

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



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 SUBPOENA *AD TESTIFICANDUM*

I.

On August 31, 2012, non-party Sigma Corporation (“Sigma”) filed a motion to quash a subpoena *ad testificandum* served on it by Complaint Counsel on August 28, 2012 (“Motion”). Complaint Counsel filed its Opposition to the Motion on September 5, 2012 (“Opposition”). For the reasons set forth below, Sigma’s Motion is DENIED.

II.

At the final prehearing conference in this matter on August 30, 2012, Complaint Counsel sought to offer into evidence numerous documents authored by Sigma (“Sigma documents”). Final Prehearing Conference, Tr. 123-27. Respondent McWane, Inc. objected to the admissibility of the Sigma documents on the basis that the proper foundation for admissibility had not been laid. *Id.* Complaint Counsel responded that it did not have a declaration from Sigma in compliance with Commission Rule 3.43(c), discussed below, and that Complaint Counsel had issued a subpoena for a deposition of Sigma for August 31, 2012. *Id.*

By its Motion, Sigma moves to quash the subpoena *ad testificandum* noticing a deposition for August 31, 2012 (the “deposition subpoena”). The deposition subpoena designated one topic: the “authenticity and admissibility” of almost 500 documents listed in the attachment to the subpoena. Sigma states that “[t]he focus of [its] Motion primarily is on 24 documents to which Complaint Counsel and McWane’s counsel have not agreed upon admissibility.” Sigma recites that Complaint Counsel advised Sigma that Complaint Counsel seeks to admit these 24 documents as being “kept in the course of regularly conducted activity,” and “made by the regularly conducted activity as a regular practice.”

Sigma seeks an order quashing the deposition subpoena pursuant to Commission Rules 3.31(c)(2) and 3.34(c), on the grounds that: (i) the remaining discovery sought from Sigma is unreasonably cumulative; (ii) Complaint Counsel has had ample opportunity to obtain the information now sought; and (iii) the burden of the proposed discovery on Sigma outweighs the benefit.

Complaint Counsel asserts that it has been meeting and conferring with counsel for Sigma since July 17, 2012, when Complaint Counsel provided Sigma with a list of all Sigma documents, identified by Bates and CX exhibit number, that Complaint Counsel intends to offer as evidence in this matter. Complaint Counsel further states that in its letter, Complaint Counsel notified Sigma that it would accept a declaration conforming with Commission Rule 3.43(c) in lieu of a deposition to establish admissibility of Sigma documents. Complaint Counsel argues that: (i) the subpoena is not unduly burdensome; (ii) the subpoena is not vague and provides a reasonable response date; and (iii) the benefits of discovery outweigh the burdens.

III.

The relevant Commission rule governing limitations on discovery is set forth in Commission Rule 3.31(c)(2), which states:

The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he or she determines that:

(i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit.

16 C.F.R. § 3.31(c).

Relevant Commission rules governing the admissibility of evidence are as follows. Commission Rule 3.43(b) states:

(b) Admissibility. Relevant, material, and reliable evidence shall be admitted. . . . Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. . . .

16 C.F.R. § 3.43(b). Commission Rule 3.43(c) sets forth:

(c) Admissibility of third party documents. Extrinsic evidence of authenticity as a condition precedent to admissibility of documents received from third parties is not required with respect to the original or a duplicate of a domestic record of regularly conducted activity by that third party that otherwise meets the standards of admissibility described in paragraph (b) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(1) 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;

(2) was kept in the course of the regularly conducted activity; and

(3) was made by the regularly conducted activity as a regular practice.

16 C.F.R. § 3.43(c).

Complaint Counsel states that because Sigma has been unwilling to provide a declaration that meets the requirements of Rule 3.43(c), it needs to take a deposition to establish the admissibility of Sigma's documents. Sigma's arguments for quashing the subpoena pursuant to Rule 3.31(c)(2) are addressed below.

A. Objections based upon vagueness and unreasonable response date

Sigma's charge that the subpoena is vague and has an unreasonable response date is rejected. The subpoena states that the deposition topic is "the authenticity and admissibility under the provisions of Rule 3.43 of the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission, 16 C.F.R. § 3.43 of the documents listed in Attachment A." This deposition topic is not vague and clearly provides Sigma notice of the topic of deposition. Although served on Sigma on August 28, 2012, the subpoena's response date of August 31, 2012 is not unreasonable in light of the six weeks' notice Sigma had to review the documents. According to the Declaration of Alexander Ansaldo and the July 17, 2012 letter from Complaint Counsel to Sigma's counsel, attached to Complaint Counsel's Opposition, Complaint Counsel provided Sigma over six weeks' notice of which documents Complaint Counsel intends to introduce at trial. The July 17, 2012 letter further asked Sigma to sign a declaration regarding the admissibility of the documents, attached a proposed declaration that tracked the language for authenticity as laid out in Rule 3.43(c), and informed Sigma that Complaint Counsel was seeking a declaration in lieu of a deposition on the admissibility of the documents.

B. Objections that the subpoena seeks cumulative or duplicative evidence

Sigma's charge that the subpoena is unreasonably cumulative or duplicative is also rejected. Sigma asserts that Complaint Counsel has already questioned Sigma witnesses about documents produced by Sigma and that employees of a non-party should not be repeatedly burdened by submitting to multiple depositions about the same sets of documents. As Complaint

Counsel notes, Sigma need not present those same witnesses in response to the subpoena. Depositions for purposes of establishing authenticity may be of any witness with knowledge of the record keeping practices of the business. See Rule 3.43(c) (permitting a written declaration from a document's "custodian or other qualified person"); *Commodities Future Trading Commission v. Dizona*, 594 F.3d 408, 415 (5th Cir. 2010) ("There is no requirement that the witness who lays the foundation be the author of the record or be able to attest to its accuracy."). Moreover, the Scheduling Order in this case allows for "discovery for purposes of authenticity and admissibility of exhibits" after the close of discovery. The fact that Complaint Counsel questioned Sigma's fact witnesses about the substance of some of these documents does not preclude "discovery for purposes of authenticity and admissibility of exhibits" as cumulative or duplicative.

C. Objections based upon burden

Sigma asserts that the burden of the deposition on Sigma's employees outweighs its benefit because the deposition will not likely lead to establishing any of the documents as an admissible business record. Complaint Counsel responds that at the deposition, Complaint Counsel will seek discovery regarding the circumstances of the documents' creation, the activity that Sigma was engaged in when preparing the documents, and Sigma's practices with respect to such documents in order to establish admissibility under Commission Rule 3.43.

Although the subpoena imposes some burden on Sigma, the burden is far outweighed by the benefit of the discovery. The Complaint in this case alleges that McWane conspired with Sigma to raise and stabilize the prices of ductile iron pipe fittings. Complaint ¶ 2. Because Sigma's documents are relevant to the issue of coordination between Respondent and Sigma, the benefits of discovery outweigh the burden on Sigma.

IV.

Sigma has failed to show that the subpoena is vague, requires an unreasonable response date, is unreasonably cumulative or duplicative, or that the burden to Sigma outweighs its likely benefit. Thus, Sigma has failed to meet its burden to quash the subpoena under Rule 3.31(c)(2). Accordingly, Sigma's Motion to Quash is DENIED. Sigma shall comply with the subpoena *ad testificandum* on or before September 10, 2012.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: September 6, 2012