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	)	Docket No. 9300
PITT-DES MOINES, INC.	)	
a corporation.	)	

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE DR. SIMPSON'S OPINION REGARDING EFFICIENCIES

Complaint counsel respectfully request that the Court deny Respondents' Motion to Strike Dr. Simpson's Opinion Regarding Efficiencies ("Motion to Strike"). Dr. Simpson has fully disclosed in his report and in 25 pages of deposition testimony what his role at trial will be in completely dismantling Respondents' unsupported "efficiencies" affirmative defense. Thus, the supposed basis for Respondents' motion is incorrect. Moreover, Respondents' motion, on the eve of trial, is contrary to their proffer to this Tribunal on September 30th (over three weeks ***after*** they received Dr. Simpson's report) that they would not file "any" motion in limine regarding Dr. Simpson. Joint Motion to Restore October 24 Deadline for Depositions of Expert

Witnesses, filed Sept. 30, 2002, at ¶ 6 ("Complaint Counsel and Respondents have conferred, and have agreed that they will not need to file any such motions regarding the testimony of Dr. Simpson or Dr. Harris."). Thus, Respondents' motion is without merit and should be denied.

As fully disclosed by Dr. Simpson, his role regarding Respondents' purported efficiency claims is to show how deficient they are. Indeed, Respondents' affirmative defense is not supported either by Respondents' witnesses that Respondents have identified to testify on efficiencies, or by Respondents' own expert, Dr. Barry Harris, who does not address efficiencies at all. It is Respondents' burden to put forward evidence on their affirmative defense of efficiencies, and they have yet to reveal anything that comes close to such a defense. As previously disclosed, Dr. Simpson will explain to this Tribunal what Respondents should have to show and yet have failed to offer for such a defense.

Respondents' motion claims that Dr. Simpson did not perform a complete analysis of the supposed efficiencies of the acquisition. But that is not Complaint Counsel's burden. Under the law, ***it is Respondents' burden***, and they have failed to do so here. *FTC v. Heinz*, 246 F.3d 708, 722 (D.C. Cir. 2001) (The "high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies, which the appellees [Respondents] failed to supply); *citing FTC v. University Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991) ("[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers."); *Horizontal Merger Guidelines* § 4 (Respondents' burden). Dr. Simpson's fully disclosed role on this issue is to explain why Respondents have not fulfilled their burden. His role is not to do

their job for them.

As explained below, Dr. Simpson details that Respondents' "asserted efficiencies" are not "merger-specific," that is, they are not "efficiencies that [could] be achieved by either company alone because, if they can, the merger's asserted benefits can be achieved without the concomitant loss of a competitor." *Heinz*, 246 F.3d at 720. Indeed, Respondents' own management has admitted that there was "no technical reason" why many of the claimed efficiencies could not have been achieved absent the acquisition of PDM by CB&I. *See, e.g.,* CX 535 at172-180.

Respondents also claim that Dr. Simpson has not disclosed his opinions on Respondents' failure to support an efficiencies defense. Not true. In his expert report, dated September 6, 2002, Complaint counsel's expert, Dr. John Simpson, offered several opinions on Respondents' efficiency claims and on the credibility of Respondents' October 2001 White Paper[1] (cited in Respondents' motion as their "efficiency" evidence), and provided Respondents with the bases and the reasons for his opinions. At his deposition on October 22, 2002, in 25 pages of transcript, Dr. Simpson elaborated upon these opinions and the bases for his opinions under extensive questioning by the Respondents. *Accord* Deposition of Dr. John Simpson, at 122-140, 162-169 (Oct. 22, 2002) ("Simpson Tr."). Dr. Simpson has indeed disclosed his opinions that Respondents' efficiency claims lack merit. They simply do not like what he says and thus would prefer to keep Dr. Simpson from revealing to this Tribunal the absolute lack of merit in their

[1] The October 2001 White Paper is a pre-complaint document presented to the Commission by Respondents' lawyers, titled "Efficiencies Resulting From Chicago Bridge & Iron N.V.'s February 7, 2001, Acquisition of Certain of the Assets of Pitt-Des Moines, Inc. as of October 10, 2001."

efficiency affirmative defense.

