

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. )  
\_\_\_\_\_



Docket No. 9300  
**PUBLIC RECORD**

**RESPONDENTS' MOTION TO STRIKE DR. SIMPSON'S OPINION REGARDING EFFICIENCIES**

Respondents ("CB&I") respectfully request that the Commission enter an Order prohibiting Complaint Counsel's economic expert, Dr. John Simpson, from testifying regarding efficiencies resulting from the integration of CB&I and PDM beyond the one sentence conclusory statement contained in Dr. Simpson's expert reports. In support of its motion, CB&I states the following:

**I. INTRODUCTION**

1. As Complaint Counsel has been aware for some time, CB&I believes that the integration of CB&I and PDM has resulted in substantial cost-saving efficiencies which would offset any purported loss of competition. Respondents submitted an extensive efficiencies presentation (43 pages) to Complaint Counsel on October 10, 2001, and that efficiencies

presentation was presented to the Commission members in meetings on October 14 and 15, 2001. . When discovery began, more than a half dozen depositions of CB&I employees were taken regarding this presentation as well as CB&I's efficiencies defense generally. The forty-three (43) page efficiencies presentation was marked as an exhibit at six (6) different depositions *and* is referred to in Dr. Simpson's report. It was abundantly clear to both parties throughout discovery that this report was being used as the primary support for one of CB&I's defenses to the Complaint.

2. At each of the CB&I depositions related to efficiencies, Complaint Counsel involved its senior accountant, Gabe Dagen, either in person or by telephone. Despite the unorthodox request, CB&I acceded to letting Mr. Dagen, a non-lawyer, ask questions at these depositions. Complaint Counsel told CB&I's counsel that Mr. Dagen is the FTC's in-house efficiencies analysis expert.

3. Despite the extensive discovery effort directed at attacking efficiencies, Complaint Counsel's expert witness, Dr. John Simpson, summarily dismissed CB&I's entire efficiencies defense in a single sentence in his fifty plus page report without providing any supporting explanation or analysis. Remarkably, and much to CB&I's surprise, Dr. Simpson stated in his October 22, 2001 deposition that he nonetheless plans to testify at trial as a rebuttal witness regarding CB&I's efficiencies defense. This is trial by ambush, as CB&I has not been informed of this expert's opinion, who apparently is planning to lie in wait before springing his already formed views on CB&I in rebuttal. This practice unquestionably flies in the face of the FTC Rules of Practice, the Federal Rules of Civil Procedure, and the Commission's Scheduling Order which explicitly warn against such conduct. Accordingly, Dr. Simpson should not be

permitted to give expert testimony regarding CB&I's efficiencies defense.<sup>1</sup>

## II. ARGUMENT

4. Other than regurgitating The Merger Guideline standards on efficiencies in his expert report, Dr. Simpson dismisses CB&I's entire 40 plus page efficiencies analysis and the supporting testimony in the following sentence:

5. At his October 22, 2002 deposition, Dr. Simpson was asked to explain the basis of the above quoted "opinion" regarding the inadequacy of CB&I's efficiencies defense, and to note which claimed efficiencies are not legitimate and which are not merger specific. Dr. Simpson testified that he was able to provide specific opinions on the efficiencies analysis prior to filing his expert report:

---

<sup>1</sup> CB&I does not suggest that Complaint Counsel be barred from making legal arguments regarding efficiencies based on its cross-examination of CB&I witnesses; CB&I only asserts that Dr. Simpson should be barred from giving economic testimony with regards to efficiencies.

6. In fact, Dr. Simpson stated that in an earlier draft of his expert report he *had* included some basis for his assertion that CB&I's efficiencies analysis is inadequate, and intentionally -- CB&I believes tactically -- removed it from the final draft.

7. Ultimately, as is evident from his above quoted deposition testimony, Dr. Simpson chose not to include *any* analysis of CB&I's efficiencies defense in the expert report he ultimately submitted. Further, Dr. Simpson did not provide any analysis at his deposition, despite being asked to do so.

Despite stating in his report that the efficiencies claimed by CB&I are not merger specific or legitimate, Dr. Simpson would not state which efficiencies fall into which category and how. Accordingly, Dr. Simpson should not be permitted to give opinions at trial regarding CB&I's efficiencies defense that have not been disclosed.

