

ORIGINAL

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



In the Matter of)
)

McWANE, INC.,)
a corporation, and)

STAR PIPE PRODUCTS, LTD.,)
a limited partnership,)
Respondents.)
_____)

DOCKET NO. 9351

**ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S
MOTION *IN LIMINE* TO PRECLUDE COMPLAINT COUNSEL
FROM USING PRIVILEGE AS A SWORD AND A SHIELD**

I.

On July 27, 2012, Respondent McWane, Inc. ("Respondent" or "McWane") filed a Motion *in Limine* to Preclude Complaint Counsel From Using Privilege as a Sword and a Shield ("Motion"). Complaint Counsel filed an opposition to the Motion on August 7, 2012 ("Opposition"). Having fully considered the Motion and the Opposition, and as more fully explained below, Respondent's Motion is GRANTED IN PART and DENIED IN PART.

II.

Respondent contends that Complaint Counsel will be using privilege as both a "sword and a shield" at trial, by relying upon certain "white papers"¹ and other submissions and testimony provided by McWane, SIGMA Corporation ("SIGMA"), and Star Pipe Products, Ltd. ("Star") during the investigation phase of this matter (the "Part 2 submissions"), while at the same time withholding other Part 2 submissions, or parts thereof, as privileged. Specifically, Respondent contends that Complaint Counsel's expert reviewed, and/or based his opinions in part upon, certain Part 2 submissions; that Complaint Counsel designated as exhibits for trial 19 investigational hearing transcripts ("IHTs") including IHTs that contain questions on some documents submitted during the Part 2 investigation; and that Complaint Counsel's exhibits include six documents obtained from Part 2 submissions, but that Complaint Counsel withheld other Part 2 submissions, including three IHTs. To illustrate, Respondent states that during

¹ A "white paper" is a government or other authoritative report giving information or proposals on an issue. See <http://www.merriam-webster.com/dictionary/white%20paper>.

questioning of a witness from Star at an investigational hearing, the witness identified documents marked as CX0015 and CX0016 as part of Star's August 31, 2010 submission, but that Complaint Counsel also identified as privileged and withheld from discovery other documents dated August 31, 2010, which Respondent surmises constitute parts of the same submission. As another illustration, Respondent asserts that Complaint Counsel withheld three investigative hearing transcripts of waterworks distributors (Tysinger, Himes and Henderson) that Respondent asserts were reviewed and relied upon by Complaint Counsel's expert, but that Complaint Counsel contended was a mistake and continues to refuse to produce these IHTs.

Respondent claims that it has "legitimate concerns" that Star "misled the Commission" with its Part 2 submissions and testimony; that Respondent is entitled to determine if Star made misleading statements during the Part 2 phase; and that Respondent has "a clear interest to know exactly what information" the Commission and Complaint Counsel used in deciding to issue the Complaint in this matter.

Relying on the "sword and shield" doctrine, discussed further *infra*, Respondent seeks an order (1) precluding Complaint Counsel from proffering an expert opinion based on any submission to the FTC by any non-party during the Part 2 investigation, and striking those portions of Complaint Counsel's expert's report that rely on any such submissions, and (2) precluding Complaint Counsel from introducing testimony (including via deposition or investigational hearing transcript designations) regarding any submissions from the FTC's Part 2 investigation. In the alternative, Respondent requests an order compelling Complaint Counsel to produce all submissions made by Star, and others, if any, to the FTC during the Part 2 investigation.

Complaint Counsel responds that, although designated as a motion *in limine*, Respondent's Motion is actually a motion to compel Complaint Counsel to produce documents withheld during discovery as privileged, which motion Complaint Counsel asserts is untimely under the Scheduling Order issued in this case.² Complaint Counsel further asserts that, while Complaint Counsel withheld as privileged some documents and testimony obtained during the Part 2 investigation, it produced all non-privileged Part 2 submissions, including any investigational hearing transcripts (and exhibits) for any individuals who appeared on Complaint Counsel's preliminary witness list, and all non-privileged non-party document productions. In addition, Complaint Counsel specifically states that "neither Complaint Counsel nor its expert have relied during discovery -- nor will rely upon at trial -- any Part 2 materials withheld from Respondent," that Respondent has all white papers that Complaint Counsel's expert reviewed, and that Complaint

² Paragraph 9 of the Scheduling Order's Additional Provisions states in part: "Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs." Complaint Counsel asserts that on March 30, 2012, after completing its document production in response to Respondent's First Set of Requests for Documents, Complaint Counsel produced its privilege log to Respondent that identified documents and investigational hearing transcripts that Complaint Counsel had withheld from discovery. Complaint Counsel further asserts that Respondent had notice that Complaint Counsel had not produced the documents that are now the subject of the Motion as of March 30, 2012, and a motion to compel is, therefore, untimely.

Counsel assured Respondent's counsel during "meet and confer" discussions that "Complaint Counsel's expert would not review or rely upon any Part 2 materials – either in preparing his expert report or in providing testimony at trial – that were not produced to Respondent." Holleran Decl. ¶ 5. Finally, Complaint Counsel notes that Respondent does not contend that any of the withheld documents were not properly withheld as privileged, and that in any event "exactly what information" was relied upon in deciding to bring suit in this matter is not relevant.

III.

1. *In Limine* standards generally

As stated most recently in *In re POM Wonderful LLC*:

"Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g., In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).

Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

2011 FTC LEXIS 77, at *3-4 (May 5, 2011).

In addition, "[i]n *limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial." *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009) (citations omitted). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Id.* (quoting *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000)).

2. “Sword and shield” doctrine

Respondent’s motion to preclude Complaint Counsel from relying on any Part 2 submissions, because some Part 2 submissions have been withheld as privileged, is based upon the “sword and shield” doctrine. As set forth recently in this case, the “sword and shield” doctrine holds that a litigant cannot use privileged documents “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 McWane, Inc.*, 2012 FTC LEXIS 126, at *7-8 (July 13, 2012) (Chappell, ALJ) (quoting *In re Motor Up Corp., Inc.*, 1999 FTC LEXIS 262, *5 (Aug. 5, 1999)) (“July 13 Order”). The July 13 Order continues:

The 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.” *Lerman v. Turner*, 2011 U.S. Dist. LEXIS 715, at *25-26 (N.D. Ill. Jan. 5, 2011). . . . “The primary inquiry is whether the party claiming privilege will assert the allegedly protected material in aid or in furtherance of its claims or defenses.” *Chevron Corp. v. Stratus Consulting, Inc.*, 2010 U.S. Dist. LEXIS 110023, at *32 (D. Co. Oct. 1, 2010) (citation omitted). “In an adversarial proceeding, a process designed to reach the truth of the matter through the presentation of opposing perspectives, justice does not permit one side to inform and facilitate a damages assessment, purposed for the reliance of the court, without permitting its opponent access to the materials and process underlying the assessment.” 2010 U.S. Dist. LEXIS 110023 at *33.

2012 FTC LEXIS 126, at *8-9 (quoting *In re OSF Healthcare System*, 2012 FTC LEXIS 70, at *4-6 (March 19, 2012)).

IV.

Respondent has not sufficiently identified any Part 2 submission being proffered as evidence in this case, including any submission reviewed or relied upon by Complaint Counsel’s expert, that has been withheld by Complaint Counsel. Respondent’s contention, that three withheld IHTs (from Tysinger, Himes and Henderson) were considered by the expert, is not supported by the record. In support of this contention, Respondent cites to Appendix B to the expert report, attached to Respondent’s Motion, which is a list of all the materials considered by the expert; however, the three IHTs identified by Respondents do not appear to be listed. Respondent’s further reliance on the deposition testimony of Complaint Counsel’s expert that he received “all the investigational hearing transcripts” is misplaced, because it does not appear that the expert could have personal knowledge as to whether or not what he received, in fact,

constituted “all the investigational hearing transcripts” in the case. Complaint Counsel’s Opposition fails to address this issue. Complaint Counsel maintains that the Part 2 submissions being relied upon by Complaint Counsel are non-privileged and that neither Complaint Counsel nor its expert is relying on any Part 2 submissions that have not been produced to Respondent.

It cannot be determined on the basis of the motion papers and attachments that Complaint Counsel has used, or intends to use, privileged materials as a sword while shielding others from discovery. Because it does not appear that privileged materials are being used as a “sword,” the fact that other, assertedly privileged documents are being shielded is insufficient to invoke the “sword and shield” doctrine. See *McWane, Inc.*, 2012 FTC LEXIS 126, at *10 (holding that “sword and shield” did not apply where, although Respondent appeared to be relying on a defense of advice of counsel as a “sword,” Complaint Counsel failed to identify evidence Respondent was shielding from Complaint Counsel on the ground of privilege). Respondent raises no basis other than the “sword and shield” doctrine for precluding use of Part 2 submissions. Accordingly, Respondent’s request to preclude Complaint Counsel from relying on any Part 2 submissions is unjustified.

Respondent’s alternative request that Complaint Counsel be compelled to produce privileged Part 2 materials is similarly based upon the “sword and shield” doctrine. Respondent does not contend that the withheld Part 2 submissions are not subject to a valid privilege, but rather argues that it is fundamentally unfair to permit Complaint Counsel to rely upon some Part 2 submissions while withholding others. However, as noted above, the “sword and shield” doctrine is inapplicable because it has not been demonstrated that Complaint Counsel has used, or intends to use, any privileged Part 2 submissions. Because Respondent has not raised any other valid basis for compelling production of privileged Part 2 submissions, Respondent has failed to justify an order compelling these materials.

In the event that any Complaint Counsel witness, expert or fact, has relied upon any information, including documents, testimony or other information, that was withheld from Respondent, it would be unfair to allow Complaint Counsel to rely upon any such information as evidence at trial. Accordingly, Complaint Counsel will be prohibited from doing so by this Order, as set forth *infra*. In this regard, Respondent’s Motion to Preclude Complaint Counsel from Using Privilege as a Sword and a Shield is GRANTED IN PART, but is otherwise DENIED.

V.

Having fully considered the Motion and the Opposition, and for the foregoing reasons, Respondent’s Motion *in Limine* to Preclude Complaint Counsel From Using Privilege as a Sword and a Shield Motion is GRANTED IN PART, and it is hereby ORDERED that Complaint Counsel is precluded from offering at trial in this case, by documents or testimony, including deposition testimony, or by any other method or means, including as the basis of opinions or conclusions of its expert, any information,

documents, testimony or other information, from the Part 2 investigation in this matter that Complaint Counsel has withheld from Respondent on the basis of privilege. In all other respects, the Motion is DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of any particular Part 2 submission that may be offered at the hearing, or of any expert opinion based thereon, in whole or in part.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: August 14, 2012