A. Dr. Simpson Disclosed in his Expert Report his Opinions Regarding Efficiencies and the Basis and Reasons for those Opinions

Dr. Simpson's expert report provided Respondents with his opinions regarding efficiencies and the basis and reasons for his opinions. The Commission's Rules of Practice state that an expert report shall "contain a complete statement of all opinions to be expressed and the basis and reasons therefor." 16 C.F.R. § 3.31(b). *See* Fed. R. Civ. Pr. 26(a)(2)(B). Respondents agree that this rule does not require "every minute detail must be set forth in an expert report," but that "enough information regarding his opinion [must be provided] to put the opposing party on notice as to what his opinions at trial will be." Motion to Strike ¶ 14.

In his report, Dr. Simpson explained his analysis of efficiencies:

> In some cases, an anticompetitive acquisition can generate cost savings of a kind and magnitude so that the acquisition benefits consumers. For this to be the case, however, the cost savings must be legitimate, the cost savings must be specific to the acquisition, the cost savings must be of a kind that they enhance the combined firm's ability and incentive to compete, and the cost savings must be of sufficient magnitude to offset the anticompetitive effect of the acquisition.

CX 1153 at ¶ 145. Dr. Simpson based his analysis of efficiencies upon the criteria outlined in the *Merger Guidelines*. *Id*. at ¶ 19. *See Guidelines* at § 4.

Dr. Simpson then presented his opinions relating to Respondents' efficiency claims, and the basis for these claims. In Dr. Simpson's opinion, Respondents had not presented a "comprehensive and well-documented" study of their efficiency claims; a legal document, the October 2001 White Paper, had been presented as support for Respondents' efficiency claims. CX 1153 at ¶ 146. As Respondents failed to present a comprehensive study of efficiencies, it was Dr. Simpson's opinion that it was impossible to show that efficiencies are legitimate and

merger-specific. Finally, Dr. Simpson also stated his opinion that the lack of such a comprehensive study makes it impossible to show that Respondents' alleged savings will enhance Respondents' post-merger ability and incentive to compete in the market." *Id*.

Dr. Simpson also relayed his opinions regarding the October 2001 White Paper. First, Dr. Simpson expressed his opinion that many of the savings in the white paper are not legitimate. *Id*. at ¶ 146 n.27. He also went on to state that he considered many of the savings in the white paper to not be merger-specific. *Id*. And he stated that the savings contained in the White Paper were poorly documented. *Id*. Dr. Simpson based these opinions upon section 4 of the *Merger Guidelines*, which state that efficiency claims that are "vague or . . .otherwise cannot be verified by reasonable means" are not to be considered. *Id*. at ¶¶ 9, 145.

B. Dr. Simpson Explained, in Detail in his Deposition, His Opinions Regarding Efficiencies and his Basis and Reasons for those Opinions

At his deposition on October 22, 2002, Dr. Simpson elaborated upon his report, and in particular, further discussed his opinions regarding efficiencies. Dr. Simpson discussed, in detail, the relationship between his analysis of efficiencies, as explained in Paragraph 145 of his expert report, the *Merger Guidelines* and industrial organization economics:

> Q. . . . In your report, in paragraph 145, you state that the preceding sections concluded that CBI's acquisition of PDM-EC is likely to lessen competition substantially in the relevant markets. You go on to say that in some cases, an anticompetitive acquisition can generate cost savings of a kind and magnitude, so that the acquisition benefits consumers. For this to be the case, however, the cost savings must be legitimate. The cost savings must be specific to the acquisition. The cost savings must be of a kind that they enhance the combined firm's ability and incentive, to compete, and the cost savings must be of sufficient magnitude to offset the anticompetitive effect of the acquisition. Is that your testimony?
>
> A. Yes. It is.

Q. Is that your view of the manner in which the Merger Guidelines approach efficiencies?

A. Yes, it is.

Q. And is the Merger Guidelines approach consistent with industrial organization economics as you understand it?

A. It is consistent. Yes.

Q. Are there any differences with the Merger Guidelines approach in the way industrial organization economics would look at efficiencies?