8. Rule 3.31(b)(3) of the FTC Rules of Practice requires Complaint Counsel's expert witnesses to disclose in writing "a complete statement of all opinions to be expressed and the basis and reasons therefore" as well as "the data or other information considered by the witness in forming the opinions." FTC Rules of Practice, 16 C.F.R. § 3.31(b)(3).

9. The Commission's scheduling order also requires that "[e]ach expert report shall include the subject matter on which the expert is expected to testify and the *substance* of the facts and opinion to which the expert is expected to testify and a summary of the grounds of each opinion." (Feb. 20, 2002 Scheduling Order (incorporated by reference into September 10, 2002 Third Revised Scheduling Order), Exhibit 4 hereto). (emphasis added)

10. Similarly, Rules 26(a)(2)(B) and 37(c)(1) of the Federal Rules of Civil Procedure permit an expert, on direct examination, to rely on no more than that which is disclosed in his or her Rule 26(a)(2)(B) report.<sup>2</sup> Fed. R. Civ. P. 26(a)(2)(B); Fed. R. Civ. P. 37(c)(1); *see* Fed. R. Civ. P. 26 Advisory Committee's Notes to 1993 Amendment ("Revised Rule 37(c)(1) provides an incentive for full disclosure, namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed."); *Atmel Corp. v. Information Storage Devices, Inc.*, 189 F.R.D. 410, 416 (N.D. Cal. 1999).

11. Exclusion of all evidence not disclosed in an expert's reports is an

appropriate measure for this Court to take. *See Sheek v. Asia Badger, Inc.*, 235 F.3d 687, 694 (Fed. Cir. 2000) (holding that although the district court could have “ruled to exclude all of Dr. Kennedy’s testimony -- a sanction well within the district court’s scope of discretion” since the party failed to supplement its expert reports to reflect new expert opinions, the sanction of exclusion of the undisclosed portions of the testimony was “relatively lenient” and within the court’s discretion); *Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, No 95 CIV 8833 RPP, 2000 WL 356412 (S.D.N.Y. Apr. 5, 2000) (holding that direct testimony by any expert witness at trial would be limited to the contents of the expert report unless the witness could show that such material was not available either to him or counsel retaining him as of the date of his report); *Atmel Corp.*, 189 F.R.D. at 416-17; *GEM Realty Trust v. First Nat’l Bank of Boston*, No. CIV. 93-606-SD, 1995 WL 136874 (D.N.H. Mar. 27, 1995) (precluding expert from offering expert opinion testimony at trial on subject matter not included within expert report because the offering party had a duty to disclose such opinions, and the bases and reasons therefor, prior to the close of discovery in the case); *Southern Pacific Transp. Co. v. Builders Transport, Inc.*, Civ. A. No. 90-3177, 1993 WL 185620, at \*16 (E.D. La. May 25, 1993) (“It is the practice in within this district that expert testimony is limited to the scope of the expert’s report.”).

12. Not only does Dr. Simpson’s expert report and rebuttal expert report fail to set forth any explanation for his view that CB&I’s efficiencies are illegitimate and not merger specific, he was unable to provide a basis at his deposition. *See supra* ¶ 5. Nonetheless, Dr. Simpson plans to testify at trial regarding efficiencies:

---

<sup>2</sup> The law regarding the required disclosure of opinions in expert reports is much more developed under the Federal Rules; accordingly a discussion of the law under the Federal Rules of Civil Procedure has been included.

Clearly, given the fact that the rest of Dr. Simpson's is replete with detailed citations to the record and reasonably detailed analysis, Dr. Simpson *knows* that he is required to fully set forth his opinions in his expert reports.

13. If Dr. Simpson is permitted to give his secret opinions at trial regarding CB&I's efficiencies defense, CB&I will be unfairly prejudiced by this "surprise" as it will not have had an opportunity to discover his opinions and prepare accordingly.<sup>3</sup> This was clearly a tactical decision given Dr. Simpson's testimony that his opinion regarding efficiencies was set forth in an earlier draft of his report. The underlying purpose of the Rules and the Commission's Scheduling Order is to avoid this type of "trial by ambush." *See Congressional Air, Ltd. v. Beech Aircraft Corp.*, 176 F.R.D. 513, 516 (D. Md. 1997).

