

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

09 04 2012

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In the Matter of)	
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)	
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

thus whom to call to testify at trial.” *Id.* Depositions also provide parties material for cross-examining and impeaching witnesses. *See* 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

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:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

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

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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

By: s/ Thomas H. Brock
Attorney