

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



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

**COMPLAINT COUNSEL’S OPPOSITION TO TOMMY E. BRAKEFIELD’S  
MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER**

Without providing any compelling reason, Mr. Brakefield’s August 29, 2012 Motion to Quash Subpoena or for Protective Order (“Motion”) asks this Court to break with its prior rulings and exempt him from appearing at trial. Due to Mr. Brakefield’s participation in, and proximity to, the alleged wrongdoing at issue in this case, his presence at trial is vital to the resolution of the claims. Having denied similar motions in the past, we ask the Court to deny this Motion.

**BACKGROUND**

Tommy E. Brakefield was the National Sales Manager of alleged co-conspirator SIGMA Corporation (“Sigma”) from 2003 until the end of 2011. Mr. Brakefield is also the President of the Ductile Iron Fittings Research Association (“DIFRA”), the trade association that the Complaint alleges implemented an unlawful information exchange among the three primary suppliers of ductile iron pipe fittings, Sigma, McWane and Star Pipe Products Ltd (“Star”). In connection with these allegations, Complaint Counsel and Respondent deposed Mr. Brakefield on May 4, 2012, separately as Sigma’s employee and as DIFRA’s President. On August 23, 2012, Mr. Brakefield provided a declaration

authenticating DIFRA documents. On August 15, 2012 and August 17, 2012, respectively, Complaint Counsel and Respondents issued subpoenas *ad testificandum* compelling Mr. Brakefield's testimony at trial. Mr. Brakefield's testimony at trial will be directly relevant to one of the issues at the heart of the Complaint: whether DIFRA facilitated collusion between Sigma, Star, and McWane.

### ARGUMENT

Mr. Brakefield's live trial testimony is vital to Complaint Counsel's case. Mr. Brakefield's asserted burden in appearing is insufficient to excuse Mr. Brakefield from his obligation to provide live testimony pursuant to Complaint Counsel's August 15, 2012 subpoena. Accordingly, his Motion should be denied.

Contrary to Mr. Brakefield's assertions, Mr. Brakefield's deposition transcripts are not a substitute for his live trial testimony. As this Court has repeatedly held, deposition transcripts have the distinct purpose of helping litigants prepare their case, and their examinations of trial witnesses; they are not a substitute for live testimony. *See In re: The Coca Cola Company*, 1990 F.T.C. LEXIS 204, at \*1 (1990); *In re: Schering-Plough Company*, 2002 F.T.C. LEXIS 176, at \*3 (2002).

In *Coca Cola*, this Court explained that parties are "entitled to require [witness] attendance at trial despite his previous deposition, since the purpose of depositions is to prepare for trial, not to serve as a substitute for live testimony in Court." 1990 F.T.C. LEXIS 204, at \*1. Likewise, in *Schering-Plough*, this Court reiterated that depositions are taken in anticipation of, and not in lieu of, live trial testimony. 2002 F.T.C. LEXIS 176, at \*3 (2001). Depositions are for "learning what witnesses know and will say and

thus whom to call to testify at trial.” *Id.* Depositions also provide parties material for cross-examining and impeaching witnesses. *See* 7 Moore’s, § 30.02[1] at 30-14.

Thus, Mr. Brakefield’s live trial testimony is not “unnecessary” whether his testimony is “fully known and is available to counsel” or not. Motion at ¶ 6. That Complaint Counsel’s learned what Mr. Brakefield would likely say at trial during his deposition does not, alone, obviate Complaint Counsel’s right to present his testimony live at trial if it wishes. As *Shering-Plough* explains, this is precisely the purpose of depositions. Moreover, Mr. Brakefield’s trial testimony will likely address documents that had not been produced as of the time of his deposition. Additionally, this Court’s ability to assess Mr. Brakefield’s credibility is an important reason for bringing Mr. Brakefield to testify live at trial.

The bases for Mr. Brakefield’s claim that attending trial would be burdensome do not overcome Complaint Counsel’s right to present Mr. Brakefield’s live trial testimony. This Court has compelled testimony from witnesses when the burden to them has been “minimal.” *See Schering-Plough*, 2002 F.T.C. LEXIS 176, at \*12 (compelling deposition testimony). A busy schedule or work disruptions, even for public officials, are generally insufficient to excuse witnesses from complying with *ad testificandum* subpoenas. *See Arkwright Mutual Insurance Co. v. National Fire Ins. Co.*, 1993 WL 34678 (S.D.N.Y. 1993) (enforcing a deposition subpoena against AIG’s president); *CBS v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984) (enforcing a deposition subpoena despite the witness’s “busy schedule”); *Culp v. Devlin*, 78 F.R.D. 136.141 (E.D. Pa. 1978) (enforcing deposition subpoenas against the mayor and police commissioner).

Here, Mr. Brakefield, who is retired from the work force, pleads no specific burden other than the uncertainty of the date of his testimony. Motion at ¶¶ 5-6. Yet, as Complaint Counsel has explained to Mr. Brakefield, he need not bear the cost of his travel or his lodging in connection with his testimony at trial. Having raised no other burden to appearing, this Court cannot rely on his mere assertion of a burden in excusing Mr. Brakefield appearance.

### CONCLUSION

For the reasons stated above, Complaint Counsel asks this Court to deny Mr. Brakefield's Motion.

Dated: September 4, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 4, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

The Honorable D. Michael Chappell  
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**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

September 4, 2012

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