A. When you say industrial organization economics, you are talking about a discipline, and there are things that people agree on within the discipline. There are some things that people have differing views on. So I don't know how to answer your question.

Simpson Tr. at 122-123.

Further, Dr. Simpson explained in his deposition that there are alternative measures for evaluating efficiencies:

Q. Well, are there any generally accepted principles in industrial organization economics regarding efficiencies that are not reflected in the Merger Guidelines approach to evaluating efficiencies?

A. In evaluating efficiencies, one can use different, different metrics for measuring efficiencies. The one that the Merger Guidelines use is to ask if this acquisition occurs, do we think that prices will increase, or do we think they will go down, and again, I'm talking about not just prices, but prices and quality. There is a paper by Oliver Williamson that suggests a tradeoff, and in that tradeoff, what he is looking at is the cost savings that would accrue to the firm in comparing that to what is called the dead weight loss. Is that your question?

Q. Yes. How do you understand the dead weight loss?

A. The dead weight loss is the consumer and producer surplus that would be lost as a result of a price increase because the price increase reduces the quantity sold. Reduces the quantity sold.

Q. And do you agree with Mr. Williamson's approach?

A. The -- his approach on a technical basis is sound, but the difference between the two approaches is, really comes down to how one wants to weight the interest of consumers versus the interest of producers.

. . . if I might expand on that a little bit more. A second issue that comes up is that a point made by Judge Posner is that you could have the producer surplus dissipated through competition by companies to get this producer surplus, and that would be one argument against the Williamson type approach.

Q. So you think the Merger Guidelines approach to efficiency is weighted towards the welfare of consumers over producers? Whereas the Williamson approach might weigh efficiencies in a manner which focuses more an the welfare of producers, as compared to consumers?

A. I think the Merger Guidelines are consistent with two ideas that are a little bit separate. One is just a desire to focus on the price that consumers pay, and if you, if that's the focus, then looking at it the way the guidelines do and asking whether prices would be higher as a result of this acquisition is appropriate. The second idea with which the guidelines is consistent is Posner's point, which is that these, this producer surplus that would be generated would be competed away by companies as they tried to get the producer surplus, and that they would be dissipated in a wasteful manner, and so the Merger Guidelines are consistent with those two ideas. The Williamson approach differs from the Merger Guidelines.

Id. at 124-125.

Dr. Simpson disclosed, in his deposition, his opinion regarding the preferred approach to analyzing efficiencies:

Q. Which do you think is the most accurate approach to assessing the economic consequences of efficiencies in a merger?

A. You are asking me personally?

Q. I'm asking you as you sit here as a Ph.D. economist who has 12 years of experience in reviewing mergers as an economist?

A. There are differences within the profession in this issue. I think I come closer -- I come down more on the side of the Merger Guidelines interpretation than I do on the Williamson interpretation. Having said that, if there was some acquisition that seemed to create huge savings for the companies involved, and it would create a trivial amount of consumer harm, it would seem to me that that

type of acquisition or merger should go through.

Id. at 126.

In his deposition, Dr. Simpson explained how efficiencies are to be measured under the *Merger Guidelines*:

> Q. What is the measuring basis for efficiencies under the Merger Guidelines? Is it savings as a percentage of the transaction price at issue, or savings as a percentage of the company's total costs post merger?
>
> A. My understanding is that it's the former.

Dr. Simpson disclosed, in his deposition, the basis for his opinion:

> Q. And what is your understanding based on?
>
> A. The Merger Guidelines, but for this, my reading of the Merger Guidelines, but as far as reading the Merger Guidelines with this issue in mind, I don't know that I ever read them focusing on this issue.

Id. at 126-127.

