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 these foreign witnesses and to seek counter-declarations from them. Respondents have known since September 5 that Complaint Counsel planned to include [ ] on the September 16 witness list and have had ample opportunity to interview or depose him.

Moreover, Respondents' claim of prejudice is unfounded because Respondents concede that anyone knowledgeable regarding the LNG tank industry should have known long ago that these witnesses and the companies they represent possessed knowledge relevant to this case. Respondents' Motion to Strike at 4-7. Further, Respondents' assertion that they had no opportunity to interview or depose these individuals until they appeared on Complaint Counsel's witness list is refuted by the numerous third-party depositions Respondents have noticed of persons who had not, at the time, been identified as witnesses for Complaint Counsel. Respondents are the leading firms in the markets alleged in the Complaint and have had ongoing business dealings with each of the witnesses or the companies they represent, who are customers or prospective customers of CB&I. Indeed, Respondents

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.

ARGUMENT

Complaint Counsel's Final Proposed Witness List included three individuals who had not been listed on earlier witness lists because Complaint Counsel had no reason to expect that these individuals would likely be witnesses for Complaint Counsel in this matter. Complaint Counsel have not withheld from Respondents the identity of any proposed witness. The witnesses challenged in Respondents' motion are three among 34 fact witnesses identified by Complaint Counsel.

Two of the recently added witnesses are located in Canada. For the reasons explained in the Court's April 18, 2002 Order, foreign discovery must be conducted voluntarily, in the first instance, and requires flexibility regarding the form in which voluntary third-party testimony or statements are to be accepted. Order Denying Respondents' Motion for Issuance of Subpoenas at 6-7. Complaint Counsel have offered the testimony of one of these witnesses by declaration (CX 1548 (Exhibit A)) and are attempting to obtain voluntarily the testimony of the other foreign witness either live or by declaration.[6] Complaint Counsel intend to offer the live testimony of the third witness, [ ], who is located in the United States. In the course of discovery, information obtained from one witness, or from documents secured through discovery, prompts a party to conduct further investigation, which

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[6] As explained, *infra*, earlier in this litigation, Respondents requested this Court to authorize the issuance of several subpoenas *duces tecum* and *ad testificandum* to foreign entities. By order of April 18, 2002, Judge Timony denied Respondents' motion and directed the parties to initially seek foreign discovery on a voluntary basis. Complaint Counsel and Respondents have each pursued voluntary discovery of foreign witnesses in accordance with that Order. One of the Canadian witnesses at issue indicated that he would not be amenable to testifying live at trial, but has submitted a declaration. CX 1548 (Exhibit A). The other Canadian witness has indicated a willingness to submit a declaration, but has not yet done so, and it is unclear at this point whether this witness would be willing to testify live at trial. Complaint Counsel are attempting, at this time, to secure voluntarily the testimony of this foreign witness in whatever form he is willing to provide such testimony.

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-party interviews have been conducted by the parties.

Respondents will not be prejudiced by the inclusion of these witnesses in Complaint Counsel's Final Witness List. Complaint Counsel identified each of the three individuals to Respondents as soon as Complaint Counsel determined that we would likely list them as a witness. Although discovery formally ended on September 6, 2002, depositions of witnesses who were scheduled prior to that time are continuing. On September 23 and 24, Complaint Counsel took the depositions of two party witnesses pursuant to stipulation between Complaint Counsel and Respondents. *See* Exhibit F attached hereto. Respondents deposed a third-party witness on September 25, and on October 1, the parties completed the deposition of one of Respondents' third-party witnesses, whose previous deposition had been cut short by counsel for the third party. Respondents have been free, and remain free, to seek to interview each of the witnesses, to seek to depose the United States witness and to attempt to secure voluntary declarations from the Canadian witnesses.

