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' MOTION TO WITHDRAW INADVERTENTLY STIPULATED DOCUMENTS FROM EVIDENCE

Respondents respectfully request that this Court grant the withdrawal of two exhibits inadvertently entered as evidence pursuant to Joint Exhibit 7 ("JX 7"). Specifically, the deposition testimony (in two parts and thus constituting two exhibits) of an expert witness that Respondents do not intend to call, was inadvertently entered into evidence through a joint stipulation offered by Complaint Counsel on December 16, 2002. At this time, in order to speed up this trial, Respondents do not believe it is necessary and do not plan on calling this expert at trial. However, if the entirety of the depositions are allowed to remain in evidence, Respondents may be forced to call the expert, or another CB&I employee, in order to provide this Court with complete testimony, an event which could potentially add two additional trial days to Respondents' case. Although Complaint Counsel is aware that Respondents did not intend to

stipulate this deposition into evidence, Complaint Counsel has failed to consent to the removal of the disputed exhibits from evidence and instead argues their admissibility on the merits. On the merits, the expert deposition at issue is inadmissible hearsay. For this reason and the reasons stated herein, the two inadvertently entered documents should be removed from evidence.

I. Both Respondents and Complaint Counsel Inadvertently Admitted Two Documents That Continued To Be In Dispute

On December 16, 2002, after extensive discussion of dozens of potential exhibits, Complaint Counsel offered a document stipulation marked as JX 7 and the documents listed therein to be entered into evidence. (Attached as Exhibit A). Over the week preceding the entering of JX 7 into evidence, Respondents reviewed numerous versions and variations of JX 7 submitted by differing attorneys for Complaint Counsel. See Dahlquist Declaration at ¶ 4 (Attached as Exhibit B). When Respondents received the final version from Complaint Counsel, Respondents hurriedly reviewed and signed the stipulation when it was offered by Complaint Counsel. See Dahlquist Declaration at ¶ 4 (Attached as Exhibit B). On December 20, 2002, four days after JX 7 was entered into evidence, Respondents learned that it had inadvertently agreed to the admission of two documents, CX 1577 and CX 1578, that were contained within stipulation JX 7. See Dahlquist Declaration at ¶ 6 (Attached as Exhibit B). These documents, the two part deposition of John Vaughn, an expert witness that Chicago Bridge and Iron ("CB&I") does not intend to call at trial, were extensively discussed prior to the submission of JX 7. Complaint Counsel wanted the deposition to be admitted as part of the stipulation, and Respondents never wavered in their resistance to this extraordinarily questionable approach. See Dahlquist Declaration at ¶ 3 (Attached as Exhibit B).

Respondents learned of their error when, on December 20, 2002, Complaint Counsel informed Respondents that it intended to seek the admission of CX 1577 and CX 1578

into evidence before the close of its case. See Dahlquist Declaration at ¶ 5 (Attached as Exhibit B). Complaint Counsel inquired if any agreements could be made as to the admissibility of the documents. Respondents informed Complaint Counsel that it continued to object to the admissibility of CX 1577 and CX 1578 and would not stipulate to their admissibility. See Dahlquist Declaration at ¶ 5 (Attached as Exhibit B). Both parties agreed that they were at an impass with respect to these two documents and would be required to address the issue before this Court. See Dahlquist Declaration at ¶ 5 (Attached as Exhibit B). As is apparent from Complaint Counsel's inquiry on December 20, 2002, four days after JX 7 was submitted and admitted by this Court, both Complaint Counsel and Respondents were unaware that these documents had been entered into evidence four days earlier.

Soon after Complaint Counsel informed Respondents of its desire to seek the admission of Mr. Vaughn's depositions, both parties discovered that CX 1577 and CX 1578 had previously been entered as part of JX 7. Respondents immediately requested that Complaint Counsel remove the two inadvertently admitted documents from evidence. See Dahlquist Declaration at ¶ 8 (Attached as Exhibit B). Complaint Counsel has thus far refused to remove the two inadvertently stipulated documents from evidence. Respondents have continually maintained that Mr. Vaughn's depositions are inadmissible hearsay since their first appearance on Complaint Counsel's exhibit list and never intended for these two documents to become part of a joint stipulation. See Dahlquist Declaration at ¶ 10 (Attached as Exhibit B). As a result of Complaint Counsel's failure to accommodate Respondents' request to remove these documents, Respondents have filed this motion.

