

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
CHICAGO BRIDGE & IRON COMPANY N.V.)	
a foreign corporation,)	
)	
CHICAGO BRIDGE & IRON COMPANY,)	DOCKET NO. 9300
a corporation, and)	
)	
PITT-DES MOINES, INC.,)	
a corporation.)	

ORDER GRANTING RESPONDENTS' MOTION TO MODIFY WITNESS LIST

I.

On October 4, 2002, Respondents (Chicago Bridge and Iron ("CB&I") and Pitt-Des Moines ("PDM")) filed a Motion for Leave to Modify Their Witness List. On October 7, 2002, Complaint Counsel filed its opposition. For the reasons set forth below, the motion is GRANTED.

II.

Respondents' motion seeks an order allowing Respondents to add one expert witness to their witness list, to allow Respondents to submit an additional expert report, and to allow Complaint Counsel to take the deposition of this expert outside the close of discovery. Respondents assert that the expert's testimony would be limited to the sole purpose of analyzing and testifying about the analysis provided by one particular witness designated by Complaint Counsel. The identity of this witness was designated as confidential information by the parties in the confidential versions of their pleadings and need not be revealed in this Order for purposes of ruling on Respondents' motion.

Complaint Counsel asserts that Respondents have failed to demonstrate good cause for adding an expert witness past the deadlines established for witness lists and expert reports. Complaint Counsel asserts that Respondents already have documents in their possession that should be sufficient either to confirm or to refute the testimony of this one witness.

III.

Commission Rule 3.21 requires Administrative Law Judges to enter a scheduling order that “establishes a scheduling of proceedings, including a plan of discovery” 16 C.F.R. § 3.21(c)(1). Pursuant to 16 C.F.R. § 3.21(c)(1), Additional Provision Number Four of the first Scheduling Order, entered on February 20, 2002, states that “[t]he final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.” All subsequent revised scheduling orders state that the “Additional Provisions” of the February 20, 2002 Scheduling Order remain in effect.

Under the Third Revised Scheduling Order, entered on September 10, 2002, Respondents were required to provide their final proposed witness list by September 19, 2002, and were required to provide expert witness reports by September 23, 2002. Pursuant to Commission Rule 3.21(c)(2), the Administrative Law Judge may grant a motion to extend any deadline or time specified in the prehearing scheduling order “only upon a showing of good cause.” 16 C.F.R. § 3.21(c)(2).

Respondents assert that the following circumstances, taken together, demonstrate good cause:


- Complaint Counsel did not designate this employee of a particular non-party customer of CB&I as a new witness until July 25, 2002. Prior to July 25, 2002, this individual had not appeared on Complaint Counsel’s preliminary witness list (served on April 23, 2002) or on Complaint Counsel’s revised witness list (served on May 28, 2002.)
- By agreement of all parties, this witness’ deposition was not conducted until August 21, 2002. During his deposition, the witness testified to his belief that the merger between CB&I and PDM had caused prices for certain tanks to increase.
- During his deposition on August 21, 2002, counsel for Respondents asked counsel for this witness’ company to provide any written analysis, backup information or calculations supporting the witness’ opinion. The non-party did not produce the requested documents until September 23, 2002.
- Citing concerns regarding confidentiality, the non-party designated the documents as “Attorney’s Eyes Only.” This designation prevented Respondents’ counsel from showing the documents to CB&I employees who might have been able to assist Respondents’ counsel in analyzing the documents.

IV.

Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension. *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998); Fed. R. Civ. P. 16 Advisory Committee Notes (1983 amendment). For an unexplained reason, Complaint Counsel designated this individual as a witness three months past the deadline for serving its preliminary witness list and two months past the deadline for serving its revised witness list. Since Respondents did not receive the documents supporting the expert opinion of this late designated witness until September 23, 2002, and the pleadings demonstrate that the delay is not attributable to Respondents, Respondents have demonstrated that they could not have listed their witness or provided an expert report analyzing the opinion offered by Complaint Counsel's witness by the deadlines established in the Scheduling Order. Accordingly, Respondents have demonstrated good cause and their motion is GRANTED.

Respondents may name an expert witness for the sole purpose of analyzing and testifying about the opinion of the particular witness identified in the confidential pleadings. Respondents have until October 17, 2002 to identify an appropriate expert. The expert shall serve his expert report on Complaint Counsel no later than October 23, 2002. Any deposition of this expert shall take place on or before October 31, 2002.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: October 16, 2002