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 RESPONDENT'S MOTION *IN LIMINE* TO PRECLUDE COMPLAINT COUNSEL'S PROPOSED PROFFER OF INVESTIGATIONAL HEARING TRANSCRIPTS AT TRIAL

Respondent's Motion *in Limine* to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial ("Motion") reflects Respondent's refusal to follow the FTC Rules of Practice for Adjudicative Proceedings and this Court's Scheduling Order. Respondent's Motion seeks a blanket exclusion of evidence – all Investigational Hearing ("IH") transcripts – that is expressly admissible under Rule 3.43(b). Respondent's Motion also seeks to circumvent Respondent's obligations under this Court's Scheduling Order to identify specific "objections to the designated testimony," due on August 16, 2012. Without any specific examples of objectionable IH testimony designated by Complaint Counsel, Respondent's Motion articulates no valid basis for the blanket exclusion of either party-opponent or third party IH testimony. Rather, Respondent attempts to exclude relevant, material, reliable, and thus, admissible testimony. Accordingly, this Court should deny Respondent's Motion.

Factual Background

Complaint Counsel produced IH transcripts for 18 witnesses to Respondent at the beginning of Part 3 discovery. Castillo Decl., at ¶ 2 (explaining that there are 19 IH

transcripts because one witness had two IHs). Respondent deposed each IH witness. *Id.* at ¶ 3.

During the depositions of the IH witnesses, Respondent examined the witness' credibility and the bases for their prior testimony, and often asked IH witnesses to re-affirm their prior IH testimony. *Id.* at ¶ 3. Respondent relied on the IH testimony throughout discovery, and proposes to use deposition designations that include testimony incorporating the witnesses' IH testimony. *Id.* at ¶ 5. Respondent's expert also relied on IH testimony in the preparation of his expert report. *Id.*

The depositions were brief, as Complaint Counsel and Respondent split single, seven-hour days with many witnesses who were directly involved in many aspects of the conduct challenged in the Complaint. *Id.* at ¶ 4. Given these time constraints, Complaint Counsel did not question witnesses during their Part 3 depositions on all areas covered in their IH testimony. *Id.* Respondent, Complaint Counsel, and the witnesses themselves frequently referred to their IH testimony, and Respondent marked many IH transcripts as exhibits to the depositions. *Id.*

Analysis

Respondent's Motion moves to exclude *all* IH transcripts from evidence on the basis that IHs are inherently unreliable and would necessarily lead to undue delay and duplicative testimony. There is no basis for such a sweeping exclusion under Rule 3.43(b). Indeed, Respondent does not cite a single line of testimony offered by Complaint Counsel, but instead raises generic arguments about IHs taken under the Part 2 Rules. Respondent's argument that IHs should be excluded because they are somehow less reliable than depositions is contrary to the plain language of Rule 3.43(b).

Rule 3.43(b) requires admission of all evidence that is "relevant, material, and reliable," unless that evidence is more prejudicial than probative, or its presentation would cause "undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). Significantly, the Commission amended Rule 3.43(b) in 2009 to add language that expressly allows for the admission of IH transcripts:

> If otherwise meeting the standards for admissibility described in this paragraph, depositions, ***investigational hearings***, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay.

Id. (emphasis added). In addition, Rule 3.43(b) requires admission of all relevant party-opponent statements. *Id.* ("Statements or testimony by a party-opponent, if relevant, *shall* be admitted.") (emphasis added).

The IH testimony in this case is reliable and would not lead to duplicative testimony or undue delay. The IH testimony of Respondent's own employees is also admissible party-opponent statements. To the extent that any specific IH designations are objectionable, such objections should be resolved pursuant to the procedures set forth in this Court's Scheduling Order for exchanging objections to specific designations on August 16, 2012.

