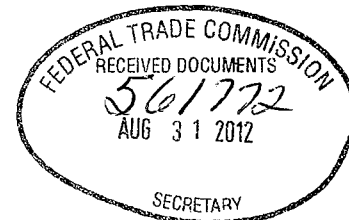


ORIGINAL



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

In the Matter of

McWANE, INC.,
a corporation.

PUBLIC

Docket No. 9351

**DECLARATION OF MATTHEW A. WHITE, ESQUIRE, IN SUPPORT OF
NON-PARTY SIGMA CORPORATION'S MOTION TO QUASH SUBPOENA**

I, Matthew A. White, declare as follows:

1. My name is Matthew A. White. I am over 18 years of age, and have personal knowledge of the facts set forth in this Declaration. I am an attorney and partner in the law firm of Ballard Spahr LLP. I represent SIGMA Corporation ("SIGMA"), a non-party in the above-captioned matter. I make this Declaration based upon my personal knowledge and in support of SIGMA's Motion to Quash the Subpoena *Ad Testificandum*.

2. On Monday, August 27, 2012 at approximately 3:40 p.m., in an effort to avoid filing the instant Motion, I met and conferred with Complaint Counsel—Alexander Ansaldo, Esquire, and Thomas Brock, Esquire—via telephone in an effort in good faith to resolve by agreement the issues raised in the instant Motion.

3. On Wednesday, August 29, 2012, at approximately 4:00 p.m., I had a further conversation with Ted Hassi, Esquire, Lead Complaint Counsel. While more progress was made, we have been unable to resolve all issues yet, and we feel obliged to file the instant Motion to protect SIGMA's rights.

4. I have set forth more fully below the issues leading up to the instant Motion, in addition to our unsuccessful efforts towards resolution.

5. On July 17, 2012, Complaint Counsel for the Federal Trade Commission (the “FTC”) wrote to me and stated that they intended to offer into evidence at the hearing of this matter almost 500 exhibits related to SIGMA. The exhibits were not included in Complaint Counsel’s letter to me, but included only by a list of the very same “Attachment A” that is attached to the instant subpoena.

6. In that July 17 correspondence, Complaint Counsel requested that SIGMA sign and return a declaration regarding the admissibility of those exhibits. The declaration sought a SIGMA witness to attest that each of the documents was (a) “made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters,” (b) “was kept in the ordinary course of regularly conducted activity,” and (c) “was made by the regularly conducted activity as a regular practice.” A true and correct copy of the proposed declaration is attached hereto as **Exhibit A**.

7. On August 14, 2012, without having sent to me true and correct copies of the documents that Complaint Counsel sought to offer into evidence, Complaint Counsel again asked that SIGMA sign the declaration regarding admissibility of these documents.

8. On that same date, I requested that Complaint Counsel confer with counsel for Respondent, McWane, Inc. (“McWane”)—as I had received a similar request from McWane’s counsel regarding admissibility of McWane’s documents in the trial of this matter—and propose a narrower subset of documents for which SIGMA could review to determine whether such documents would qualify for a declaration as to their admissibility.

9. On August 16, 2012, Complaint Counsel informed me that McWane would not stipulate to the admissibility of any SIGMA documents and requested that SIGMA sign the same declaration that was provided to me on July 17, 2012.

10. On August 17, 2012, I wrote to Complaint Counsel outlining several issues relating to the requested declaration. I stated that the burden on SIGMA to review these 500 documents would be substantial, especially because the documents for which Complaint Counsel was seeking a declaration had not been sent to me. I stated that the documents would have to be retrieved, printed, reviewed, and then presented to the correct witness within SIGMA to attest to each document's authenticity—as the hundreds of documents identified in Attachment A contained communications from dozens of different people, both within and without SIGMA. I stated to Complaint Counsel that I estimated it would cost more than \$20,000.00 in legal fees to do this work and requested, again, that Complaint Counsel confer with counsel for McWane to limit the scope of documents.

11. In that same communication to Complaint Counsel, I stated that the declaration sought was substantively flawed. I stated that, while SIGMA would be willing to stipulate or affirm that any document provided in response to a subpoena in this proceeding came from its files and was a true and correct copy as maintained in the regular course of its record-keeping, SIGMA could *not* declare, as was requested, that every document on Attachment A “was kept in the ordinary course of regularly conducted activity,” and “was made by the regularly conducted activity as a regular practice.” I was concerned and expressed to Complaint Counsel that almost all of the documents in Attachment A are e-mails or other such documents that arise under a variety of circumstances. I gave an example of certain documents that related to negotiations of a Master Distribution Agreement with McWane. I explained that such documents were the result

of a fairly extraordinary set of circumstances and, in my opinion, could not satisfy the affirmation sought. I stated that SIGMA was prepared to work with Complaint Counsel to achieve a declaration that would accurately apply to all of the requested documents.

12. On August 24, 2012, Complaint Counsel sent to my colleague an electronic file containing 24 documents, which was a subset of the documents contained in Attachment A to the instant subpoena. Complaint Counsel stated that counsel for McWane would stipulate to the admissibility of every document contained in Attachment A, aside from these 24 documents. Therefore, Complaint Counsel again requested that SIGMA execute the same declaration language set forth in their July 17, 2012 letter with respect to these 24 documents.