II. The Documents At Issue Are Inadmissible Hearsay

Complaint Counsel has informed Respondents' that it is unwilling to remove the two exhibits at issue from evidence because they are properly admissible. Although Respondents assert that the two exhibits are required to be removed from evidence solely because they were inadvertently entered, Respondents also assert that the documents are not admissible because they contain inadmissible hearsay.

The two documents at issue, CX 1577 and CX 1578, are the morning and afternoon deposition transcripts of John Vaughn, an expert witness retained by Respondents "for the sole purpose of analyzing and testifying about the opinions of the particular witness identified in the confidential pleadings." See Order Granting Respondents' Motion to Modify Witness List (October 16, 2002) (Attached as Exhibit C). Complaint Counsel has suggested that the statements made by Mr. Vaughn in his deposition are admissible as admissions of a party opponent or party agent.

First, consistent with this Court's Order during the pre-trial hearing held on November 7, 2002, statements made by a former employee during a deposition do not constitute party admissions. See Final Pre-Trial Hearing Conference Tr. at 114:3-7 (Nov. 7, 2002) (Attached as Exhibit D). It is clear that Mr. Vaughn was not an employee of CB&I at the time his deposition was taken. Although Mr. Vaughn had a long career with CB&I, he has been retired since the end of 2000. Mr. Vaughn was clearly not an employee of CB&I when he submitted his expert report on October 23, 2002, and had his deposition taken on October 30, 2002.

Consistent with this Court's earlier ruling, the statements made by Mr. Vaughn do not constitute party admissions. On November 7, 2002, Complaint Counsel attempted to offer

deposition testimony from various witnesses into evidence. This Court denied Complaint Counsel's motion with respect one deponent, Carroll Davis, who also has been retired since 2000 and was not an employee at the time his deposition was taken. See Final Pre-Trial Hearing Conference Tr. at 114:3-7 (Nov. 7, 2002) (Attached as Exhibit D). Consistent with this Court's ruling on November 7, 2002, the deposition testimony of Mr Vaughn is not admissible because he was not an employee of CB&I at the time his deposition was taken.

Second, contrary to Complaint Counsel's assertions, the statements made by Mr. Vaughn in his deposition are hearsay and do not constitute admissions of a party agent. Complaint Counsel has attempted to argue that Mr. Vaughn's statements are admissions of a party agent. However, case law has held that expert witness testimony does not fall under 801(d)(2). See Kirk v. Raymark Indus., Inc., 61 F.3d 147, 163-64 (3d Cir. 1995)(stating that an expert witness is not in the control of the party who hired him); see also Brandt v. Wand Partners, et al., 242 F.3d 6, 21 (1st Cir. 2001) (citing Kirk rule and stating that "an expert is more like an independent contractor offering his own opinion and is not 'controlled' by the party who employs him."); A-Cal Copiers, Inc. v. North Am. Van Lines, Inc., 180 F.R.D. 183, 189 (D. Mass. 1998) (holding that the fact that a party hired a witness to prepare a report does not evidence the existence of an agency relationship as required by Rule 801(d)(2)(C) and (D) since the party who hired the witness did not "control" the investigation).

III. Complaint Counsel Seeks To Use Statements Unrelated To The Expert's Narrow Purpose Ordered By This Court

If this Court should find that the statements contained within CX 1577 and CX 1578 are admissible, the admitted statements should be limited to the testimony directly related to Mr. Vaughn's expert report and this Court's order granting Respondents permission to add an expert "for the sole purpose of analyzing and testifying about the opinions of the particular

witness identified in the confidential pleadings." See Order Granting Respondents' Motion to Modify Witness List (October 16, 2002) (Attached as Exhibit C). Since Mr. Vaughn has been retired from the tank industry since 2000 and is no longer familiar with the inner workings of CB&I, any testimony unrelated to his expert report is not reliable and should be excluded pursuant to FTC Rule 3.43.