A. Respondents' Failure to Comply, on a Timely Basis, with the Court's Discovery Order Has Prejudiced Complaint Counsel

The erroneous premise of Respondents' Motion to Strike is that discovery is limited to deposing or cross examining witnesses listed by opposing counsel. Complaint Counsel have appropriately used the allowed discovery period to identify, locate and interview persons who may be able to provide information important to this case. Commission Rule 3.31(c)(1) makes clear that

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 testifying employee witnesses.[7] These e-mail files are an important means of discovering persons who may provide valuable witness testimony, and Respondents' failure timely to complete production of

[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

Respondents assert that they would be prejudiced if affidavits of the two Canadian witnesses are admitted because they were denied the opportunity to take foreign discovery by this Court's Order of April 18, 2002. Respondents' Motion to Strike at 4. However, Respondents fail to acknowledge the Court's directive to seek, in the first instance, voluntary statements from foreign witnesses, although subsequent to entry of the Order Respondents have done just that. Respondents themselves have submitted as an exhibit the June 4, 2002, declaration of a foreign witness, [ ] DX 202.

Respondents' motion for issuance of subpoenas to be served in a foreign country was denied, without prejudice, because Respondents had failed to satisfy any of the requirements of FTC Rule 3.36(b) for issuance of such subpoenas. Order Denying Respondents' Motion for Issuance of Subpoenas, April 18, 2002. Among numerous deficiencies in Respondents' motion, this Court found

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); *see* Order Denying Respondents' Motion for Issuance of Subpoenas at 6.

Nevertheless, ignoring the guidance of the Commission and of this Court regarding the appropriate and preferred procedure for securing and presenting evidence from foreign witnesses, Respondents instead seek to block presentation of testimony or sworn statements of foreign witnesses offered by Complaint Counsel in accordance with this Court's directive that the parties may appropriately seek to obtain voluntary statements of foreign witnesses. Turning the Commission's April 3, 2001, statement on its head, Respondents now argue that voluntarily submitted testimony or sworn statements of foreign witnesses should not be considered by the Court because such witnesses may not be subject to subpoena.

C. There Is Good Cause for Allowing Complaint Counsel to Include the

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

explanations of its tardiness trivial.[8] The reasons why Complaint Counsel, in this action, named the three witnesses when we did are significant and described in detail below. In *Koch v. Koch Indus.*, 179 F.R.D. 606, 608-09 (D. Kan. 1998), plaintiff added seven new witnesses ten days before the commencement of trial and following entry of the pretrial order in a case that had been in litigation for 13 years. In *Cox v. Consolidated Rail Corp.,* Civ. A. Nos. 83-0514, 85-0845, 1987 WL 8728, at *1-*2 (D.D.C. Mar. 12, 1987), of "the twenty witnesses (excluding the plaintiffs themselves) designated to testify . . . only six were identified prior to the close of discovery." In the present litigation, Complaint Counsel have recently included, in a list of 34 fact witnesses, three fact witnesses whose testimony is highly material to our central claim and to Respondents' defense. These circumstances stand in stark contrast to *Cox*, in which the court stated, "The instant case does not involve a situation where plaintiff has discovered one or two new witnesses who are able to provide additional support to its central claim." *Cox v. Consolidated Rail Corp*., *1-*2 (D.D.C. Mar. 12, 1987).

Finally, Respondents have yet to complete their own discovery obligations. *See* Complaint Counsel's Motion to Compel. It is ironic for Respondents to argue that they are prejudiced by Complaint Counsel naming three additional witnesses just prior to or after the close of discovery, when

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[8] "The reasons offered by Geiserman for this failure to timely designate are weak, at best. He asserts that the pretrial order did not specify a deadline date for designation. This is incredible, because the scheduling order and local rule 8.1(c) plainly impose a deadline to designate his expert witnesses at least 90 days before trial. One does not need a legal degree to count back 90 days from the scheduled trial date of December 5, which the pretrial order contained. The second excuse, that the omission resulted from a scheduling mistake in counsel's office, is not the type of satisfactory explanation for which relief may be granted." *Geiserman v. MacDonald*, 893 F.2d at 791.

Respondents are almost two months delinquent in producing responsive e-mails pertaining to each of the witnesses included in their Final Proposed Witness List, which e-mail is a vital source from which Complaint Counsel may ascertain the identity of potential witnesses.

The circumstances that led to the listing of each of three witnesses on Complaint Counsel's Final Proposed Witness List are discussed below.

A. [ ]

Respondents argue that Complaint Counsel should have learned about the existence of [ ] earlier because he has been involved in the LNG industry for years. Respondents' Motion to Strike at 4. However, although Respondents identified, in their initial disclosures, on February 23, 2001, 108 individuals as having discoverable information relevant to the allegations of the Complaint, they failed to disclose that [ ] had information relevant to this case.