14. CB&I is certainly not taking the position that every minute detail must be set forth in an expert report; however it is clear that under the rules an expert must at least provide enough information regarding his opinion to put the opposing party on notice as to what his opinions at trial will be.<sup>4</sup> In this case, CB&I has no idea which efficiencies Dr. Simpson does

---

<sup>3</sup> Indeed, CB&I believed that Dr. Simpson was not planning to address efficiencies at all; that is until his remarkable deposition testimony indicating that he plans to testify at trial regarding efficiencies.

<sup>4</sup> Based on statements made by Complaint Counsel at Dr. Simpson's deposition, it is evident that Complaint Counsel believes that Dr. Simpson's conclusory dismissal of CB&I's efficiencies defense puts CB&I on notice with regards to any efficiencies opinion.

For the reasons set forth herein, Complaint Counsel is mistaken. If this did constitute sufficient notice, Dr. Simpson could have simply submitted a one-page report stating 1) This acquisition is anti-competitive, 2) new entry is insufficient, 3) CB&I and PDM have and still do dominate the market, and 4) this company should be broken up. Clearly, that would not be a sufficient expert disclosure under the Rules and the Commission's Scheduling Order.



not believe are merger specific, and which efficiencies Dr. Simpson believes are not legitimate, and which efficiencies Dr. Simpson believes he needs more information in order to evaluate.

15. Further, Dr. Simpson has provided no explanation whatsoever regarding the basis for his opinions or how he plans to testify at trial.

### III. CONCLUSION

WHEREFORE, Dr. Simpson should be precluded from giving opinions regarding CB&I's efficiencies due to his failure to make the required disclosures under the FTC Rules of Practice, the Commission's Scheduling Order, and the Federal Rules of Civil Procedure.<sup>5</sup>

Dated: November 20, 2002

Respectfully submitted,



Duane M. Kelley  
Jeffrey A. Leon  
Greg J. Miarecki  
Winston & Strawn  
35 W. Wacker Drive  
Chicago, IL 60601-9703  
(312) 558-5600 (voice)  
(312) 558-5700 (fax)  
dkelley@winston.com  
jleon@winston.com  
gmiareck@winston.com

---

<sup>5</sup> CB&I is aware that it agreed to not make any Motions in Limine with regards to expert reports, and it does not view this motion to be a motion in limine. Further, CB&I was unaware until Dr. Simpson's October 22, 2002 deposition that he was planning to testify extensively regarding efficiencies, and that he had actively deleted a fulsome discussion of efficiencies from a prior draft of the report.

Nada S. Sulaiman  
Winston & Strawn  
1400 L Street, N.W.  
Washington, D.C. 20005  
(202) 371-5700 (voice)  
(202) 371-5950 (fax)  
nsulaima@winston.com

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

**CERTIFICATE OF SERVICE**

I, Nada S. Sulaiman, hereby certify that on this 20th day of November, 2002, I served a true and correct copy of the Public Version of Respondent's Motion to Strike Dr. John Simpson's Opinion Regarding Efficiencies, by hand delivery upon:

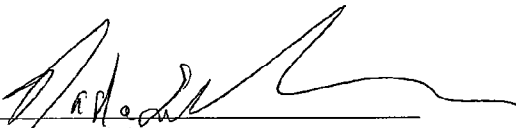
The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
(two copies)

Secretary of the Commission  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Room H-159  
Washington, D.C. 20580

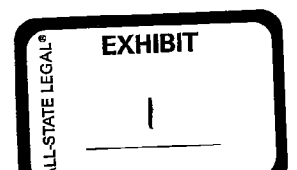
and by fax and hand delivery upon:

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

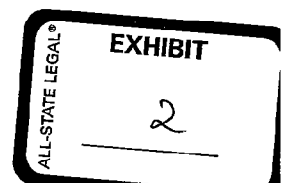
Steven L. Wilensky  
Federal Trade Commission  
601 Pennsylvania Avenue, N.W.  
Room S-3618  
Washington, D.C. 20580

  
\_\_\_\_\_  
Nada S. Sulaiman

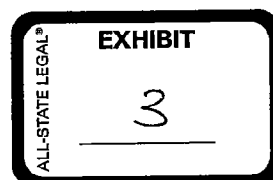
*IN CAMERA*



*IN CAMERA*



*IN CAMERA*



*IN CAMERA*

