



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

In the Matter of)
)
McWANE, INC.,) PUBLIC
)
a corporation, and) DOCKET NO. 9351
)
STAR PIPE PRODUCTS, LTD.,)
a limited partnership,)
)
Respondents.)
_____)

**MCWANE, INC.’S MOTION IN LIMINE TO PRECLUDE COMPLAINT COUNSEL
FROM USING PRIVILEGE AS A SWORD AND A SHIELD**

It is now clear that Complaint Counsel intends to affirmatively use at trial some white papers and other submissions McWane, Sigma, and Star provided to the Federal Trade Commission during its Part 2 investigation, but withhold other submissions or parts of submissions as “privileged.” That, by definition, is improper game-playing because it uses the privilege as a sword (selectively waiving it when Complaint Counsel believes it suits its interest) and a shield (invoking it to withhold submissions from McWane when its suits Complaint Counsel’s interest). This Court has already noted that such game-playing is improper: “the sword and shield theory applies to a litigant that seeks to use information as a ‘sword,’ in furtherance of a claim or defense, but at the same time ‘shields’ such information from discovery by invoking a privilege.” (See July 13, 2012 Order at 4.) Indeed, Complaint Counsel has also acknowledged, that a party cannot use privilege as “both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” (see CC’s June 25, 2012 Motion to Exclude quoting *In re OSF*

Healthcare & Rockford Health Sys., 2012 FTC LEXIS 70, at *4-5 (Mar. 19, 2012).)

Case law is clear that Complaint Counsel cannot selectively use some white papers and other submissions affirmatively while withholding others with no valid basis. Accordingly, McWane respectfully requests that this Court order Complaint Counsel to produce all white papers and other submissions made by Star (and others, if any) to the Federal Trade Commission during its investigation, or in the alternative, preclude Complaint Counsel from proffering an expert opinion based on any submissions to the FTC by any non-party during the Part 2 investigation at trial, and striking those portions of Dr. Schumann's report that relies on such information. McWane further requests that Complaint Counsel be precluded from eliciting testimony (whether from a live witness or via deposition or investigative hearing designations) regarding any submissions from the FTC's Part 2 investigation. McWane's counsel has met and conferred with Complaint Counsel and was unable to reach a resolution.

FACTUAL BACKGROUND

Complaint Counsel has proffered an expert opinion for trial based, at least in part, on the white papers and others submissions made by McWane, Sigma and Star, but Complaint Counsel has continuously refused to produce all submissions to Respondent. [REDACTED]

[REDACTED] Complaint Counsel has also designated 19 investigational hearing transcripts as exhibits for trial that contain questions on some documents from government submissions, but again Complaint Counsel has withheld the other submissions.

At minimum, Complaint Counsel [REDACTED]

On the other hand, Complaint Counsel has withheld a number of submissions by Star on the basis of government informant privilege.

Further, Complaint Counsel has used *parts* of Star submissions during investigational hearings, which it has included on both their exhibit list and deposition designations, yet withheld other parts of the *same submissions* on the basis of government informant privilege. (*Id.*)

For example, Complaint Counsel questioned [REDACTED]

[REDACTED] While they selectively choose to include these two particular Star submissions, their privilege log indicates they are withholding other materials submitted by Star *on the very same day* (presumably, part of the same submission) on the basis of government informer and attorney client privilege. [REDACTED]

This is just one example of many. There are dozens of entries on Complaint Counsel's privilege log of CC withholding Part 2 submissions on the basis of privilege, while affirmatively using others.

[REDACTED] This is by definition using privilege as a sword and a shield.

ARGUMENT

This Court has made clear that a party cannot use privilege as “both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” *In re OSF Healthcare & Rockford Health Sys.*, 2012 FTC LEXIS 70, at *4-5 (Mar. 19, 2012) (citing *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998)). This Court further held in its recent ruling on CC’s motion to compel that “[t]he operative case law holds that subject matter waiver occurs only where a party attempts to gain a tactical advantage by ‘us[ing] the disclosed material for advantage in the litigation but [invoking] the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials.’” (See July 13, 2012 Order at 4) (citing *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011)). This is exactly what is occurring here - [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] Now, Complaint Counsel is attempting to use Star’s submissions to gain a tactical advantage in this litigation while hiding behind the government informer privilege to deny McWane access to Star’s other white papers and submissions.

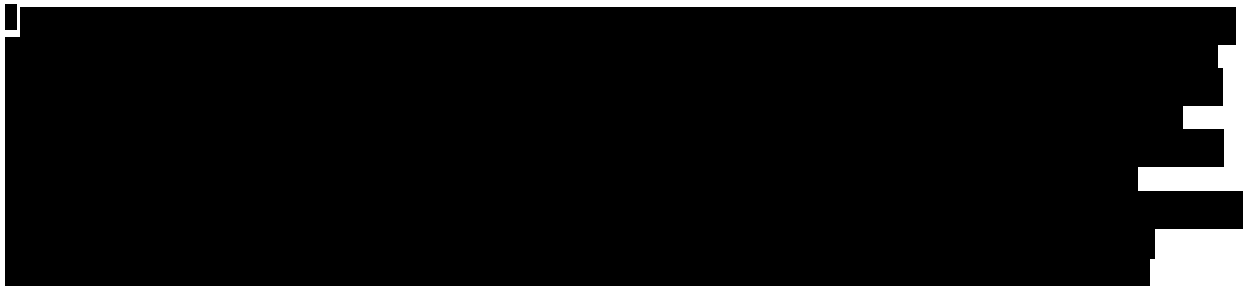
Here, Complaint Counsel is picking and choosing what submissions it wants to use (and therefore produces) and what they withhold. This violates well-settled case law as well as fundamental fairness. McWane has an interest in the truth coming out in this litigation and Complaint Counsel is merely hiding behind their privilege log in an attempt to prejudice McWane. [REDACTED]

[REDACTED]

Complaint Counsel has not denied that additional Star white papers exist, but merely argued that such submissions are privileged, were not provided to their expert, and has thus refused to produce them on those grounds.¹ Accordingly, Complaint Counsel should produce all such submissions immediately, or be precluded from using any submissions to the Commission during its Part 2 investigation by any party or non-party during trial.

CONCLUSION

For the reasons set forth herein, McWane's Motion is due to be granted.



/s/ Joseph A. Ostoyich
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One of the Attorneys for McWane, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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, Rm. H-113
Washington, DC 20580

I also certify that I delivered via 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:

Edward Hassi, Esq.
Geoffrey M. Green, Esq.
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By: /s/ William C. Lavery
William C. Lavery
Counsel for McWane, Inc.

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| |) | |
| Respondents. |) | |
| _____ |) | |

PROPOSED ORDER

On July 27, 2012, McWane, Inc. filed its Motion in Limine to Preclude Complaint Counsel From Using Privilege as a Sword and a Shield. Upon consideration of this motion, it is hereby GRANTED.

ORDERED:

_____, 2012

D. Michael Chappell
Administrative Law Judge

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STATEMENT REGARDING MEET AND CONFER

Pursuant to Paragraph 4 of the Scheduling Order, counsel for McWane met and conferred in good faith with Complaint Counsel regarding the issues raised in this motion but could not reach an agreement.

By: /s/ William C. Lavery

Counsel for McWane, Inc.

EXHIBIT 1

**This exhibit has been
marked Confidential
and redacted in its
entirety**

EXHIBIT 2

**This exhibit has been
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EXHIBIT 3

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EXHIBIT 4

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EXHIBIT 5

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