At the end of July 2002, based on a telephone conversation with a third party, Complaint Counsel first became aware of the existence of [ ]. [ ], a Canadian national, is employed as a consultant for [ ], which is investigating the purchase of an LNG tank. CB&I recently submitted a bid for the project, and [ ] contacted two foreign LNG tank competitors about constructing the project. On July 26, 2002, Complaint Counsel first interviewed [ ] by telephone. [ ] referred Complaint Counsel to his client, [ ], the ultimate purchaser of the tank who is located in the United States. After interviewing [ ], Complaint Counsel notified Respondents that we would call [ ] as a witness. However, Complaint Counsel learned that [ ] had greater knowledge relating to efforts to secure competing bids

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.

While now claiming prejudice, Respondents themselves raised the materiality of the [ ] LNG peak shaving project, which they concede that they noted in their July 9, 2001, White Paper to the Commission. However, Respondents nevertheless failed to identify in their Initial Disclosures either [ ] or any individuals from [ ] as having knowledge relevant to the Complaint or Respondents' Answers. Moreover, Respondents failed to disclose, in their white paper, that the foreign bidders had submitted higher bids than CB&I. Therefore, Complaint Counsel had no reason to look to [ ] for a fact witness. Respondents revealed, in their white paper, only part of the story regarding bidding for the project. It was only through Complaint Counsel's third-party voluntary discovery efforts that Complaint Counsel discovered the significance of [ ]'s potential testimony. Yet, Respondents now claim prejudice by Complaint Counsel including a witness from [ ], who Complaint Counsel have identified through our own discovery efforts.

C. [ ]

[ ] is an engineer with [ ], a municipal utility servicing the city of [ ]. In 1994, [ ] put an LNG peak shaving plant out for bid. CB&I, PDM, and two groups including foreign LNG tank constructors submitted bids for the project; CB&I won the project. The bids from the foreign tank constructors were substantially higher than the bids submitted by either CB&I or PDM. The circumstances surrounding this project are consequently highly relevant to this case.

Complaint Counsel have talked previously with representatives of [ ] during this litigation. However, Complaint Counsel's contacts have been with personnel other than [ ], and none of

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 September 5, 2002, Complaint Counsel informed Respondent that we expected to place [ ] on Complaint Counsel's Final Proposed Witness List.

Respondents are in no way prejudiced by Complaint Counsel's decision, prior to the close of discovery, to include [ ] on Complaint Counsel's Final Witness List. Rather it is Complaint Counsel who have been prejudiced by Respondents' failure timely to provide material and recent e-mail communications between CB&I and its customers including [ ]. Respondents have long been aware that [ ] had discoverable information relevant to the allegations of the Complaint.

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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

receiving their testimony by declaration. Further, because neither of these declarations had been received by Complaint Counsel until after submission of Complaint Counsel's Exhibit List, there is good cause for allowing addition of these declarations as exhibits.

Respectfully submitted,

_____

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Washington D.C. 20580
(202) 326-2650

Counsel Supporting the Complaint

Dated: October 3, 2002

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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a foreign corporation,	)	
CHICAGO BRIDGE & IRON COMPANY	)	
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	)	Docket No. 9300
and	)	
PITT-DES MOINES, INC.	)	
a corporation.	)	

ORDER

On September 26, 2002, Respondents filed a Motion to Strike three witnesses identified on Complaint Counsel's Final Witness List. Having considered Respondents' Motion and Complaint Counsel's Opposition thereto the Court finds that Complaint Counsel have shown good cause for inclusion of the three witnesses on their final witness list. The relevance of the testimony of the three proposed witnesses is high and the burden imposed upon Respondents by their addition to Complaint Counsel's Final Proposed Exhibit List is low.

The Court further finds, in accordance with this Court's prior ruling regarding foreign discovery, that Complaint Counsel have shown good cause for acceptance by the Court of reliable, relevant and material testimony of foreign witnesses submitted voluntarily in the form of declarations conforming to

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:

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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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CHICAGO BRIDGE & IRON COMPANY	)	
a corporation,	)	Docket No. 9300
and	)	
PITT-DES MOINES, INC.	)	
a corporation.	)	

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: