

unilateral right to assert or to waive, on the behalf of the trade association as a whole or of its other members, DIFRA's privilege with its counsel. Thus, this Motion is more properly directed either to DIFRA itself, or to the only parties who have actually asserted the privilege in this litigation on a question CC complains was not answered [REDACTED]

[REDACTED]

Second, CC's assertion that McWane injected privileged communications with DIFRA's counsel into this litigation is simply incorrect. To the contrary, CC brought DIFRA into this litigation by asserting a claim against McWane based on DIFRA's structure, its operations and its data gathering.¹ To defend itself against this claim, as McWane clearly has the legal right to do, McWane has developed underlying *factual evidence* regarding the basic structure, purpose and operation of DIFRA, all of which is highly probative - - and none of which was the subject of any assertion of privilege by McWane. Indeed, McWane simply asked factual questions about documents produced - - without any privilege assertion over them - - by a number of third-parties. CC asked questions about the same documents and did not claim at any deposition that McWane somehow blocked it from getting answers it sought to DIFRA-related questions. Nor did CC move to compel at any time during fact discovery in this matter. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ The Complaint challenges the structure of DIFRA (how many members) and DIFRA's data gathering. Complaint ¶¶ 2 ("exchanged sales data in order to facilitate this price coordination"), 34(a) ("This exchange of information was to be achieved under the auspices of an entity styled as the Ductile Iron Fittings Research Association ("DIFRA"), 34(c) ("Sigma and Star manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA information exchange in order to induce McWane to support higher price levels"), 35-38 (extensive allegations of how DIFRA's structure and info gathering facilitated collusion).

[REDACTED]

[REDACTED]

[REDACTED] McWane has not relied on any privileged communications with DIFRA's counsel in establishing these fundamental facts about DIFRA. Thus, no implied waiver of the attorney client privilege may be found. In addition, given the nature of Complaint Counsel's claim, it would be arbitrary, capricious, and grossly prejudicial to preclude McWane from presenting such non-privileged factual evidence.

Third, CC has failed to meet its legal burden of proof to establish implied waiver of the privilege. It has not identified a single document that McWane allegedly withheld based on an attorney-client privilege with Bradley Arant or Long, or a single instance in which McWane's counsel instructed a witness not to answer a question based on an attorney-client privilege with Bradley Arant or Long. Furthermore, Complaint Counsel has not shown that it has been prejudiced by any alleged assertion of privilege. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Fourth, Complaint Counsel has failed to comply with the procedural meet and confer requirement [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FACTUAL BACKGROUND

The Complaint in this proceeding alleges that McWane, Star and Sigma conspired beginning in January, 2008 to raise the price at which ductile iron fittings were sold in the United States. Complaint, ¶ 2. The Complaint further alleges that McWane, Star, and Sigma “exchanged sales data in order to facilitate this price coordination.” *Id.* DIFRA was the so-called “information exchange” that facilitated the alleged price coordination. Complaint, ¶ 35.²

[REDACTED]

² See also Complaint, ¶ 34 a:

Before announcing the June 2008 price increase, McWane planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales of DIPF. This exchange of information was to be achieved under the auspices of an entity styled as the Ductile Iron Fittings Research Association (“DIFRA”).

and Complaint, ¶ 34 c:

Sigma and Star manifested their understanding and acceptance of McWane’s offer by initiating their participation in the DIFRA information exchange in order to induce McWane to support higher price levels.

[REDACTED]

CC does not cite (and did not raise at any point during discovery in this matter) any McWane assertion of privilege based on communications between DIFRA's lawyers and DIFRA that it claims has blocked it from getting answers to DIFRA-related questions. Nor does CC cite a DIFRA-related document that it argues McWane redacted based on an improper privilege assertion. To the contrary, substantial DIFRA documents have been produced by various parties, including McWane, with very little redaction - - and CC did not challenge any redaction during discovery.

[REDACTED]

[REDACTED]

[REDACTED]

⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ARGUMENT

Implied waiver, or “at-issue” waiver, is an involuntary forfeiture of a privilege that may arise when a party “attempts to use the privilege as both a shield and a sword by partially disclos[ing] privileged communications or affirmatively rely[ing] on [them] to support its claim or defense and then shield[ing] the underlying communications from scrutiny.” *Pall Corp. v. Cuno Inc.*, 268 F.R.D. 167, 168 (E.D.N.Y. 2010) (citations omitted, brackets in original). To support a finding of implied waiver, the party arguing for a waiver must show that the opposing party “relies on the privileged communication as a claim or defense or as an element of a claim or defense.” *Id.* (citations omitted, emphasis in original). Waiver may also be found if the privilege holder “makes factual assertions the truth of which can only be assessed by examination of the privileged communication.” *Id.* at 169 (citations omitted). In practical terms, the doctrine of implied waiver is intended to prevent parties from asserting claims the opposing party cannot adequately dispute without access to the privileged materials. *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003).

Complaint Counsel has not established that McWane is relying on a privileged communication with Bradley Arant or Long to establish a claim or defense. The only evidence

[REDACTED]

McWane has presented regarding DIFRA consists of underlying facts and non-privileged communications, each of which has been independently assessed by Complaint Counsel through its examination of witnesses. *See Sony Electronics, Inc. v. Soundview Technologies, Inc.*, 217 F.R.D. 104, 110 (D.Conn. 2002) (distinguishing purely factual information from legal advice of counsel). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

McWane's use of that factual evidence- - all of which was produced in discovery by multiple parties and was the subject of testimony from multiple witnesses elicited by McWane and CC - - has not injected any privileged communication with Long or Bradley Arant into this litigation. "Only if the disclosure is of *privileged* information can it justify the forced disclosure of additional privileged information." *Trustees of the Electrical Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc.*, 266 F.R.D. 1, 10 (D.D.C. 2010) (emphasis supplied). The disclosure of underlying facts or non-privileged communications with an attorney can never waive privileged communications. *Id.*

Where the party seeking to overcome a privilege is the party that has injected an issue into the litigation, an implied waiver of the privilege is not justified. *See In re: Sims*, 534 F.3d 117, 134 (2nd Cir. 2008) ("a party's psychotherapist-patient privilege is not overcome when his mental state is put in issue only by another party"). To waive the attorney-client privilege, the defendant "must do more than merely deny" the allegations in the complaint; it "must inject a new factual or legal issue into the case." *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994) (quoting *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095,

1098 (7th Cir. 1987)). In presenting underlying facts about DIFRA's structure, purpose and data gathering functions, McWane is doing nothing more than denying Complaint Counsel's allegations that DIFRA was a nefarious organization designed to further an alleged price-fixing conspiracy. The fact that DIFRA was guided by experienced antitrust counsel is not itself privileged. *See In re Grand Jury Proceedings*, 899 F.2d 1039, 1042-43 (11th Cir. 1990) (it is well established that a client's identity and the fact of legal representation itself is not privileged).

Complaint Counsel's Motion is misdirected to McWane. As only one of the former members of DIFRA, McWane possesses neither the right nor the ability to waive the attorney-client privilege on behalf of DIFRA or the other members of the organization. *See In re: Seagate Technology, LLC*, 497 F.3d 1360, 1372 (Fed.Cir. 2007) ("The attorney-client privilege belongs to the client, who alone may waive it."). *See also Cox*, 17 F.3d at 1417 (same). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] If Complaint Counsel wishes to take this matter up with those parties, it should have done so at the time. In any event, McWane should not be penalized because CC now disagrees with an assertion of privilege by DIFRA's counsel. However, it would be arbitrary, capricious and grossly unfair to preclude McWane from submitting in its defense underlying, non-privileged facts regarding DIFRA, as the result of the actions of parties it did not subpoena and does not control.

Not only has Complaint Counsel failed to show that McWane has relied on a privileged communication [REDACTED] but it also has failed

to explain how it has been prejudiced by this alleged reliance. Absent proof of prejudice, Complaint Counsel's Motion must be denied. *See Cox*, 17 F.3d at 1418.

CONCLUSION

For each of the independent reasons set forth above, Complaint Counsel's Motion is due to be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2012, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via 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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EXHIBIT A

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EXHIBIT B

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