITNESS LIST

Pursuant to Rule 3.22 of the Federal Trade Commission's Rules of Practice ("FTC Rules"), Respondents Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company (collectively known as "CB&I"), and Pitt-Des Moines, Inc. ("PDM") hereby submit this Motion for Leave to Modify Their Witness List. In support of their motion, Respondents state as follows:

1. On July 25, 2002, Complaint Counsel informed counsel for Respondents that they planned to add a new witness to its witness list --

Complaint Counsel advised Respondents that [redacted] would "provide information on LIN/LOX tanks, including recent pricing of these tanks." (See July 25, 2002 Letter from Cecelia Waldeck to Jeffrey Leon at 1) (attached as Confidential Exhibit A). Prior to July 25, 2002, [redacted] had not appeared on Complaint Counsel's preliminary witness list (served on April 23, 2002) or its revised witness list (served on May 28, 2002.)²

2. [redacted] is a resident of Tulsa, Oklahoma. Because of the many depositions already scheduled at the time [redacted] was disclosed as a witness, the parties were not able to conduct [redacted] deposition in Tulsa until August 21. The date was selected because it coincided with three other depositions that were planned in Tulsa during August 20-21.

3. During [redacted] deposition, he testified to his belief that the merger between CB&I and PDM had

[redacted] (See, e.g., [redacted] Deposition at 9-11) (attached as Confidential Exhibit B).

4. As support for his view, [redacted] claimed to have conducted

5. During the deposition, counsel for Respondents asked counsel for [redacted] to provide any written analysis, backup information, or calculations supporting

² To be fair, many witnesses were disclosed by both parties after the revised witnesses lists were due. Most of these witnesses were deposed without incident or need for further follow-up. The particulars regarding [redacted] are a unique situation that has arisen and is not intended as a critique or complaint over the timing of the disclosure of [redacted] on July 25. The chronology is simply intended to give the Court a sense of how we have gotten to this point on October 4, 2002.

opinion. Initially, counsel for Respondents asked [redacted] to provide this information without a confidentiality designation under the protective order. Counsel for Respondents explained to counsel for [redacted] that it was necessary to provide [redacted] analysis to CB&I estimators, so that those estimators could assist Respondents' counsel in evaluating all of the line-items in [redacted] analysis.

6. Counsel for [redacted] indicated that his client was unwilling to provide [redacted] analysis under these terms because [redacted] considered the analysis to be sensitive business information. (See August 23, 2002 Letter from [redacted] to Jeffrey Leon and Greg Miarecki at 1) (attached as Confidential Exhibit C). Over the next few weeks, counsel for Respondents and counsel for [redacted] conferred regarding this issue. In an attempt to accommodate [redacted] concerns regarding confidentiality, Respondents agreed to accept the backup for [redacted] analysis under an Attorneys' Eyes Only designation. Counsel for [redacted] eventually produced this material to Complaint Counsel and counsel for Respondents on September 23, 2002.

7. Since this time, counsel for Respondents have attempted to analyze these materials without involving a professional estimator from CB&I. However, the materials provided by [redacted] are extremely complex, dense, and require knowledge of estimating processes that Respondents' counsel -- who are merely lawyers and not engineers or tank builders -- simply do not have. [redacted] compared

(See [redacted] Analysis) (attached as Confidential

Exhibit D). There is no way that lawyers can check the accuracy of assumptions without working with experienced tank engineers and estimators who have immediate access to During the days that Respondents' counsel had analysis, they tried consulting with Respondents' own estimator employees to obtain the information and analysis necessary to prepare for trial cross-examination. However, because of the limited amount of information Respondents' counsel can disclose to these employees because of the attorneys' eyes only confidentiality designation, these efforts have been completely stymied. Respondents' counsel need to work with an expert witness to analyze opinion and backup materials. This witness may ultimately testify regarding that analysis at trial.

8. The Third Revised Scheduling Order states that Respondents' final witness list was due on September 19, 2002, and that their expert reports were due on September 23, 2002. (See Third Revised Scheduling Order at 2) (attached as Exhibit E). In light of the circumstances set forth above (e.g. that Respondents did not even receive the document until September 23), Respondents request that this Court grant them leave to add one expert estimator to their witness list, with sufficient time to retain the expert and prepare an expert report. Specifically, Respondents propose the following schedule:

- On or before October 9 -- Respondents identify an appropriate estimating expert witness.
- On or before October 22 -- Respondents provide an expert witness report.
- On or before October 29 -- Complaint Counsel to take the expert's deposition.

In the alternative, Respondents request that this Court strike the testimony of

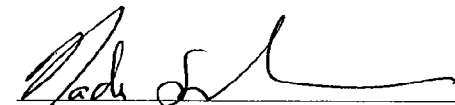
9. Lest Respondents be accused of hypocrisy for moving to add a late witness while Respondents had previously moved to strike Complaint Counsel's late-disclosed witnesses, the

following should be observed. First, for the reasons stated herein, there is justification for adding this expert. [redacted] was disclosed relatively late in discovery by Complaint Counsel, and Respondents have used deliberate diligence in following up with the matters raised in [redacted] deposition. This is unlike Complaint Counsel's late-disclosed witnesses, two of which Complaint Counsel knew of for over a year and did nothing in pursuit, and the third of which they knew of since this July but did not disclose to Respondents until after discovery closed. In contrast, Respondents notified Complaint Counsel immediately when it became apparent this new expert would be required. Second, Respondents have followed proper procedure and have asked leave of this Court to add the new witness, while Complaint Counsel added its late disclosed witnesses without first seeking leave. Finally, Complaint Counsel bears the burden of proof. It ought not be able to stymie CB&I's defense with late witness disclosures that CB&I has no chance to respond to. If [redacted] had been disclosed before the end of July, this all would have been worked out before the discovery deadline. Complaint Counsel ought not be able to profit from the timing of its disclosure of [redacted], or the use by [redacted] employer of the protective order to designate the material attorneys' eyes only.

