

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
CHICAGO BRIDGE & IRON COMPANY N.V.)
)
a foreign corporation,)
)
CHICAGO BRIDGE & IRON COMPANY)
)
a corporation,)
)
and)
)
PITT-DES MOINES, INC.)
)
a corporation.)

Docket No. 9300

To: The Honorable D. Michael Chappell
Administrative Law Judge

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS'
MOTION TO CALL CERTAIN WITNESSES BY DEPOSITION**

Respondents have met neither the conditions necessary for use of deposition testimony in lieu of live testimony under FTC Rule 3.33 (g)(1)(iii), nor the conditions set out in the Court's letter of September 17, 2002, to the parties relating to trial logistics. The nine third-party witnesses are available to testify at trial, and Respondents have made no showing that they have been unable to procure the attendance of the witnesses at trial. Respondents failed to notice, at the time the discovery depositions of these witnesses were noticed or conducted, that they intended to use the depositions in lieu of live testimony over the objection of Complaint Counsel. Complaint Counsel would be severely prejudiced if it is denied the opportunity to cross examine the nine third-party witnesses who Respondents now propose to present by transcript of

discovery depositions.

None of these witnesses are “dead,” “out of the United States or is located at such a distance that his attendance would be impractical,” “unable to attend or testify because of age, sickness, infirmity, or imprisonment,” nor have Respondents even attempted to show that they cannot “procure the attendance of the deponent by subpoena,” or “[t]hat such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.” FTC Rule 3.33(g)(1)(iii)(A)-(E).

Instead, after consultation with their witnesses, they have decided that these witnesses are too busy or that a trip to Washington, DC would be inconvenient between the Thanksgiving and Christmas holidays. None of these reasons is allowed under the Rule. Nor could Complaint Counsel ever reasonably expect that when Respondents moved to have this hearing postponed for two months that they would use that as an excuse to take away from this Tribunal and the Commission the Rule’s express preference for “presenting the testimony of witnesses orally in open hearing.” In short, Respondents put themselves in this position and cannot claim that they have somehow created “special circumstances” warranting an excuse for nine of the thirteen third-party witnesses on their witness list. Accordingly, Respondents’ Motion to Call Certain Witnesses by Deposition should be denied.

FACTUAL BACKGROUND

On September 17, 2002, this Court issued a letter to the parties stating that “Judge Chappell will allow the use of properly offered and admitted depositions of third parties in lieu of live testimony where such use is agreed to by both sides.” The parties engaged in negotiations relating to the use of deposition testimony of various witnesses and reached an agreement relating to several witnesses. Complaint Counsel has not agreed to use of depositions in lieu of live testimony for nine third-party witnesses referenced in Respondents’ Motion because Complaint Counsel intends to cross examine these witnesses at trial.

ARGUMENT

I. Respondents Can Not Meet the Standards Set Out in FTC Rule 3.33(g)(1) for the Use of Deposition In Lieu of Live Testimony

FTC Rule 3.33(g)(1) sets out the standards for the use of deposition testimony in FTC administrative hearings. Ordinarily, depositions of third parties may only be used to contradict or impeach the testimony of the deponent. FTC Rule 3.33(g)(1)(i). Depositions of third parties may be used for any purpose, including for use in lieu of live testimony, *only* if the Administrative Law Judge finds:

(A) That the deponent is dead; or

(B) That the deponent is out of the United States or is located at such a distance that his attendance would be impractical, unless it appears that the absence of the deponent was procured by the party offering the deposition;
or

(C) That the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(D) That the party offering the deposition has been unable to procure the

attendance of the deponent by subpoena; or

(E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

FTC Rule 3.33(g)(1)(iii)(A)-(E). Signally, the Rule emphasizes the *“importance of presenting the testimony of witnesses orally in open hearing.”* *Id.* That is what Complaint Counsel expected would happen here and that Respondents’ claims could be tested by cross-examination “the greatest legal engine ever invented for the discovery of truth.” *United States v. Green*, 399 U.S. 149, 158 (1970).¹

Respondents base their argument for use of depositions in lieu of live testimony on Rule 3.33(g)(1)(iii)(B), which states that a party may use a deposition for any purpose if the Administrative Law Judge finds that “the deponent is out of the United States or is located at such a distance that his attendance would be impractical . . .” Respondents’ Motion ¶7. The language of Rule 3.33(g)(1) closely follows the language of Fed. R. Civ. P. 32(a)(3) and the language of Fed. R. Evid. 804(b)(1), both of which adopt an unavailability standard for use of depositions in lieu of live testimony. Fed. R. Evid. 804(b)(1) treats deposition transcripts as hearsay, which are only acceptable in lieu of live testimony if the declarant is unavailable. The restrictions imposed by Fed. R. Civ. P. 32 codify the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only

¹ The Rule, however, also recognizes that depositions of party witnesses are admissions, not hearsay, and may be introduced in evidence by an adverse party without a witness. Rule 3.33(g)(1)(ii). This provision does not apply here as all the proposed witnesses under Respondents’ motion are third parties.

if the witness is not available to testify in person. Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 2142.² As the court noted *In re Coca-Cola Co.*, 117 F.T.C. 795 (1994), a party is entitled to require a witnesses' 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." *In re Coca-Cola Co.*, 1990 FTC LEXIS 204, at *1 (June 12, 1990).

