

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

ORIGINAL



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In the Matter of )  
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McWANE, INC., )  
a corporation, and )  
 )  
 )  
STAR PIPE PRODUCTS, LTD., )  
a limited partnership, )  
Respondents. )  
\_\_\_\_\_)

DOCKET NO. 9351

**ORDER DENYING MOTION TO QUASH SUBPOENAS OR  
FOR PROTECTIVE ORDER FILED BY MR. TOMMY E. BRAKEFIELD**

**I.**

On September 4, 2012, non-party Mr. Tommy E. Brakefield (“Mr. Brakefield”) filed a motion for a protective order or an order quashing subpoenas *ad testificandum* served on him in this matter (“Motion”). Complaint Counsel filed an Opposition to the Motion on September 4, 2012 (“Opposition”). Respondent McWane, Inc. (“Respondent”) represented at the trial in this matter that it does not intend to file a response to the Motion. For the reasons set forth below, the Motion is DENIED.

**II.**

Mr. Brakefield, a retired former employee of Sigma Corporation (“Sigma”), who also held the title of President of the Ductile Iron Fittings Research Association (“DIFRA”) during the efforts to organize that association, filed a motion to quash subpoenas *ad testificandum* compelling Mr. Brakefield’s testimony at trial. Mr. Brakefield asserts that he was previously called as a witness by Complaint Counsel to give deposition testimony on May 4, 2012, and that he has given one declaration to Complaint Counsel and one at the request of Respondent on the authenticity of documents. Mr. Brakefield asserts that he resides in Alabama, that he has been called to be a witness at trial in Washington, D.C., and that he has not been advised of the specific date on which he will be called to testify. Mr. Brakefield argues that it is both burdensome and unnecessary for Mr. Brakefield to be required to be available for multiple days and to travel to Washington, D.C., when his testimony is fully known and available to counsel and the Court.

Complaint Counsel asserts that Mr. Brakefield was the National Sales Manager of alleged co-conspirator Sigma and the President of DIFRA, the trade association that the Complaint alleges implemented an unlawful information exchange among the three primary suppliers of ductile iron fittings, Sigma, Star Pipe Products Ltd. (“Star”), and Respondent. Complaint Counsel charges that 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. Specifically, Complaint Counsel asserts that Mr. Brakefield's testimony at trial will be directly relevant to whether DIFRA facilitated collusion between Sigma, Star, and Respondent, which Complaint Counsel contends is one of the issues at the heart of the Complaint.

### III.

Mr. Brakefield provides no grounds for seeking to quash the subpoenas *ad testificandum* other than he has previously provided deposition testimony and declarations in this matter and that he does not wish to travel from Alabama to Washington, D.C. A party is "entitled to require [a non-party's] attendance at the 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." *In re Coca-Cola Co.*, 1990 FTC LEXIS 204, \*1 (June 12, 1990). Accordingly, the fact that Mr. Brakefield has previously provided deposition testimony does not provide a basis to quash the subpoenas for trial testimony.

Further, Mr. Brakefield's claim that attending trial would be burdensome does not overcome Complaint Counsel's right to present Mr. Brakefield's live trial testimony. Complaint Counsel states that it has informed Mr. Brakefield that he need not bear the cost of his travel or his lodging in connection with his testimony at trial. The fact that appearance at trial presents some burden on an individual does not protect him from providing testimony. *See In re Schering-Plough*, FTC Docket 9297 (ALJ Chappell, Nov. 7 2001) (Order Denying AHP's Motion to Quash) (compelling executives to provide deposition testimony although they had previously provided testimony at an investigational hearing).<sup>1</sup> Accordingly, Mr. Brakefield's claim that the subpoenas *ad testificandum* impose a burden on him does not provide a sufficient basis to quash the subpoenas for trial testimony.

### IV.

For the above stated reasons, Mr. Brakefield's Motion is DENIED. Complaint Counsel shall provide to Mr. Brakefield notice of the specific date it intends to call Mr. Brakefield at trial, and an estimate of the length of his testimony in hours.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: September 5, 2012

<sup>1</sup> Complaint Counsel cites *In re Schering-Plough Co.*, 2001 FTC LEXIS 176 (2001) for the proposition, *inter alia*, "this Court reiterated that depositions are taken in anticipation of, and not in lieu of, live trial testimony." Opposition at 2. However, the document cited by Complaint Counsel is titled "Complaint Counsel's Opposition to AHP's Motion to Quash Two Subpoenas *Ad Testificandum* Served On AHP After AHP's Withdrawal From Adjudication and, In The Alternative, For Protective Order." Complaint Counsel's brief, although posted on Lexis, is not "this Court's" reiteration, nor does it constitute any legal authority.