I. IH Transcripts Are Reliable

Respondent does not claim that the IH transcripts taken in this investigation are irrelevant or immaterial. Respondent does not even claim that they are unreliable. Instead, Respondent claims that depositions are "much more reliable," Motion at 1, because Respondent's counsel had the opportunity to object and contemporaneously cross-examine witnesses. Because this is true of all IHs under the Part 2 Rules, *see* 16 C.F.R. §§ 2.8 (c), 2.9(b), ruling for Respondents on this basis would require the exclusion

of *all* IH testimony in *every* case – a consequence the Commission clearly did not envision when they explicitly amended Rule 3.43(b) to allow for the admission of IH transcripts.[1]

Complaint Counsel provided Respondent with its deposition and IH designations on July 6 as called for in the Scheduling Order. None of these designations are cited in Respondent's Motion. To the contrary, *Respondent* seeks to introduce at trial two of the four passages cited in its Motion as "unreliable" through its own designations.[2]

Respondent's four cherry-picked IH excerpts do not demonstrate the so-called unreliability of IH testimony, nor do they meet Respondent's heavy burden to demonstrate that *all* IH testimony would be inadmissible for any purpose. *See Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2001). And Respondent cannot proffer two of the four excerpts as probative and relevant evidence in support of its case while using the same testimony to argue that Complaint Counsel's designations, which are never excerpted or even cited in Respondent's Motion, should be excluded.

Respondent's own reliance on the IH transcripts throughout discovery belies Respondent's arguments against the reliability of the IH transcripts. Respondent frequently asked witnesses to re-affirm their IH testimony at deposition, often marked the witness' IH transcript as a deposition exhibit, and Respondent's own expert relied on the IH transcripts in developing his opinions for his expert report. Castillo Decl., at ¶ 3, 5.

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[1] 16 C.F.R. Parts 3 & 4 Rules of Practice; Final Rule, 74 Fed. Reg. 1804 (effective Jan 13, 2009) (codified at 16 C.F.R. § 3).

[2] *See* Motion at 2-3; Castillo Decl., at ¶ 6.

In short, Respondent's own actions demonstrate the reliability of IH transcripts in this case.

II. Admission of the IH Transcripts Will Not Unduly Waste Time Or Duplicate Evidence

Respondent's Motion also baselessly asserts that admission of any IH transcripts will waste time and duplicate evidence. Respondent's Motion, however, never explains how admitting the IH transcripts would cause any undue delay. To the contrary, Paragraph 19 of the Court's Scheduling Order ensures the opposite: IH and deposition transcripts will not be read into the record or presented in open court without the Court's prior approval.

Without offering a single example, Respondent also posits that a witness's IH testimony is necessarily duplicative of subsequent deposition testimony and would result in the "needless presentation of cumulative evidence." Motion at 5. In fact, many of the Part 3 depositions reference prior IH testimony and the IH transcripts were marked as deposition exhibits. This deposition testimony – much of which is designated to be offered as evidence at trial by Respondent – would be difficult to understand if all IH testimony were excluded. Castillo Decl., at ¶ 4, 5. Moreover, as explained above, given the substantial time constraints involved in a shared, 7-hour deposition, Complaint Counsel relied on the admissibility of IH transcripts under Rule 3.43(b) and did not always question witnesses on the same topics that were covered at their IH. *Id.* at ¶ 5. While Complaint Counsel does not doubt that there is some overlap between a witness' IH and deposition testimony, such objections are best dealt with on an individual basis under the procedure set forth by the Scheduling Order.

III. Respondent Has No Basis for Opposing Admission of IH Transcripts for McWane Executives

Respondent's Motion as it pertains to the IH transcripts of McWane executives must also fail. With respect to party-opponent testimony, 3.43(b) states, "Statements or testimony by a party-opponent, if relevant, *shall* be admitted." *See* 16 C.F.R. 3.43(b) (emphasis added); *cf.* F.R.E. 801(d)(2)(D) (A statement of a "party's agent or employee on a matter within the scope of that relationship and while it existed" is not hearsay.) Because Respondent does not argue that the testimony in these IH transcripts is not relevant, there is no basis to exclude the IH transcripts of the McWane executives, Leon McCullough or Rick Tatman.

