UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
CHICAGO BRIDGE & IRON COMPANY N.V.	)	
a foreign corporation,	)	**PUBLIC RECORD VERSION**[1]
CHICAGO BRIDGE & IRON COMPANY	)	
a corporation,	)	
	)	Docket No. 9300
and	)	
PITT-DES MOINES, INC.	)	
a corporation.	)	

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE

Pursuant to Section 3.22 (c) of the Federal Trade Commission's Rules of Practice ("FTC Rules"), 16 C.F.R. 3.22(c), Complaint Counsel file this opposition to Respondents' Motion to Strike three witnesses from Complaint Counsel's Final Proposed Witness List. For the reasons set forth herein, there is good cause why Complaint Counsel should be permitted to present the testimony of these three CB&I customer witnesses who, only through discovery, Complaint Counsel learned

[1] All text in bold and brackets is Confidential subject to the March 5, 2002 Protective Order entered in this case. Pursuant to FTC Rule of Practice 3.45(e), 16 C.F.R. § 3.45(e), a list of the names and addresses of persons who should be notified of the Commission's intent to disclose in a final decision any of the confidential information contained in this motion is attached as Exhibit E.

are able to provide testimony important to this proceeding. Two of the witnesses are located in Canada. One of the Canadian witnesses has submitted a declaration executed in accordance with 28 U.S.C. § 1746.[2] Upon receipt of the September 23, 2002 executed declaration, Complaint Counsel immediately provided it to Respondents on September 24, 2002. Complaint Counsel are continuing our efforts to secure a declaration from the other Canadian witness and hope to receive one shortly. In the event we obtain such a declaration, we will promptly provide it to Respondents. Because these witnesses are located outside the United States, Complaint Counsel submit that there is good cause for receiving their testimony by declaration. Further, because neither of these declarations had been received by Complaint Counsel until after we submitted Complaint Counsel's Exhibit List, there is good cause for allowing addition of these declarations as exhibits. As noted *infra*, Respondents have likewise included the declaration of a foreign declarant, [

], as one of their proposed exhibits. DX 202.

Respondents argue that the three additional witnesses at issue should be struck because they

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[2] CX 1548, Declaration of [ ], Exhibit A hereto. The applicable statute provides: "Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form: (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)"[;] (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)" 28 U.S.C. § 1746.

were named after the close of discovery on September 6, 2002. As explained below, Complaint Counsel became aware of the important potential testimony of these individuals only recently through discovery, including voluntary discovery of third parties, and identified these individuals to Respondent as soon as we reached the opinion that we would likely include these witnesses in the final witness list.

The testimony of each of these three witnesses is highly relevant to this case and rebuts arguments advanced by Respondents' economic expert. *See* Expert Report of Barry C. Harris. Respondents will not be prejudiced by the inclusion of these three witnesses. We understand that Respondents have already initiated contact with the witnesses. Respondents state that they have known about the proposed Canadian witnesses since September 13. They have been free to interview

acknowledge that they asserted in their July 9, 2001, White Paper that the experiences of two of these companies are relevant to analysis of the competitive effects of the acquisition. Respondents' Motion to Strike at 6-7.

As noted above, Respondents have not limited their third-party discovery to persons identified on Complaint Counsel's witness lists. Prior to receipt of Complaint Counsel's Initial Witness List on April 22, 2002, Respondents issued 29 subpoenas for third-party depositions.[3] Between April 23 and May 23, Respondents issued thirteen additional subpoenas *ad testificandum* to third-party companies[4] who were not on Complaint Counsel's Initial Witness List. Further, notwithstanding the May 7, 2002, deadline for Respondents to disclose their expert witnesses, Respondents informed Complaint Counsel, for the first time by telephone late on October 2, 2002, that they may add an unnamed expert witness.[5]

Respondents have ably demonstrated their ability to conduct voluntary third-party discovery, of persons within as well as outside the United States, and to depose witnesses they believe may have knowledge relevant to this case. They did not need to wait until Complaint Counsel completed our allowed discovery and identified supplemental witnesses based theron, in order to conduct their own third-party discovery.

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[3] Respondents' cover letters are attached hereto as Exhibit B.

[4] Respondents' cover letters are attached hereto as Exhibit C.

[5] October 2, 2002, telephone call from Jeffrey Leon to Steven Wilensky.

leads to identification of potential witnesses. Complaint Counsel have, in good faith, followed this approach in preparing Complaint Counsel's case and in rounding out Complaint Counsel's witness list. Such a result is certainly foreseeable in a case such as this, where some 50 depositions and many third-

permissible discovery includes identifying and locating "persons having any knowledge of any discoverable matters." 16 C.F.R. § 3.31(c)(2).