13. After reviewing these 24 documents, I set up a telephone call with Complaint Counsel on August 27, 2012, as set forth in Paragraph 2 above. During that call, I stated to Complaint Counsel that the language sought in the proposed declaration was inaccurate and, therefore, SIGMA could not declare that these 24 documents were “made by the regularly conducted activity as a regular practice” because, in my opinion, none of them were a “regular practice,” but related to unique business issues that did not arise in any regular course of SIGMA’s operations. I also stated almost all of the 24 documents had been the subject of examination with SIGMA witnesses in both the Investigative Hearing that preceded the complaint in this matter and during the depositions conducted in the adjudicative proceeding of this matter and that any evidentiary issues were, or should have been, dealt with by Complaint Counsel during those depositions.

14. Complaint Counsel stated during this call that they would be noticing a records deposition of those 24 documents for August 31, 2012. I replied that such a deposition would be

futile, as no SIGMA deponent could state that each of the 24 documents “was kept in the ordinary course of regularly conducted activity,” or “was made by the regularly conducted activity as a regular practice.” In response, Complaint Counsel stated it still intended to go forward with the records deposition of a SIGMA representative.

15. Following this phone call, I again reached out to Complaint Counsel to state that SIGMA wanted to be truthful and accurate in any declaration it signed regarding these 24 documents for which the FTC sought admissibility at trial. I stated that SIGMA would entertain a draft affidavit that contained accurate language. I stated that I would accept service on behalf of SIGMA of a subpoena *ad testificandum* in the event we could not reach agreement on the language of a declaration. Late in the date on Wednesday, August 29, 2012, Complaint Counsel forwarded to me a draft affidavit addressing the authenticity of the documents produced from SIGMA’s files. By e-mail shortly thereafter, I advised Complaint Counsel that I believed that SIGMA (or its counsel) could sign a declaration stating that the documents it produced in this matter are “(1) accurate duplicates, produced from SIGMA’s files, or original records that were kept as a regular practice in the ordinary course of SIGMA’s business, and (2) in the same, or substantially the same, condition as when it was produced, sent, or received by SIGMA (as the case may be).”¹

16. It is my understanding that such a declaration would satisfactorily address Complaint Counsel’s concerns about authenticity of documents produced by SIGMA.

¹ Attachment A to the subpoena lists three documents bearing an “E” Bates label prefix, five documents bearing an “SPP” Bates label prefix, and 11 documents bearing a CX Bates label prefix. None of these documents was produced from SIGMA’s files, so SIGMA will be unable to attest to the authenticity of those documents.

17. By Federal Express delivery, on August 28, 2012, I received the subpoena at issue in this Motion. The subpoena seeks to compel a SIGMA witness to review and testify about the “authenticity and admissibility” of approximately 500 documents. The subpoena does not contain copies of the documents. The date of the deposition is less than 72 hours after the subpoena was served.

18. By Federal Express delivery received on August 29, 2012, I received a CD-ROM containing .pdf files that purports to be all of the approximately 500 documents listed in Attachment A to the subpoena. I received this disc less than 48 hours before the noticed deposition.

19. As set forth in Paragraphs 15 and 16, it is my understanding that Complaint Counsel only seeks examination on the 24 documents identified on August 24, 2012, and not on all of the approximately 500 documents set forth on Attachment A to the subpoena.

20. As counsel for SIGMA, I also was present at, and am familiar with, the depositions of SIGMA’s employees in this matter. In particular, I entered into an agreement with counsel for McWane, and Complaint Counsel to agree upon a nine-hour deposition of Victor Pais—who no longer is an active employee at SIGMA—due, in part, to the large number of documents that he sent or received. Mr. Pais’s Investigative Hearing took almost seven hours, and Mr. Pais has been subpoenaed to appear as a witness in the hearing of this matter, along with Mitchell Rona, Thomas Brakefield, Larry Rybacki, and Matt Minamyner—all of whom were deposed already concerning many of the instant documents. Siddharth Bhattacharji, who has been deposed in this proceeding, and who also sent or received documents subject to the subpoena, has been subpoenaed for trial by McWane’s counsel.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of August, 2012,
in Philadelphia, Pennsylvania.



Matthew A. White

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	PUBLIC
McWANE, INC.,)	DOCKET NO. 9351
Respondent)	

DECLARATION

I, _____, pursuant to 28 U.S.C. § 1746, make the following statement:

1. I am an employee of Sigma Corporation. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.

2. I have reviewed the documents referenced in Attachment A to this Declaration, which have been identified by Complaint Counsel with CX numbers for use as exhibits in the above-captioned matter.

3. I hereby certify that each document referenced in Attachment A herein: (a) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (b) was kept in the course of regularly conducted activity; and (c) was made by the regularly conducted activity as a regular practice.

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on: _____

Name:
Title:

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

In the Matter of

McWANE, INC.,
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PUBLIC

Docket No. 9351

Certificate of Service and Regarding Electronic Submission

I certify that on August 30, 2012, I submitted the "Motion To Quash Subpoena" along with a proposed order and Declaration of Matthew A. White, Esquire, electronically in PDF format using the FTC's E-Filing System, and also served a copy of the foregoing document in on the following by the method indicated:

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

(original and 10 copies of unredacted version sent by Federal Express)

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-106
Washington, DC 20580

(original and 10 copies of unredacted version sent by Federal Express)

Edward Hassi
Geoffrey M. Green
Linda Holleran
Thomas H. Brock
Michael L. Bloom
Jeanine K. Balbach

J. Alexander Ansaldo
Bureau of Competition
Federal Trade Commission
Washington, DC 20580

Complaint Counsel

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Counsel for McWane, Inc.
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atruitt@maynardcooper.com)

I also certify that the electronic PDF copy of the foregoing document sent to the Secretary of the Commission via the FTC E-Filing System is a true and correct copy of the original in my possession, which is available for review by the parties and the adjudicator.



Matthew A. White