IV. Respondent's Motion Lacks "Necessary Specificity" Required for a Motion *In Limine* and Ignores the Scheduling Order

Finally, Respondent's Motion should be denied because it is "too sweeping in scope" and fails to identify the specific IH testimony that should be excluded with "necessary specificity." *See Weiss v. La Suisse, Societe d'Assurances sur la Vie*, 293 F. Supp. 2d 397, 407 (S.D.N.Y. 2003) (denying a motion *in limine* as sweeping and overbroad). These types of motions *in limine* are not only "discouraged," *see* Scheduling Order at p. 3, but are also properly denied. *E.g.*, *Abbott Labs. v. Sandoz, Inc.*, 743 F. Supp. 2d 762, 783 (N.D. Ill. 2010) (denying over-inclusive motion since "specific objections . . . can be addressed at trial").

This Court's Scheduling Order expressly establishes procedures and deadlines for handling any evidentiary objections to individual IH transcript designations. According to the Scheduling Order, parties must exchange objections to designated testimony on August 16, 2012, and any such objections are to be resolved by or before the final

prehearing conference on August 30, 2012. Because Respondent's Motion tries to circumvent this Court's specific procedures for objections to designations of specific IH testimony, it should be denied.

Conclusion

For the above reasons, Complaint Counsel respectfully requests that this Court deny Respondent's Motion.

Dated: August 7, 2012

Respectfully submitted,

/s/ Monica Castillo

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DECLARATION OF MONICA M. CASTILLO

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

1. My name is Monica M. Castillo. I am making this statement in *In the Matter of McWane, Inc.*, FTC Docket No. 9351, in support of Complaint Counsel's opposition to McWane, Inc.'s Motion *in Limine* to Preclude Complaint Counsel Proposed Proffer of Investigational Hearing Transcripts at Trial ("Motion"). All statements in this Declaration are based on my personal knowledge as a Staff Attorney for the U.S. Federal Trade Commission, Bureau of Competition, and if called upon to testify, I could competently do so.
2. Complaint Counsel produced the Investigational Hearing ("IH") transcripts for all 18 witnesses from its Part 2 investigations to Respondent at the beginning of Part 3 discovery. There were 19 transcripts in total, since there were two investigational hearings of a single witness.
3. During Part 3 discovery, Respondent deposed each IH witness. At deposition, Respondent examined the witness' credibility and the bases for their prior testimony, and often asked IH witnesses to re-affirm their prior IH testimony.

4. The Part 3 depositions were brief, as Complaint Counsel and Respondent split single, 7-hour days with witnesses who were directly involved in many aspects of the conduct challenged in the complaint. Given these time constraints, Complaint Counsel did not question witnesses on all areas covered in the IH testimony. The deposition testimony referring to the IH testimony would sometimes be difficult to understand without being able to refer to the IH transcripts, since Respondent, Complaint Counsel, and the witnesses themselves made frequent references to the IH testimony. In addition, many IH transcripts were marked as exhibits to the depositions by both Respondent and Complaint Counsel.
5. Additionally, Respondent's expert reports cites that he relied on IH transcripts in the formation of his opinions and in the preparation of his expert report in this case.
6. Complaint Counsel did not designate any IH testimony contained in Respondent's Motion. However, two of the four passages of IH testimony that are excerpted by Respondent in its Motion are contained in Respondent's own designations of testimony that it intends to introduce at trial.

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.

Respectfully submitted,

s/ Monica M. Castillo
Counsel Supporting the Complaint
Bureau of Competition
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Washington, DC 20580

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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
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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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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.

August 7, 2012 By: s/ Thomas H. Brock
Thomas H. Brock