Complaint Counsel timely filed our Final Proposed Witness List on September 16, 2002. The trial date and the dates set for filing of final witness lists had been extended by two months upon the motion of Respondents. Respondents' Motion for a Sixty-Day Extension of Time, June 14, 2002. In addition to other discovery and trial preparation efforts, Complaint Counsel and Respondents used the additional time afforded by this extension to identify, locate, and interview persons who might be able to provide valuable testimony. Among the sources of such information were Respondents' e-mail files, which include communications between Respondents and their customers.

However, Complaint Counsel have been hampered in our efforts to discover potential witnesses by Respondents' failure timely to comply with Complaint Counsel's document discovery. In granting Respondent's Motion for an Extension of Time, Administrative Law Judge Timony directed that "CB&I will produce documents responsive to the Complaint Counsel's document requests on a rolling basis beginning on July 12, 2002 and ending no later than August 6, 2002." Order of July 1, 2002. Nevertheless, Respondents delayed, until August 27, production of e-mail files from their sales and marketing department, and respondents have still not produced the e-mail files of each of their

[7] Respondents' failure to produce these files, despite this Court's July 1 Order to complete, by August 6, production of documents responsive to Complaint Counsel's document request, is the subject of Complaint Counsel's September 26 Motion to Compel.

these files has prejudiced Complaint Counsel.

As discussed, *infra*, Complaint Counsel promptly reviewed the August 27 document production and discovered two July 17, 2002 e-mail communications from [ ] to CB&I in which [ ] observed [

] CX 786 (Exhibit D hereto). These e-mail communications alerted Complaint Counsel that [ ] is knowledgeable concerning current competitive conditions in the LNG tank market and prompted Complaint Counsel to contact and interview [ ], an interview which was delayed by the Labor Day holiday weekend. Based on that interview, Complaint Counsel informed Respondents on September 5 that we expected to call [ ] as a witness.

B. Respondents Have Not Been Prevented from Obtaining Voluntary Declarations from Foreign Witnesses

that "Respondents have not demonstrated that they cannot obtain the requested evidence voluntarily from the foreign companies." Order Denying Respondents' Motion for Issuance of Subpoenas at 6, April 18, 2002. Specifically, this Court noted: "Respondents have made no showing in their motion that they have contacted the foreign companies to determine whether they will voluntarily provide documents, statements, or deposition testimony." *Id*. at 6-7, April 18, 2002. Rule 3.36(b)(3) requires Respondents to make a specific showing that "[t]he information or material sought cannot reasonably be obtained by other means." The Federal Register notice accompanying the publication of the rule explains that:

> [foreign] discovery should only occur if a judge determines that . . . other means of obtaining the information (*such as domestic discovery or voluntary arrangements*) have been exhausted or are not available.

66 Fed. Reg. 17623, April 3, 2001 (emphasis added);

Three Witnesses

The testimony to be presented by these three witnesses is highly relevant to this case. [ ] was project manager for an LNG peak shaving plant for which foreign competitors submitted non-competitive bids and has recently turned to CB&I to build an additional LNG tank at the site. His recent experience sheds light on competition since the acquisition. [ ], of Canada, works for a company that received bids from CB&I, PDM, and foreign companies for an LNG peak shaving plant. He is expected to testify that the bids of the foreign competitors were higher than the bids from the U.S. firms, CB&I and PDM.

[ ], of Canada, is a consultant who is advising a U.S. firm on the purchase of an LNG tank for construction in the United States. CX 1548 ¶ 6 (Exhibit A). He testifies that in April 2002, he requested bids for the project. CX 1548 ¶ 10 (Exhibit A). The subsequent responses to these bids could not have been known to Complaint Counsel when we submitted our Initial Witness List on April 22, 2002, or our Revised Witness List on May 28, 2002. Although he sought foreign constructors to bid for this project, each declined to submit a bid. CX 1548 ¶¶ 12, 13 (Exhibit A). He found the bid submitted by CB&I on this project to be high relative to comparable prices he has observed in the past and testifies that based on his experience in observing competition between CB&I and PDM prior to the acquisition, he believes that the elimination of competition between CB&I and PDM has adversely affected the price he was able to obtain from CB&I. CX 1548 ¶¶ 11, 16 (Exhibit A).

The testimony of each of the witnesses is material and important to confronting Respondents' asserted defense that competition in the United States by foreign firms has offset any anticompetitive

effects of the acquisition in the LNG tank market. *See* Expert Report of Barry C. Harris. The relevance of the two Canadian witnesses is particularly high. Because there are few bid contests between CB&I or PDM and foreign-based suppliers for North American LNG tank projects, the information provided by the two Canadian witnesses will provide the Court with a substantially more informed basis for assessing Respondent's defense. Admitting evidence relating to the two projects in which the Canadian witnesses sought competitive bids from CB&I and others will serve the Court's "interest of having all of the relevant evidence before it . . . ." Order of June 18, 2002.