During the deposition of Mr. Vaughn, Complaint Counsel inquired into numerous areas concerning Mr. Vaughn's observations while at CB&I which were entirely unrelated to Mr. Vaughn's work as an expert in this case. Respondents objected to Complaint Counsel's treatment of Mr. Vaughn as a fact witness during the deposition, but permitted Complaint Counsel's inquiries in order to provide evidence of Mr. Vaughn's experience and status as an expert on the issues related to his report. See J. Vaughn Dep. Tr. 19:16-20:8 (October 30, 2002)(Vol. 2) (Attached as Exhibit E). Respondents now believe that Complaint Counsel is seeking to use Mr. Vaughn's deposition testimony for a purpose entirely unrelated to his expert analysis. If Respondents attempted to have Mr. Vaughn testify on a variety of issues beyond the scope of this Court's limited order, Complaint Counsel would surely object. Respondents' ask that this Court hold Complaint Counsel to the same standard.

Respondents' clearly designated Mr. Vaughn as a expert witness for the limited purpose of reviewing the opinions and analysis of complaint Counsel's witness Chung Fan. Respondents did not identify Mr. Vaughn as a fact witness, nor would Respondents have been permitted to do so as a result of this Court's Order. Despite this limitation, Complaint Counsel repeatedly attempted to use Mr. Vaughn as a fact witness during his deposition in order to inquire as to the inner workings of CB&I. For example, Complaint Counsel made numerous inquiries similar to the following example:

> Q. Is the estimating department at CB&I at that time, was it subsumed underneath the sales department?
> A. Yes.
> Q. Is that still the case to your knowledge?
> A. As of today I can't say because I'm not an employee of CB&I.
>
> J. Vaughn Dep. Tr. 12:19-13:2 (October 30, 2002)(Vol. 2)(Attached as Exhibit F).

Complaint Counsel was aware that Mr. Vaughn had been retired in 2000 and his knowledge regarding CB&I and his experience in the industry was only current through December of 2000. Nonetheless, Complaint Counsel continually asked Mr. Vaughn questions regarding the dynamics of a post acquisition CB&I. For example:

> Q PDM has now merged with CB&I and that information should be available at CBI, is that correct?
> A Well --
> MR. DAHLQUIST: Object to the form.
> THE WITNESS: Let me back up and maybe I could clarify this a little bit. At the time the Connecticut job was built, PDM and CBI were not together.
> Now, what happened after they came together, I don't know, and I don't know how information from one company transferred into the other company, and that very well may be the reason they were not able to provide that information to me.
>
> J. Vaughn Dep. Tr. 14:3-17 (October 30, 2002)(Vol. 2) (Attached as Exhibit F).

Complaint Counsel should not be permitted to introduce into evidence questions and answers that clearly went beyond the scope of Mr. Vaughn's expert report and the Order issued by this Court limiting Mr. Vaughn's purpose in this case. Any testimony outside of the scope of Mr.

Vaughn's limited purpose as an expert providing opinions on the analysis of Chung Fan is clearly not reliable and should be excluded pursuant to FTC Rule 3.43.

IV. Complaint Counsel Has Failed To Enter The Exhibits To Mr. Vaughn's Depositions, Rendering The Exhibits Incomplete

Complaint Counsel has acted unfairly in failing to include the exhibits to Mr. Vaughn's deposition, which includes his expert report, which are required to fully understand the testimony included within the depositions. In the event that this Court should decide that the inadvertently admitted documents should remain in evidence, Respondents request that Mr. Vaughn's expert report, a document that was labeled as an exhibit at the deposition, also be admitted into evidence.

V. Conclusion

Since documents CX 1577 and CX 1578 were inadvertently admitted into evidence by both parties on JX 7 and are inadmissible hearsay, Respondents respectfully request that this Court grant this motion and permit both documents to be removed from the joint stipulation and from evidence.

