ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER DENYING RESPONDENT'S MOTION TO PRECLUDE COMPLAINT COUNSEL'S PROPOSED PROFFER OF INVESTIGATIONAL HEARING TRANSCRIPTS AT TRIAL

I.

On July 27, 2012, Respondent McWane, Inc. ("Respondent" or "McWane") filed a Motion *in Limine* to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial ("Motion"). Complaint Counsel filed an opposition to the Motion on August 7, 2012 ("Opposition"). Having fully considered the Motion and the Opposition, and as more fully explained below, Respondent's Motion is DENIED.

II.

As stated most recently in *In re POM Wonderful LLC*:

> "Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g., In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).
>
> Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne*

Partners v. AT&T Technologies, Inc., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL) (AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

2011 FTC LEXIS 77, at *3-4 (May 5, 2011).

In addition, "*[i]n limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial." *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009) (citations omitted). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Id.* (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).

III.

Respondent states that Complaint Counsel has designated for admission at trial portions of 19 investigative hearing transcripts (IHTs). Respondent contends that all the IHTs should be excluded pursuant to Rule 3.43(b) of the Commission's Rules of Practice because they are unreliable, cumulative, a waste of time, and/or any probative value is outweighed by the risk of confusion and prejudice to Respondent if they are admitted. In support of its argument that the IHTs are unreliable and/or present the risk of confusion and prejudice, Respondent asserts that, pursuant to Commission Rules of Practice 2.8 and 2.9, Respondent was not given notice of, and did not attend, 17 of the 19 investigative hearings, and that there was no opportunity to object to improper questions or to contemporaneously cross-examine any of the investigational hearing witnesses. In support of Respondent's argument that the IHTs should be excluded as a "waste of time" and "needless presentation of cumulative evidence," Respondent asserts that Complaint Counsel also has taken the deposition of every witness who provided testimony earlier at an investigational hearing and, according to Complaint Counsel's final proposed witness list, intends to call each such witness for live testimony at trial. Moreover, Respondent argues, depositions and live testimony are more thorough and more reliable than IHTs, and there is no risk of prejudice to Complaint Counsel from being barred from introducing the IHTs.

Complaint Counsel argues that the Commission's Rules expressly allow the admission of IHTs, and the procedural rules governing the conduct of investigational hearings do not result in testimony so inherently unreliable as to be subject to a blanket exclusion. Complaint Counsel asserts that Respondent has failed to demonstrate that any of the designated investigational hearing testimony is unreliable. Complaint Counsel states that, indeed, Respondent has failed to identify any allegedly objectionable

investigational hearing testimony that has been designated for admission. Moreover, Complaint Counsel notes, Respondent deposed each investigational hearing witness, including examining each witness' credibility and bases for prior testimony.

Furthermore, Complaint Counsel argues, the IHTs cannot be deemed cumulative or unnecessary where, as here, Respondent has failed to point to any testimony that is duplicative of other testimony. In addition, the testimony is not duplicative, Complaint Counsel asserts, because due to limitations on the time allowed for the depositions of each investigational hearing witness, Complaint Counsel did not question the witnesses on all areas covered by the investigational hearing testimony, and references to investigational hearing testimony in the depositions will be difficult to understand without further reference to the actual investigational hearing testimony. According to Complaint Counsel, Respondent has also designated investigational hearing testimony as exhibits and Respondent's expert relied on IHTs in forming his opinions. Finally, Complaint Counsel notes that investigational hearing testimony of McWane executives is admissible pursuant to Rule 3.43(b) in any event, as statements of a party-opponent.

IV.

Pursuant to Commission Rule 3.43(b), "[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, 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 based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). With respect to the admissibility of investigational hearing testimony, Rule 3.43(b) further states:

> Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. . . . If otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay.

Id. (emphasis added); *see also* 74 Fed. Reg. 1804 at *1816 (January 20, 2009) (Commission explaining that under revised Rule 3.43(b), investigational hearings "would be admissible and would not be excluded solely because they constitute or contain hearsay, if the testimony or other form of hearsay was sufficiently reliable and probative").

Regarding the conduct of investigational hearings, the Commission's Rules provide that:

> [s]uch hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation. . . . Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational

> hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. . . .

16 C.F.R. § 2.8(b), (c). In addition, pursuant to Rule 2.9, investigational hearing witnesses are entitled to review, correct and sign the hearing transcript; bring counsel; and be advised by counsel during questioning. However, there are only limited rights to object to questions, and there are no provisions for cross-examination. 16 C.F.R. § 2.9.

Respondent cites no authority for its position that the Commission's Rules that do not allow Respondent's counsel to appear, object to questions, or cross-examine the investigational hearing witness, necessarily result in testimony that is unreliable and, therefore, must be excluded under Rule 3.43(b). Moreover, the witness' ability to review and correct the IHT, and to be advised by counsel, are indicia of the testimony's reliability. In addition, the IHT attached to Respondent's motion shows that the testimony was given under oath, which also adds to its reliability. Respondent's argument that deposition testimony and live testimony are more reliable than investigational hearing testimony, because of the ability to cross-examine, does not mean that the investigational hearing testimony is unreliable to the extent that it is inadmissible in its entirety. Rather, this argument goes to the weight to be given the investigational hearing testimony, not to its admissibility.

The Rules do not, however, provide for the automatic admission of IHTs at trial. Rather, Rule 3.43 clearly contemplates that individual portions of investigational hearing testimony can be excluded, like any other proffered evidence, if the testimony is irrelevant, unreliable, duplicative, or otherwise fails to "meet[ ] the standards for admissibility described in" Rule 3.43. 16 C.F.R. § 3.43(b). Respondent has failed to identify any testimony that has been designated by Complaint Counsel to which it objects, and Respondent's general assertions of unreliability or duplication of evidence are insufficient. *See In re Rambus*, 2002 FTC LEXIS 90, at *10 (Nov. 18, 2002) (holding that conclusory assertions of burden were insufficient basis for quashing subpoena). *See also In re North Texas Specialty Physicians*, 2006 FTC LEXIS 10, at * 8-9 (Jan. 10, 2006) (denying motion to stay injunctive order, in part because "[s]imple assertions of harm or conclusory statements based on unsupported assumptions" were insufficient to meet burden of showing harm). Such general assertions are particularly insufficient to exclude evidence, prior to, and outside the context of, trial.

Respondent has failed to meet its burden of demonstrating that Complaint Counsel's proffered IHTs are clearly inadmissible on all potential grounds. Accordingly, Respondent's Motion is DENIED.

V.

Having fully considered the Motion and the Opposition, and for all the foregoing reasons, Respondent's Motion to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial is DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of any particular IHT testimony that may be offered at trial.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 15, 2012