Dr. Simpson explained further, in his deposition, that claimed efficiencies associated with products outside the relevant markets cannot be weighed, in this case, without taking into account possible anticompetitive effects of the acquisition in those other markets:

> Q. Well, how have you measured efficiencies in this case? I mean, let's take at face value the claim in CB&I's October 10th, 2001 presentation to the FTC that there are annual cost savings of almost $440 million a year and the purchase price for the acquisition was $86 million.
>
> A. You are asking how do I weigh the anticompetitive harm that I believe occurs as a result of this acquisition against possible efficiencies from this acquisition, and as I understand your question, you are suggesting that anticompetitive harm is confined to the markets named in the FTC's complaint, and you are asking me to compare the anticompetitive harm in those markets against efficiencies that you see occurring across the whole range of products the firm offers? Is that correct.

Q. . . . do you measure efficiencies as 50 percent of the transaction price in this instance?

A. No. I do not.

Q. So you measure efficiencies, assuming there are $44 million in cost savings, as compared to CB&I's total operational expenses as a percentage of those following the acquisition?

A. When I'm trying to evaluate the efficiencies from this acquisition, I'm looking at the anticompetitive harm in the markets named in the FTC complaint, and also considering any anticompetitive harm that might occur in other areas in trying to balance that against the legitimate efficiencies that are merger specific and that would enhance a combined firm's ability to compete.

Id. at 127-128.

Dr. Simpson disclosed, in his expert report, his opinion that Respondents have not presented a "comprehensive, well-documented" efficiency study. CX 1153 at ¶ 146. Dr. Simpson reaffirmed this opinion in his deposition:

Q. If you read paragraph 146 of your report, you state the Respondents, which is CB&I, have not yet presented a comprehensive well-documented efficiency study.

A. Yes.

Q. Do you believe that to be true?

A. Yes.

Dr. Simpson explained, in his deposition, the basis for this conclusion:

Q. Have you reviewed CB&I's efficiency study?

A. Yes, I have.

Q. And you have determined that it's not comprehensive or well documented?

A. Yes.

Q. Is it your position that each and every one of the efficiencies identified by

Chicago Bridge & Iron in its efficiency study is not documented or true?

A. I looked at the efficiency study, and there were what I believe to be fairly significant flaws in what was prepared for the October 10th, 2001 [White Paper] and having seen those flaws, I tended to discount the study as a whole.

Q. So you give CB&I no credit for any efficiencies based on your analysis of the efficiencies study?

A. I think CBI did a poor job of documenting any efficiencies they believe are generated by the acquisition. If I might mention something, the fact that I believe that there is substantial learning by doing in this industry would suggest that there would be at least some efficiencies from the acquisition.

Q. Is there any other efficiency that you think is valid that was stated in CB&I's efficiency report?

A. None come to mind.

Simpson Tr. at 129-130.

Dr. Simpson continued by reiterating the opinion from his expert report that Respondents' failure to present a comprehensive, well-documented efficiency study makes it impossible to estimate the amount of cost savings, if any, that are both legitimate and merger-specific. CX 1153 at ¶ 146.

Q. As a result, you say consequently, I cannot yet estimate the amount of cost savings that are both legitimate and merger specific. In addition, I cannot yet evaluate the extent to which of these cost savings would enhance the combined firm's ability and incentive to compete. Is that your testimony?

A. Yes. It is.

Simpson Tr. at 130.

Dr. Simpson also reaffirmed his opinion, expressed in footnote 27 of his report, that many cost savings in the October 2001 White Paper are not legitimate or merger-specific.

Q. In your footnote 27, you refer to the October 10th, 2001 presentation of the

efficiency studies and you state that the Respondents estimated that CB&I's acquisition of PDM would generate annual cost savings of almost $44 million per year, however, many of these claimed cost savings are not legitimate are or are merger specific. Many other claim cost savings are too poorly documented for me to evaluate. Is that your testimony?

A. Yes, it is.

Q. And you have reviewed this and you have determined that some of the cost savings identified in here are not legitimate in your view, is that correct?

A. Yes.

Q. And you have determined that some of the cost savings identified in Exhibit 5, the efficiencies presentation, are not merger specific, is that correct?

A. Yes.

Q. And you have also reviewed Exhibit 5 and determined that many other claimed cost savings are too poorly documented for you to evaluate, is that correct?

A. Yes.

Id. at 130-131.