Dated: Washington, D.C.

Respectfully submitted,

October 8, 2002



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

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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CHICAGO BRIDGE & IRON COMPANY,)
)
a corporation,) Docket No. 9300
)
and)
)
PITT-DES-MOINES, INC.,)
)
a corporation.)
_____)

ORDER

Upon consideration of Respondents' Motion for Leave to Modify Their Witness List, and for good cause shown,

It is ORDERED that Respondents may name an expert witness for the sole purpose of analyzing and testifying about the analysis of _____ Respondents shall have until October 9, 2002 to identify an appropriate expert. The expert shall serve his expert report on Complaint Counsel no later than October 22, 2002. Any deposition of this expert shall take place on or before October 29, 2002.

ORDERED
October _____, 2002

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

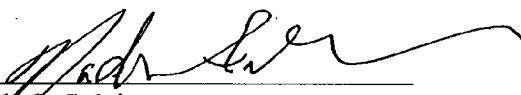
I, Nada S. Sulaiman, hereby certify that on this 8th day of October, 2002, I served a true and correct copy of: Respondents' Motion for Leave to Modify Their Witness List, by hand delivery upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(two copies)

And by fax and hand delivery upon:

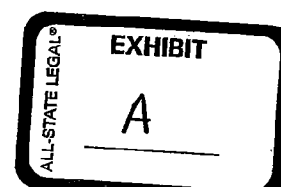
Rhett R. Krulla, Esq.
Acting Assistant Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room S-3602
Washington, D.C. 20580

Steven L. Wilensky, Esq.
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Room S-3618
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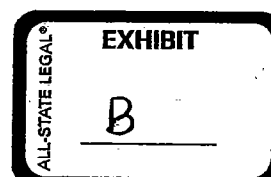


Nada S. Sulaiman

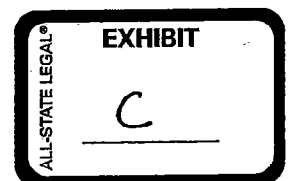
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Protective Order**



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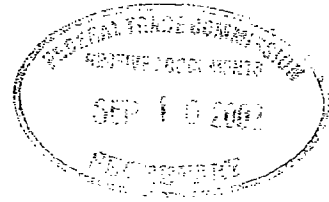
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THE LEGAL[®]
EXHIBIT

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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a foreign corporation,)
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CHICAGO BRIDGE & IRON COMPANY,)
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Docket No. 9300

THIRD REVISED SCHEDULING ORDER

- September 13, 2002 - Parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).
- September 16, 2002 - Complaint Counsel provides to Respondents' counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.
Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.
- September 19, 2002 - Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including designated testimony to be presented by deposition and copies of all exhibits (except for demonstrative, illustrative or summary exhibits), and a brief summary of the testimony of each witness.
Respondents' Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists and a brief summary of the testimony of each witness.



- September 23, 2002 - Respondents' Counsel provides expert witness reports.
- September 24, 2002 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- September 26, 2002 - Deadline for filing motions *in limine* and motions to strike (except as to experts).
- October 1, 2002 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- October 1, 2002** - Deadline for motions for summary decision.
- October 3, 2002 - Deadline for filing responses to motions *in limine* and motions to strike.
- October 7, 2002 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit sur-rebuttal expert reports on behalf of Respondents).
- October 11, 2002 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.
- October 10, 2002** - Deadline for depositions of experts (including rebuttal experts), except that any depositions scheduled and confirmed prior to the entry of this order to be taken between October 11 and October 24 may be taken as scheduled.
- October 17, 2002** - Deadline for filing motions *in limine* and motions to strike as to experts, except as to motions relating to experts' whose depositions were taken between October 11 and October 24, in which case, any such motion shall be filed within 7 days of the deposition.
- October 21, 2002** - Complaint Counsel shall file pretrial brief identifying all factual issues and legal issues to be decided in this case. Legal issues shall be supported by legal authority. In addition, the pretrial brief shall expressly set forth Complaint Counsel's position as to each and

every element required to prove the violations alleged in the Complaint and to support any defense asserted in the Answer, including the legal and factual bases in support thereof.


- October 24, 2002** - Deadline for filing responses to motions *in limine* and motions to strike as to experts, except as to motions in limine or to strike experts which were filed after the October 17 deadline, in which case, any response to such motion shall be filed within 7 days of the filing of such motion.
- October 24, 2002 - Exchange proposed stipulations of law, facts, and authenticity.
- October 28, 2002** - Respondents' Counsel shall file pretrial brief identifying all factual issues and legal issues to be decided in this case. Legal issues shall be supported by legal authority. In addition, the pretrial brief shall expressly set forth Respondents' position as to each and every element required to prove the violations alleged in the Complaint and to support any defense asserted in the Answer, including the legal and factual bases in support thereof.
- October 28, 2002 - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
- October 30, 2002** - Deadline for responses to motions for summary decision.
- November 6, 2002 - Final prehearing conference to be held at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. Counsel may present any objections to the final proposed witness lists and exhibits, including the designated testimony to be presented by deposition. Trial exhibits will be admitted or excluded to the extent practicable.

- November 12, 2002 - Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

All "Additional Provisions" of the February 20, 2002 Scheduling Order remain in effect.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: September 10, 2002

**Redacted Pursuant to
Protective Order**

