

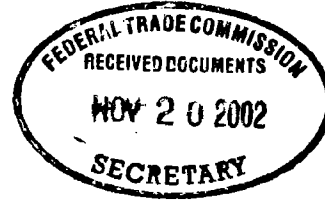
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)

CHICAGO BRIDGE & IRON COMPANY N.V.,)

a foreign corporation,)

CHICAGO BRIDGE & IRON COMPANY N.V.)



and)

PITT-DES-MOINES, INC.,)

a corporation.)

PUBLIC RECORD

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

EFFICIENCIES

prohibiting Complaint Counsel's economic expert, Dr. John Simpson, from testifying regarding

efficiencies resulting from the integration of CB&I and PDM 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

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 has submitted

presentation (43 pages) to Complaint Counsel on October 10, 2001, and that efficiencies

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 also introduced at trial.

Counsel involved its senior accountant, Gabe Dagen, either in person or by telephone. Despite 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

efficiencies defense in a single sentence in his fifty plus page report without providing any

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.¹

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

efficiency analysis and the expert 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.

¹ CB&I does not suggest that Complaint Counsel be barred from making legal arguments regarding 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 CD & P's efficiency analysis is inadequate and

misleading -- CD&P believes tactically -- removed it from the final draft.

7. Ultimately, as is evident from his above quoted deposition testimony, Dr.

ultimately submitted. Further, Dr. Simpson did not provide any analysis at his deposition

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 "each expert~~
~~disclose 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.² 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 27(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."); *United States 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 testimony was “relatively lenient” and within the

RPP 2000 WL 356412 (S.D.N.Y. Apr. 5, 2000) (holding that direct testimony by any expert

show that such material was not available either to him or counsel retaining him as of the date of

N.J. CIV. 03-606 SD 1005 WL 136874 (D.N.H. Mar. 27, 1995) (precluding expert from offering

offering party had a duty to disclose such opinions, and the bases and reasons therefor, prior to

A. No. 90-3177, 1993 WL 185620, at *16 (E.D. La. May 25, 1993) (“It is the practice in within

12. Not only does Dr. Simpson’s expert report and rebuttal expert report fail

specific, he was unable to provide a basis at his deposition. *See supra* ¶ 5. Nonetheless, Dr.

Simpson plans to testify at trial regarding efficiencies:

² 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

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.³ 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).

provide enough information regarding his opinion to put the opposing party on notice as to what

is presented at trial will be.⁴ In this case, CB&I has no idea which efficiencies Dr. Simpson does

⁴ 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


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.

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.⁵

Dated: November 20, 2002

Respectfully submitted,



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⁵ 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

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Counsel for Respondents
Chicago Bridge & Iron Company N.V.

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

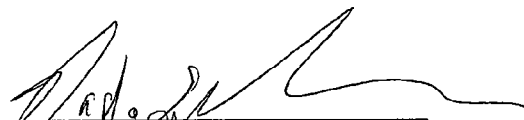
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

and by fax and hand delivery upon:

Rhett R. Krulla
Acting Assistant Director

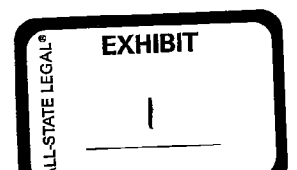
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room S-3602

Steven L. Wilensky
Federal Trade Commission
601 Pennsylvania Avenue, N.W.
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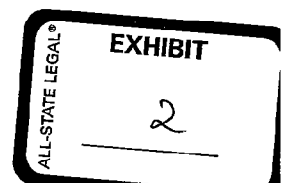


Nada S. Sulaiman

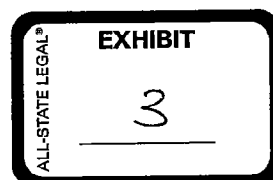
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