Dr. Simpson elaborated by explaining that one of the reasons for his opinion was the existence of an earlier set of efficiency claims that were vastly different from those contained in the October 2001 White Paper.

A. I did not -- I do not know that this is the final efficiencies presentation that CBI will make for this case. This was a presentation made over a year ago.

Q. Is there any other efficiencies analyses you have seen?

A. There was one that I think was done prior to this that claimed efficiency savings that were far less than the $44 million.

Q. This October 10th, 2001 efficiency study is the most recent efficiency study that you have seen, correct?

A. Yes, it is.

Q. And you have analyzed it, correct?

A. Yes.

Q. And you have reached conclusions regarding the legitimacy of the merger savings, whether the merger savings are merger specific, or whether this alleged savings are too poorly documented for you to analyze, is that correct? . . .

A. The burden of making an efficiencies defense rests with the parties to an acquisition, and when I wrote my report, I have not seen an efficiency study that I thought was carefully done and that was, had been prepared for the case. This was prepared for meetings with the Federal Trade Commission, the commissioners.

. . . THE WITNESS: Let me tell you my problem. There were two efficiency reports presented. There was this one, and there was the one prior to it. They come up with vastly different numbers.

Id. at 133-134.

Moreover, Dr. Simpson explained, the presence of several blatant errors in the October 2001 White Paper led Dr. Simpson to state that many of the savings in the White Paper were not legitimate or merger-specific.

BY MR. LEON:
Q. Can you go through this report now and tell me which efficiencies you view are not legitimate, which you view to be not merger specific, or which you view to be too poorly documented for you to evaluate?

THE WITNESS: The burden of making an efficiency defense rests with the parties. The parties had submitted during the course of the FTC's investigation two efficiency studies. They differed dramatically in the cost savings that they claimed. I looked at the more recent of the two, one that's dated October 10th, or one that refers to October 10th, 2001, and I looked through some of the efficiency claims, and I came up with a, I came up with errors that I thought accounted for a high percentage of the efficiencies claims and based on that concluded that the whole study was not very well done and based on that I had expected a more detailed study at some later date.

Id. at 136.

A. Relating to the October 10th, or the efficiencies presentation, listing the efficiencies as of October 10th, 2001, you had earlier asked why what I have written in my report

initially had been taken out and one reason was when I first got this, I looked at it and with the intent of going through it and identifying claimed efficiencies and commenting on them. As I went through it, I found more and more what I believe to be flaws and as these flaws accumulated, I began to believe that this was not the efficiency claims that CBI would present at trial, but they would do something that would be more refined than this study.

Id. at 162.

THE WITNESS: Prior to writing my first report and my rebuttal report, efficiencies was not a major focus for me, and the reason being that I did not see an efficiencies presentation that was well documented or that seemed to withstand scrutiny or I mean even -- the, some of the errors in here struck me as just being so obvious that I did not believe this to be a serious efficiency study and as a consequence, it was not a focus of my preparation in writing my report.

Id. at 168.

In his deposition, Dr. Simpson explained further that he also based his opinion on Respondents' inability to verify its efficiency claims, as demonstrated in the depositions of its witnesses, including Gerald Glenn, Robin Ritter, and Roger Butts, *id*. at 163.

Q. And prior to your issuing your report on September 6, 2002, you had reviewed deposition testimony of CB&I witnesses where those witnesses were questioned by Mr. Dagen, as well as FTC lawyers about the efficiencies analysis? Is that correct?

A. I had reviewed some depositions prior to when I submitted my first report where Mr. Dagen had been present.

Q. And do you believe that those depositions presented further evidence to support your contention that the October 10th, 2001 efficiencies analysis was flawed because the savings were not properly documented, were not merger specific?

A. My reading of those depositions were one of the things that led me to believe that this had major flaws in it. This report, Exhibit 5.

Id. at 166.

THE WITNESS: I read some of those depositions. Some of what was in those depositions, along with other things, led me to believe that this efficiencies presentation which is Exhibit 5 was not a serious accounting of efficiencies. Because of that, I did not

try to present a detailed critique of all the efficiencies claimed in this report.

Id. at 168-169.

