



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of)	
)	
McWANE, INC.,)	PUBLIC
)	
a corporation, and)	DOCKET NO. 9351
)	
STAR PIPE PRODUCTS, LTD.,)	
a limited partnership,)	
)	
Respondents.)	

**MCWANE, INC.'S MOTION IN LIMINE TO PRECLUDE COMPLAINT COUNSEL'S
PROPOSED PROFFER OF INVESTIGATIONAL HEARING TRANSCRIPTS AT
TRIAL**

Complaint Counsel has designated portions of 19 investigative hearing transcripts for use in their case in chief. (*See* Complaint Counsel's Proposed Designations.) All 19 witnesses were also deposed in this matter after a much more complete documentary record was compiled in the Part 3 litigation. The depositions are thus much more reliable than the investigative hearings. Moreover, unlike the investigative hearings, McWane was able to cross examine all 19 witnesses at their depositions and to object to leading and other improper questions. Accordingly, the deposition transcripts (and, of course, live testimony) are more thorough and more reliable than the one-way and duplicative investigational hearing transcripts and McWane respectfully requests that this Court exclude the investigational hearing transcripts from evidence at trial under Rule 3.43(b). 16 C.F.R. § 3.43(b). McWane has met and conferred with Complaint Counsel on this issue, and while Complaint Counsel indicated they may be willing to withdraw designations for certain individual witnesses, they do not agree to the exclusion of all

investigative hearing transcripts, and the parties could not reach an agreement.

FACTUAL BACKGROUND

Complaint Counsel has designated excerpts from 19 investigative hearing transcripts for use in their case in chief. Complaint Counsel conducted these investigative hearings under Part 2 of the Federal Trade Commission’s Rules of Practice, and pursuant to those rules Respondent was not given notice of 17 of the 19 *ex parte* hearings, did not have the right to attend 17 of the 19 hearings, did not have the opportunity to contemporaneously cross-examine any of the 19 witnesses, and did not have the opportunity to object to flawed questions at any of the 19 hearings. 16 C.F.R. § 2.8(c). While witnesses are permitted to be represented by counsel at the investigative hearings, the Part 2 rules prohibit counsel from objecting or questioning the witnesses. 16 C.F.R. § 2.9(b). At the investigative hearings of McWane’s two witnesses,

[REDACTED]

At investigative hearings of key witnesses from Sigma and Star, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

* * *

[REDACTED]

█ █ █

█ [REDACTED]

█ █

█ [REDACTED]

█ [REDACTED]³

Such questioning was completely improper and the risk of confusion outweighs any possible value.

Finally, each of the 19 witnesses for which Complaint Counsel has designated investigative hearing testimony was also deposed in this matter, thus making the investigative hearing transcripts duplicative and unnecessary. To date there has been no suggestion that any of these witnesses are unavailable to testify at trial and no suggestion that their deposition transcripts are insufficient for some reason. On the contrary, Complaint Counsel has listed each

² [REDACTED]
³ [REDACTED]

of these witnesses on its Final Proposed Witness List and has designated portions of each of their deposition transcripts.

ARGUMENT

Rule 3.43(b) of the Commission’s Rules of Practice requires that “unreliable evidence shall be excluded.” 16 C.F.R. § 3.43(b). Rule 3.43(b) also states that evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.* Finally, Rule 3.43(d) directs the Administrative law Judge to control the presentation of evidence so as to make the presentation “effective for the ascertainment of the truth.” 16 C.F.R. § 3.43(d).

First, Complaint Counsel’s designation of selected portions of investigative hearing testimony clearly violates 3.43(b)’s bar on “unreliable evidence,” of which any probative value of the testimony would be far outweighed by the danger of “unfair prejudice” and “confusion of the issues.” 16 C.F.R. § 3.43(b). Counsel for witnesses at the hearings did not have the right to object, and the witnesses themselves did not have the right to clarify or explain their testimony under questioning by their own counsel, or to review, correct and sign the transcripts. More importantly, McWane’s counsel was not present at 17 of the 19 hearings, could not object to the questions and was not permitted to cross examine any of the 19 witnesses. Thus, the prejudice to McWane would far outweigh the limited probative value here. The Supreme Court has held that the “right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights” sought to be protected by the Constitution. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 174 (1970). “It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.

Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of ‘even handed justice.’” *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

Second, aside from the question of reliability, the investigative hearings are a “waste of time” and “needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(b). Rule 3.33(b) provides that “[t]he fact that a witness testifies at an investigative hearing does not preclude the deposition of that witness.” 16 C.F.R. § 3.33(b). Following that provision, Complaint Counsel took the deposition of *every witness* who earlier provided testimony at investigative hearings.⁴ Accordingly, there is no need for any use of the investigative hearing transcripts, and no prejudice to Complaint Counsel for being denied use of them, as they were present at each of the depositions. Admission of the investigative hearing testimony would thus violate Rule 3.43(b)’s injunction against “unreliable” evidence, and would be unnecessarily cumulative.

Finally, Complaint Counsel presumably intends to call many of these witnesses live. (See Complaint Counsel’s Final Proposed Witness List.) Compared to reliance on investigative hearing transcripts, live testimony is widely recognized as being more conducive to the ascertainment of the truth. *See Loiaz v. EG & G, Inc.*, 910 F.2d 1, 8 (1st Cir. 1990) (“testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person” . . . “second best, not to be used when the original is at hand”). If live testimony is not sought or not available, deposition testimony - - based on a more complete documentary record and subject to the crucible of cross-examination (and with the ability to object to improper questions) - - is more probative than any one-way and early-stage investigational hearing transcript. As such, the testimony should be excluded for the additional reason that Complaint Counsel presumably intends to call each witness for which they

⁴ With the exception of three investigative hearings that Complaint Counsel is withholding transcripts on the basis of privilege.

have designated investigative hearing testimony live.

CONCLUSION

For the reasons set forth herein, McWane's Motion is due to be granted.

/s/ Joseph A. Ostoyich
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One of the Attorneys for McWane, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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Geoffrey M. Green, Esq.
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By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

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PROPOSED ORDER

On July 27, 2012, McWane, Inc. filed its Motion in Limine to Preclude Complaint Counsel’s Use of Investigative Hearing Testimony at Trial. Upon consideration of this motion, it is hereby GRANTED.

ORDERED:

_____, 2012

D. Michael Chappell
Administrative Law Judge

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STATEMENT REGARDING MEET AND CONFER

Pursuant to Paragraph 4 of the Scheduling Order, counsel for McWane met and conferred in good faith with Complaint Counsel regarding the issues raised in this motion but could not reach an agreement.

By: /s/ William C. Lavery
Counsel for McWane, Inc.

EXHIBIT 1

**This exhibit has been
marked Confidential
and redacted in its
entirety**