Dated: Washington, D.C.
December 31, 2002

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

CERTIFICATE OF SERVICE

I, David E. Dahlquist, hereby certify that on this 31st day of December, 2002, I served a true and correct copy of: Respondents' Motion To Withdraw Inadvertently Stipulated Documents From Evidence, 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)

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

Steven L. Wilensky
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
Room S-3618
Washington, D.C. 20580

David E. Dahlquist

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DECLARATION OF DAVID E. DAHLQUIST

I, David E. Dahlquist, do solemnly and sincerely declare as follows:

1. I am over the age of eighteen and competent to give testimony. The information set forth below is based upon my own personal knowledge information, and/or belief.

2. I am an attorney with Winston & Strawn and a member of the team representing the Chicago Bridge & Iron Company in the instant action brought by the Federal Trade Commission.

3. Over the weeks preceding the submission of Joint Exhibit 7 ("JX 7"), I had dozens of conversations with Complaint Counsel concerning hundreds of documents that each party was seeking to enter into evidence. I had discussed with Complaint Counsel on numerous occasions that we continued to object to the submission of Mr. Vaughn's deposition testimony

into evidence and were unwilling to stipulate to its admissibility. Both parties agreed that we were at an impass with respect to these documents and recognized the need to argue the admissibility of these documents before this Court at a future date.

4. In the days prior to the submission of JX 7, I reviewed numerous versions of a proposed JX 7 that were sent to me for review by differing attorneys from Complaint Counsel. Upon arriving in court on the morning of December 16, 2002, Complaint Counsel presented me with a final version of JX 7 for review which continued to contain last minute changes and additions. I hurriedly reviewed the list of exhibits contained on JX 7 and compared it with a list of document numbers I had complied detailing those documents to which we were unwilling to stipulate admissibility. Due to a typographical error, my list did not contain the two exhibits at issue in this motion. Due to time pressures, I was unable to verify the exhibit numbers with the actual documents. As a result, I mistakenly believed that we had resolved our issues relating to the documents contained within JX 7 and agreed to its submission to this Court, thereby inadvertently agreeing to the admission of two documents that continued to be at issue.

5. On Friday, December 20, 2002, four days after JX 7 was admitted into evidence, Complaint Counsel informed me of its desire to seek the admission of John Vaughn's deposition testimony. As I had done numerous times before, I told Complaint Counsel that Respondents continued to object to the admissibility of these documents was not willing to stipulate to admissibility. Complaint Counsel informed me that they understood our objection but would seek to argue the admissibility of these documents before the Court prior to the close of their case.

6. Shortly after my conversation with Complaint Counsel regarding its desire to have these document entered as evidence, Complaint Counsel informed me that Mr. Vaughn's

deposition was marked as CX 1577 and CX 1578 and had already been admitted into evidence as part of the documents listed in JX 7.

7. I immediately informed Complaint Counsel that Respondents continued to have objections relating to the admissibility of CX 1577 and CX 1578 and stated that I had inadvertently agreed to their admission on JX 7.

8. I immediately requested that Complaint Counsel remove the two inadvertently admitted documents from the stipulation.

9. I assumed the removal of the exhibits would not be an issue due to an occasion that occurred a few weeks earlier where I had removed exhibits from Respondents first joint document stipulation when Complaint Counsel represented that they had inadvertently agreed to the admission of a few documents. At Complaint Counsel's request, I had removed those exhibits and asked Complaint Counsel to do the same. Complaint Counsel has thus far refused to remove CX 1577 and CX 1578 from their previously entered document stipulation.

10. Complaint Counsel has been aware of my continuing objection to CX 1577 and CX 1578 since the documents first appeared on its exhibit list. As is evident from the conversation where Complaint Counsel expressed its desire to have these documents admitted as evidence, even though they were inadvertently admitted four days prior, Complaint Counsel was also clearly unaware that these documents were part of stipulation JX 7.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2002

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David E. Dahlquist