Dr. Simpson went on to identify specific examples of efficiency claims in the October 2001 White Paper that he considered significantly flawed. Dr. Simpson testified:

> A significant amount of the personnel savings are accounted for by this voluntary retirement offer, and CBI's, one of CBI's 10-K said that the retirement offer was made to people basically to adjust the size of CB&I to their workload and also because of the combination of CBI and Howe Baker, it does not mention at all the combination of CBI and PDM as a reason for the retirement offer.

Id. at 162. These are just some of the examples of Dr. Simpson's testimony. For Respondents to assert now that they are not on notice of what Dr. Simpson will state at trial is complete nonsense.

C. Respondents Have the Burden of Proving that Efficiencies Outweigh Anticompetitive Effects of the Acquisition

Respondents also claim that Dr. Simpson should have done some kind of efficiency analysis. That is not his job. He is simply criticizing Respondents' flawed attempt at an efficiency defense. As explained above, and as Dr. Simpson explained to Respondents' counsel repeatedly, it is Respondents' burden to prove its purported efficiencies defense by demonstrating that the "acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." *University Health*, 938 F.2d at 1223. The *Merger Guidelines* also explain why this is Respondents' burden, not Complaint Counsel's:

> "Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. . . . Therefore, the merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."

Guidelines at § 4.

In meeting their burden, Respondents must show that these efficiencies "represent more than mere speculation and promises about post-merger behavior." *FTC v. Heinz*, 246 F. 3d 708, 721 (D.C. Cir. 2001). Efficiency claims that are "vague or speculative or otherwise cannot be verified by reasonable means" are not to be considered. *Guidelines* at § 4. Respondents must present these efficiencies in "'real terms.' . . .To hold otherwise would permit a defendant to overcome a presumption of illegality based solely on speculative, self-serving assertions." *University Health*, 938 F.2d at 1223.

D. Respondents' Claimed Efficiencies Cannot Withstand Scrutiny

As Simpson disclosed and testified, Respondents have failed to meet their burden of demonstrating that their claimed efficiencies are more than mere speculation. CX 1153 at ¶¶ 145-146; Simpson Tr. at 122-123. Respondents' alleged efficiency claims are based upon a document (a pre-complaint white paper) created by its lawyers, not its businessmen. Simpson's conclusions are further supported by Respondents' failure to produce any witness who has been able to substantiate Respondents' efficiency claims. Each of the five witnesses that Respondents have identified in its Final Witness List as being knowledgeable about efficiencies have denied knowing about, or were unable to provide any support for, Respondents' efficiency claims. Instead, these witnesses directed Complaint counsel towards other witnesses, who were not only unable to provide support for Respondents' efficiency claims, but who directed Complaint counsel towards even more people. Even Respondents' own expert, Dr. Harris, omitted discussion of Respondents' efficiency claims, both in his report and in his deposition.

1. Respondents' White Paper is Not a Comprehensive Study of Efficiencies

The basis for Respondents' purported efficiency claims is an October 2001 White Paper, a legal document created at the direction of CB&I's lawyers, CX 503 at 7-8 (Ritter), and presented to the Commission in the hopes of persuading the Commission to vote against issuing an administrative complaint.[2] Motion to Strike at ¶ 1. These self-serving statements are not a comprehensive analysis of Respondents' efficiencies claims, as required by the *Guidelines*. *Guidelines* at § 4. Rather, they are the vague and speculative statements that the *Guidelines* and courts have refused to consider in weighing efficiencies against the anticompetitive harm from a transaction. *See id.*; *University Health*, 938 F. 2d at 1223; *Heinz*, 246 F. 3d at 721. And it is no wonder that Dr. Simpson finds that the White Paper lacks support.

2. Respondents' Witnesses Cannot Substantiate An Efficiencies Defense.

Respondents' take issue with Dr. Simpson's criticism that their efficiencies claims are unsupported. But Dr. Simpson is right. Respondents' self-serving assertions cannot be verified by Respondents' witness testimony. In their Initial Witness List, dated April 30, 2002, Respondents identified Gerald Glenn and Robin Ritter as witnesses who would testify regarding efficiencies. Neither witness was able to support Respondents' efficiency claims and both denied knowledge of how these claims were calculated. Additionally, the witnesses named in Respondents' Final Witness List who will supposedly testify regarding efficiencies--Michael Braden, Roger Butts,[3] Steve Glenn, Ned Bacon and Robin Ritter--denied having any knowledge

[2] The administrative complaint in this matter was issued by the Commission on October 25, 2001.