Respondents cite three reasons why depositions should be allowed in lieu of live testimony for certain third-party witnesses: travel time to Washington D.C., busy work schedules, and holiday travel plans. Respondents' Motion ¶¶9-15. These rationales amount to mere inconvenience, rather than a real inability to attend the trial as required under FTC Rule 3.33(g)(iii)(A)-(E).

Further, the reasons cited by Respondents in support of their motion can not withstand analysis. The most distant location where any of the witnesses cited by Respondents live is the Houston metropolitan area, about a three and one half hour airplane trip from Washington D.C. Both Complaint Counsel and Respondent will call live numerous third-party witnesses from the Houston area. In fact, four of the five third-party witnesses that Respondents intend to call live (witnesses identified as third-party witness number 3, 4, 8 and 12 on Respondents' Final Witness List) live in the Houston metropolitan area; the fifth (Respondents' third-party witness number 5)

² The preference for live testimony is deeply embedded throughout the Federal Rules of Civil Procedure. For example, the advisory committee note on Rule 43(a), which allows for the presentation of testimony by contemporaneous transmission from a different location (i.e., video) under compelling circumstances, states the following:

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of the witness face-to-face is accorded great value in our tradition.

lives in Washington state. CB&I Letter (Oct. 8, 2002). Respondents have offered no rationale why the journey to Washington D.C. is any more arduous for some third-party witnesses than for others. In fact, Complaint Counsel and Respondents intend to call live witnesses from as far away as Alaska, California, and Washington state.

Respondents note that the third-party witnesses at issue have “extremely pressing job responsibilities that prevent them from traveling to Washington.” Respondents’ Motion ¶¶13-14. Many of the third party witnesses Complaint Counsel and Respondents intend to call live are busy, high-level executives or principals in small businesses. For example, Respondents have stated that they intend to call live Respondents’ third-party witness number 8 is a vice president of engineering for an oil and gas exploration company and Respondents’ third-party witness number 12 is a senior vice president of a major power producer. CB&I Letter (Oct. 8, 2002). Respondents have offered no evidence that the third-party witnesses they propose to call by deposition are any busier than those they will present live.

Finally, Respondents note that the trial may interrupt holiday travel plans of various witnesses. Respondents’ Motion ¶15. This trial was originally set to begin on September 10, 2002. The trial date was extended 60 days to November 12, 2002 at the request of Respondents. Respondents were aware, at the time they requested the extension, that the extension they proposed would push the trial into the holiday season. Indeed, Complaint Counsel warned, in its opposition to Respondents’ motion, that Respondents’ requested 60-day extension would push the hearing into the holidays and might inconvenience some witnesses. Complaint Counsel’s Response to Respondents’ Motion for a Sixty-Day Extension of Time at 2. Accordingly, Respondents should not now be heard to raise witnesses’ holiday travel plans as an excuse to use

depositions in lieu of live testimony.

II. Respondents Can Not Meet the Standards Set Out by this Court for the Use of Depositions in Lieu of Live Testimony

On September 17, 2002, this Court issued a letter to the parties stating that “Judge Chappell will allow the use of properly offered and admitted depositions of third parties in lieu of live testimony *where such use is agreed to by both sides.*” (italics added). This Court has conditioned the use of depositions in lieu of live testimony on the mutual consent of the parties. The parties agreed to the use of depositions, in lieu of live testimony, of six witnesses with respect to which the parties elected to dispense with cross examination at trial. Absent extraordinary circumstances, as set forth in Rule 3.33(g)(1)(iii), Complaint Counsel have the right to cross examine Respondents’ witnesses and to confront Respondents’ witnesses with evidence developed following the depositions, including evidence that Respondents have acted in a noncompetitive manner with respect to the prices Respondents have quoted to the companies these witnesses represent.

Respondents’ citation to Complaint Counsel’s Response to Respondents’ Motions Concerning the Use of Transcript Excerpts, *In re Schering Plough Corp.* at 7-8 (Respondents’ Exhibit F) for the proposition that depositions are regularly admitted in lieu of live testimony in FTC administrative hearings is misplaced. Respondents’ Motion ¶8. Sixty of the 61 witnesses for whom Complaint Counsel sought to have deposition testimony admitted, in lieu of live testimony, in *Schering Plough* were employees or experts of respondent or its co-conspirator. Complaint Counsel’s Response to Respondents’ Motions Concerning the Use of Transcript Excerpts, *In re Schering Plough Corp.* at 11. Pursuant to Rule 3.33(g)(1)(ii), the deposition of a

party may be used by an adverse party for any purpose. As explained above, the individuals at issue in Respondents' current motion are all third-parties.

III. Complaint Counsel Would Be Prejudiced by the Use of Deposition in Lieu of Live Testimony for the Witnesses at Issue

The nine third-party witnesses are available to testify at trial, and Respondents have not made any of the showings required by Rule 3.33(g)(1)(iii) to warrant use of depositions, in lieu of live testimony, at trial. Complaint Counsel would be highly prejudiced if Respondents' Motion is granted.