Respondents argue that Complaint Counsel were aware, or should have been aware, of the existence of each of these three witnesses earlier in the litigation and consequently should have named them as witnesses earlier. Respondents' Motion to Strike at 4-7. For example, Respondents suggest that because [ ] was identified in documents provided by Respondents in April 2002, Complaint Counsel should have included [ ] on the earlier witness lists. Respondents' Motion to Strike at 7. The document cited by Respondents for this proposition is a 1995 construction schedule for an LNG storage tank and is devoid of any information that would suggest that the persons identified in the document should be named as witnesses by Complaint Counsel. Respondents' Motion to Strike Exhibit E. Among the volumes of documents that have been submitted in this case, it is likely that thousands of individuals with some connection to the products at issue are mentioned somewhere. Complaint Counsel cannot be expected to list as a potential witness every person mentioned in Respondents' documents, and no prejudice is imposed on Respondents as a result of Complaint Counsel not having done so.

In pursuing discovery, Complaint Counsel, as any party, must respond to specific leads that

develop over time. Respondents, who operate in this business on a daily business, are more likely than Complaint Counsel to have previously been aware of the existence of these three witnesses and the nature of any potential testimony they could provide, and consequently are not prejudiced by their inclusion on Complaint Counsel's witness list.

It is difficult to understand how Respondents can claim prejudice while at the same time admonishing Complaint Counsel for failing to recognize years ago the obvious significance of these potential witnesses (Respondents' Motion to Strike at 6 ("Complaint Counsel have known about this project for years.")) and acknowledging Respondents' own recitation, in their pre-Complaint white papers, of the significance of these third parties to analysis of the competitive effects of the acquisition. Respondents' Motion to Strike at 6-7. Respondents consummated the acquisition on February 7, 2001, prior to responding to the FTC's outstanding investigational subpoenas and civil investigative demands; the Complaint in this matter issued on October 25, 2001; and Respondents filed their Answers to the Complaint on February 4, 2002. While Respondents have known for years about their dealings with the companies the three witnesses represent, Complaint Counsel have had to play catch up through discovery in this action.

The cases cited by Respondents for the proposition that witnesses named after the close of discovery should be struck are clearly distinguishable from the present case. In *Geiserman v. MacDonald*, 893 F.2d 787 (5th Cir. 1990), the court struck an expert witness after plaintiff missed two deadlines relating to the expert's designation. In upholding the lower court, the court found plaintiff's

for the LNG project. Therefore, Complaint Counsel asked [ ] for a declaration for use in conjunction with [ ] testimony.

Obtaining a declaration from [ ] was a time-consuming and sensitive process. Because [ ] is located in Canada, Complaint Counsel had to first notify Canadian authorities, through the International Division of the FTC's Bureau of Competition, of Complaint Counsel's request. Because he is a Canadian national, Complaint Counsel could not compel [ ] to testify, and his declaration is purely voluntary.[9] Complaint Counsel and [ ] had several telephone conversations during August and September, interrupted by [ ]'s vacation, and leading to his eventual execution of the declaration on September 23, 2002. Complaint Counsel faxed this declaration to Respondents immediately upon receiving it on September 24, 2002.

Respondents incorrectly characterize [ ]'s declaration as consisting of hearsay. Respondents Motion at 4. [ ] has personal knowledge of the subjects in his declaration. [ ] has extensive experience in the LNG industry and had been retained by [ ] to advise that company on the purchase of an LNG tank in Alaska. CX 1548 ¶¶ 1, 8 (Exhibit A). Of the sixteen substantive paragraphs contained in the declaration, Complaint Counsel can discern only two, ¶¶ 12 and 13, that arguably contain hearsay statements. In these paragraphs, [ ] recounts first hand his conversations with two foreign LNG tank

[9] Respondents suggest that Complaint Counsel should have informed Respondents earlier that we were seeking an affidavit from [ ]. Respondents' Motion to Strike at 4 n.3. There has never been a requirement in this litigation that parties notify each other that they are seeking affidavits from a potential witness, or that they submit to each other draft affidavits sent to third parties prior to signature, and Respondents have not provided such disclosures to Complaint Counsel.

constructors. [ ] testimony on this subject is reliable evidence that the statements were made.[10]

B. [ ]

In a conversation with a third-party witness in early September 2002, the third party informed Complaint Counsel that during the 1998 bid contest for an LNG tank peak-shaving plant, in southern British Columbia for [ ], two foreign LNG tank constructors submitted bids that were higher than the bids submitted by CB&I and PDM. Complaint Counsel contacted counsel for [ ][11] on September 11, 2002, to schedule a telephone interview with an employee knowledgeable regarding the bids submitted in 1998 for the LNG tank. An interview was conducted on September 13th with [ ], who [ ] designated as a knowledgeable employee. Because [ ] is a Canadian national, Complaint Counsel notified the FTC's International Division of our intention to ask [ ] for an affidavit. As required by comity agreements, the International Division notified Canadian authorities of Complaint Counsel's request for a declaration. [ ] has expressed a willingness to provide a declaration describing the 1998 bid contest for the LNG tank. However, due to his vacation and need to search for the relevant bid documents in closed files, [ ] has not yet provided Complaint Counsel with an executed declaration. As soon as Complaint Counsel receives a declaration from [ ], we will produce it to Respondents.