[3] In its Initial Witness List, Respondents' identified Mr. Butts as a witness who would testify regarding "the design process by which cryogenic storage tanks are engineered, the

of efficiencies during their depositions, or were unable to substantiate Respondents' efficiency claims.

As Respondents' witnesses did not know how efficiencies were calculated, what costs were incurred by CB&I in realizing such efficiencies, or whether these efficiencies had been implemented, Respondents were unable to substantiate their efficiency claims. As an example, one witness, Mr. Braden, is listed as knowledgeble about "efficiencies that have been realized as a result of the merger between CBI and PDM." Respondents' Final Witness List at ¶ I.4. Yet in his deposition, Mr. Braden could not explain the basis for the cost savings contained in the October 2001 White Paper.

> Q. And what about the actual final construction cost?
>
> A. Again, the estimated costs between a CBI fluted column tank and a PDM Hydropillar were – you know, there were – there was a differential. And the $150,000 stated in column two, is, again, I think a conservative number.
>
> Q. And again, do you know the specific cost differentials . . . that would account for that?
>
> A. No.

CX 552 at 32 (Braden).

Mr. Leventry was identified as knowledgeable about efficiencies by Gerald Glenn, as the person who could explain how the estimated savings from the implementation of engineering and design best practices were derived. CX 431 at 104-106, 108 (G. Glenn). Not only did Mr. Leventry not know the basis for these cost savings, but he admitted in one instance that he could

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various standards that CB&I and their competitors use to build tanks (including API standards), and the differences between the various types and styles of tanks and chambers in the relevant markets," not efficiencies. Respondents' Initial Witness List ¶ I.9. It was not until after the close of discovery that Respondents identified Mr. Butts as a witness who would testify about efficiencies. Respondents Final Witness List ¶ I.4.

not understand how these savings were calculated.

> MR. DAGEN: Under best practice it says estimating tools for LOX/LIN tanks and the first column is estimated fiscal year '01 savings.
>
> THE WITNESS: Um-hmm.
>
> MR. DAGEN: And that's $15,000, and then the next column is estimated recurring annual savings.
>
> THE WITNESS: Um-hmm.
>
> MR. DAGEN: Wouldn't that column be some multiple of the --
>
> THE WITNESS: Well, I don't know how it was put together. I'm familiar with the annual savings based on savings pertaining and how this -- those two numbers -- it does not be appear to be a relationship between those two numbers to me.

CX 497 at 75-76 (Leventry). *See id.* at 76-77, 80 (does not know how savings from best practices relating to the design of water tanks and industrial standard products were calculated). In addition, Mr. Leventry was unable to verify whether any of the best practices were merger-specific. *See id.* at 93, 100, 181, 182, 187, 202, 213.

Another witness, Ms. Ritter, repeatedly denied knowledge in her deposition of how the numbers contained in the October 2001 White Paper were derived. CX 503 at 17, 27 34, 61 (Ritter), or whether CB&I had incurred any costs in realizing these efficiencies, *id*. at 14. Ms. Ritter admitted that her knowledge of the White Paper was limited to her role collecting the information from various departments and compiling it into one document. *Id*. at 7-8, 28. In fact, of the witnesses listed, only one, Mr. Bacon, was able to provide some limited information relating to efficiencies. However, this information came after the close of discovery and more than two weeks after Dr. Simpson had submitted his expert report.

Complaint counsel's fruitless attempts to verify the efficiency claims contained in the

October 2001 White Paper reveal a trail of witnesses who are unable to support Respondents' claims. When Complaint counsel asked Respondents' witnesses to identify someone more familiar about efficiencies, Complaint counsel would be referred to another person, who turned out to be equally incapable to verify Respondents' efficiency claims, and who would refer Complaint counsel to yet another person, and so on.

When Ms. Ritter was asked to identify who provided her with information relating to the savings from procurement and fabrication, she listed Jeffrey Swift. CX 503 at 29 (Ritter). But when Complaint counsel asked Jeffrey Swift about the reductions in procurement, Jeffrey Swift directed counsel back to Robin Ritter, as the person who would know this information.

> Q. The document lists $800,000 as the estimated recurring annual savings [for procurement], correct?
>
> A. Yes.
>
> Q. If you know, what in procurement is being reduced or downsized?
>
> A. I don't know what relates to this $800,000.
>
> Q. Do you know who would know that?
>
> A. Whoever prepared the document.
>
> Q. Do you know who prepared the document?
>
> A. I have been told that Robin Ritter prepared the document.
>
> Q. According to Robin, many of the things for procurement and fabrication came from you.
>
> A. That's correct.
>
> Q. Do you agree with that?
>
> A. Yes.

Q. So do you have any idea where this $800,000 figure came from?

A. No.

CX 541 at 145-146 (J. Swift). Ms. Ritter also said that Mr. Scorsone provided her with much of the information for savings. CX 503 at 29-30 (Ritter). Mr. Scorsone, in turn, stated that the people to talk to were Ms. Ritter and Mr. Swift, particularly for savings in procurement and fabrication. CX 535 at 161-162, 166 (Scorsone).

Gerald Glenn also referred Complaint counsel to others to handle the questions relating to efficiencies which he could not answer, including Robin Ritter, CX 431 at 6 (G. Glenn), Sam Leventry, *id*. at 12-13, 104-106, 108, and Mike Braden, *id*. at 109-110. In short, all of Respondents' witnesses point the finger to the other for support for the defense, and none can give it.

E. Respondents' Motion in Limine Is Improper

Respondents received Dr. Simpson's Report on September 6, 2002. On September 30th, they filed an agreed Joint Motion, in which they told this Tribunal:

> Complaint Counsel and Respondents have learned that the Court moved the deadline for expert depositions from October 24 to October 10 to allow sufficient time for consideration of motions in limine targeted at expert witnesses. Complaint Counsel and Respondents have conferred, and have agreed that ***they will not need to file any such motions regarding the testimony of Dr. Simpson*** or Dr. Harris.

Joint Motion to Restore October 24 Deadline for Depositions of Expert Witnesses, filed Sept. 30, 2002, at ¶ 6 (emphasis added). It was on the basis of this motion that Your Honor extended the expert deposition dates.[4] Now, in complete disregard of their representation to this Tribunal,

[4] *See* Order on Extension of Time for Expert Depositions (Oct. 3, 2002) ("The parties further represent that both parties have agreed that they will not file any motions in limine

they have filed this motion on the eve of trial and caused Complaint Counsel unnecessary hardship in preparing this response while at the same time preparing for opening statements. Complaint Counsel respectfully suggests that this kind of litigation through motion practice should not be encouraged.

Conclusion

Accordingly, Complaint Counsel requests that Respondents' motion to strike Dr. Simpson's testimony regarding efficiencies be denied.

Respectfully submitted,

_____

April Tabor
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington D.C. 20580
(202) 326-2956

Counsel Supporting the Complaint

Dated: November 8, 2002

regarding the testimony of Dr. Simpson or Dr. Harris.").

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	)	Docket No. 9300
PITT-DES MOINES, INC.	)	
a corporation.	)	

ORDER

On October 31, 2002, Respondents filed a Motion to Strike Dr. Simpson's Opinion regarding Respondents' efficiency claims. Having considered Respondents' Motion and Complaint Counsel's Opposition thereto,

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

D. Michael Chappell
Administrative Law Judge

Date: November ___, 2002

CERTIFICATE OF SERVICE

I hereby certify that, on November 8, 2002, I caused a copy of Complaint Counsel's Opposition to Respondents' Motion to Strike Dr. Simpson's Opinion Regarding Efficiencies 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:

Nada Sulaiman
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5700

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

Dated: November 8, 2002

_____
April Tabor