Respondents failed to notice, at the time the discovery depositions of these witnesses were noticed and conducted, that they intended to use the depositions of these witnesses in lieu of live testimony over the objection of Complaint Counsel. Complaint Counsel took discovery of these witnesses during the depositions and asked questions appropriate to discovery. Complaint Counsel did not cross examine the witnesses, because Complaint Counsel expected, in good faith, that it would have an opportunity to do so at trial. At the time the depositions were conducted, Complaint Counsel had no reason to expect otherwise. Further, Complaint Counsel did not exhaust every material line of questioning with each witness. Complaint Counsel had no reason to believe that if it failed to pursue a particular line of questioning in a deposition, it would lose the ability to pursue these issues later at trial.

Further, Respondents elected to use leading questions in conducting their examination of the witnesses, as is their right in conducting discovery. Complaint Counsel did not interfere with Respondents' discovery of the witnesses. At trial, Complaint Counsel will object to use of leading questions in conducting direct examination of witnesses. Complaint Counsel did not

waive objection to use of leading questions in eliciting direct testimony at trial, because Complaint Counsel permitted Respondents to conduct their discovery depositions as Respondents saw fit. Respondents' proposal, after the fact, to use discovery depositions, over the objection of Complaint Counsel, in lieu of live trial testimony of Respondents' third-party witnesses circumvents the rules of evidence. FTC Rule 3.41(d) provides that "An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling or evasive, may be interrogated by leading questions" The Rule does not grant license to use leading questions for direct testimony by substituting discovery depositions for proper examination of witnesses at trial.

Moreover, many of these discovery depositions took place more than three months ago. Evidence developed subsequent to the depositions, that will form a basis for cross examination of the witnesses, reveals that Respondents have engaged in noncompetitive pricing behavior with respect to the companies some of these witnesses represent. *See, e.g.,* Complaint Counsel's Pretrial Brief at 30-31. Further, Complaint Counsel have a right to cross examine the witnesses with respect to industry developments subsequent to the depositions. Customers may have received budget pricing or estimates on relevant products since their depositions or may have had further experience in dealing with suppliers, which could affect their testimony. Two of the witnesses are employees of The Williams Companies, which sold its Cove Point LNG facility to Dominion Resources, Inc. on Sept. 5, 2002. Respondents disclose, in their Supplement to Respondents' Motion to Call Certain Witnesses by Deposition, filed November 4, 2002, that the two witnesses have been assigned to other duties at Williams. Respondents' Supplement ¶ 3.

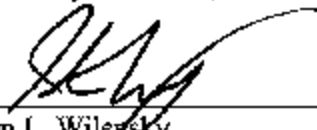
At trial, Complaint Counsel would use the sworn declaration of one of the witnesses for

purposes of cross examination and would have the witness confirm the statements in the declaration. These statements record the perception of the witness at the time of the acquisition. The declaration is attached to Respondents' Motion as Exhibit L. During the deposition, Respondents cross examined the witness regarding the contents of the declaration. The deposition testimony of the witness should not be accepted in evidence without receiving in evidence, as well, the witness's declaration.

CONCLUSION

Respondents have met neither the conditions necessary for the use of depositions in lieu of live testimony under FTC Rule 3.33 (g)(1)(iii), nor the conditions set out in this Court's letter of September 17, 2002, to the parties relating to trial logistics. Complaint Counsel would be highly prejudiced by the admission of depositions in lieu of live testimony for these nine third-party witnesses. Accordingly, Respondents' Motion to Call Certain Witnesses by Deposition should be denied.

Respectfully submitted,



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Counsel Supporting the Complaint

Dated: November 5, 2002

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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ORDER

On November 1, 2002, Respondents filed a Motion to Call Certain Witnesses by Deposition, and on November 4 Respondents filed a Supplement thereto. Complaint Counsel filed an Opposition to Respondents' Motion on November 5. Having considered Respondents' Motion and Supplement and Complaint Counsel's Opposition thereto, the Court finds that Respondents have not met the conditions required under FTC Rule 3.33 (g)(1)(iii), 16 C.F.R. 3.33 (g)(1)(iii), or the conditions set out in this Court's letter of September 17, 2002, for the use of depositions in lieu of live testimony for the nine third-party witnesses at issue.

Accordingly,

IT IS HEREBY ORDERED that Respondents' Motion to Call Certain Witnesses by Deposition is denied in its entirety.

IT IS FURTHER ORDERED that Respondents may present the testimony of these witnesses live.

ORDERED

D. Michael Chappell
Administrative Law Judge

Date: November , 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Complaint Counsel's Opposition to Respondents' Motion to Call Certain Witnesses by Deposition to be delivered by hand to

The Honorable D. Michael Chappell
Federal Trade Commission
H-104
6th and Pennsylvania Ave. N.W.
Washington D.C. 20580

Administrative Law Judge

and by facsimile and by first-class mail to:

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N.V. and Pitt-Des Moines, Inc.

Dated: November 5, 2002



Steven Wilensky