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[10] One of the individuals referred to in these paragraphs, [ ], is a witness for Complaint Counsel and can corroborate [ ] statements.

[11] [ ] acquired [ ] on March 14, 2002.

these contacts indicated that [ ] might have information material to the litigation. Respondents have apparently been in contact with [ ] and indeed, earlier in this case, submitted an affidavit from a representative of the company, [ ] - again an individual other than [ ].[12] CX 20.

On August 26, 2002, Respondents submitted to Complaint Counsel a box of documents, including two July 17, 2002, e-mail communications from [ ] to an employee of CB&I, relating to negotiations between [ ] and CB&I to add an additional LNG tank at the company's site. In the e-mail correspondence, [ ] notes as common knowledge that CBI/PDM is the only qualified US-based firm capable of executing the project sought by [ ]. CX 786 (Exhibit D). Alerted to the fact that he may have information material to the case, Complaint Counsel tried to contact [ ], but were unable to interview him until after the Labor Day weekend. After interviewing [ ], Complaint Counsel determined that he possesses important information relevant to this case. On 20.

20.

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[12] Respondent apparently chose not to include this affidavit as part of Respondents' Final Exhibit List. Complaint Counsel has included it as CX 20.

Indeed, respondents so stated in their initial disclosures on February 23, 2001. Respondents' Rule 3.31(b) Initial Disclosures at 2, 4. Respondents' acknowledgment, in their initial disclosure, that they are aware of over 100 individuals having discoverable information does not obligate Complaint Counsel to list each of those individuals on Complaint Counsel's initial witness lists. As soon as Complaint Counsel reasonably expected that [ ] may be called as a witness Complaint Counsel so notified Respondents.

Further, Respondents acknowledge that they asserted in their July 9, 2001 White Paper that the experiences of [ ] are relevant to analysis of the competitive effects of the acquisition. Respondents' Motion to Strike at 6-7. Respondents have had ample opportunity to interview or depose an individual long known by them to possess relevant information. Respondents make no representation in their motion that they have not, in fact, already interviewed [ ] or others at [ ] and perhaps realizing that their likely testimony would not be helpful to Respondents'defense, elected not to include them in their witness list.

CONCLUSION

The relevance of the testimony of the three witnesses is high and the burden imposed upon Respondents by their addition to Complaint Counsel's Final Proposed Exhibit List is low. Complaint Counsel respectfully requests that this Court deny Respondents' Motion to Strike. For the reasons set forth herein, there is good cause why Complaint Counsel should be permitted to present the testimony of these three witnesses who Complaint Counsel learned, through discovery, are able to provide testimony important to this proceeding.

Because two of the witnesses are located outside the United States, there is good cause for

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the requirements of 28 U.S.C. § 1746. Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion to Strike is denied in its entirety.

IT IS FURTHER ORDERED that Complaint Counsel may present the testimony of the two foreign witnesses by declaration.

IT IS FURTHER ORDERED that Respondents may interview or depose the witness located in the United States at such time and place as the witness may agree. Respondents may interview and may seek voluntary declarations from the two foreign witnesses as those witnesses may agree.

ORDERED

_____
D. Michael Chappell
Administrative Law Judge

Date: October ___, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused a Public Record copy of Complaint Counsel's Opposition to Respondents' Motion to Strike to be delivered by hand to

The Honorable D. Michael Chappell
Federal Trade Commission
H-104
6th and Pennsylvania Ave. N.W.
Washington D.C. 20580

Administrative Law Judge

and by facsimile and by first-class mail to:

Jeffrey A. Leon
Duane M. Kelley
Winston & Strawn
315 W. Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600

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

Dated: October 4, 2002

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CONFIDENTIAL EXHIBIT A

CONFIDENTIAL EXHIBIT B

CONFIDENTIAL EXHIBIT C

CONFIDENTIAL EXHIBIT D

CONFIDENTIAL EXHIBIT E

CONFIDENTIAL EXHIBIT F

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The following persons should be notified of the Federal Trade Commission's intent to disclose, in a final decision, the confidential material contained in Complaint Counsel's Opposition to Respondents' Motion to Strike: