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

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

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINT COUNSEL'S MOTION TO EXCLUDE EVIDENCE OR IN THE ALTERNATIVE TO COMPEL DISCOVERY

I. Introduction

On June 25, 2012 Complaint Counsel filed a Motion to Exclude Evidence Relating to Advice Related to DIFRA and its Operations ("Motion to Exclude"), or in the Alternative, to Compel Related Discovery ("Motion to Compel") (collectively, "Motion"). According to the Motion, the Ductile Iron Fitting Research Association ("DIFRA") was created as a trade association in 2007, with a membership consisting of Respondent McWane, Inc., ("Respondent" or "McWane"), Star Pipe Products ("Star"), Sigma Corp. ("Sigma"), and United States Pipe and Foundry Company LLC ("U.S. Pipe"). The Complaint in this case alleges, *inter alia*, that during parts of 2008 and 2009, DIFRA maintained an information exchange that collected and reported the total fittings shipped by DIFRA's members, and that this information exchange facilitated price coordination by indirectly enabling mutual monitoring of an alleged agreement to limit price discounting. Motion at 2; Complaint ¶¶ 35-37.

McWane, Inc. filed an Opposition to the Motion on July 5, 2012 ("Opposition"). Although they are not parties to this action, because their interests were implicated, responses were also submitted on July 5, 2012 by Star and U.S. Pipe, and on July 9, 2012 by Sigma. Having fully considered the Motion and Opposition, the Motion is GRANTED IN PART AND DENIED IN PART, as more fully explained below.

II. Contentions of the Parties

A. Complaint Counsel

According to the Motion, DIFRA's counsel during the relevant time period in this case was the firm of Bradley Arant Boult Cummings LLC ("Bradley Arant"), and principally its attorney Thad Long. Complaint Counsel contends that, although Respondent previously disavowed any intent to rely on an advice of counsel defense in this case, Respondent appears to be doing so. In support of this contention, Complaint Counsel cites Respondent's Motion for Summary Decision, filed June 1, 2012, in which Respondent, to support the claim that DIFRA was not a mechanism to facilitate price coordination, cited to the testimony **{of DIFRA's lawyer denying that DIFRA was a mechanism to facilitate price coordination}**. McWane Summary Decision Memorandum at 19 (Motion Exh. C).

Complaint Counsel also states that in response to Complaint Counsel's Requests for Admissions 48-50 ("RFAs") concerning Respondent's use of data from the DIFRA information exchange, Respondent referred to the advice of its counsel, stating: **{"As explained by Thad Long, the experienced antitrust counsel who was retained by the Association to provide it with competent legal advice, DIFRA was a pro-competitive trade association."}** Respondent's Responses to Requests for Admissions 48-50 (Motion Exh. D).

Complaint Counsel further contends that McWane's counsel elicited deposition testimony from DIFRA's president, Mr. Tom Brakefield, regarding Mr. Long's advice, as follows:

> **{Q. . . . Mr. Long says in the first paragraph, I have received proposed reporting forms from two of the four DIFRA participants and I find they are fairly consistent in approach and seem to minimize antitrust concerns. Was that advice he gave the organization at that time?**
>
> **A. That's correct.}**

Brakefield Dep. at 56-57 (Motion Exh. E). Also cited by Complaint Counsel is deposition testimony elicited by McWane's counsel from Mr. Brakefield describing Mr. Long's advice concerning legal ways fittings sales could be reported to DIFRA. *Id.*, at 37, 75 (Motion Exh. E).

According to Complaint Counsel, in "meet and confer" discussions prior to filing the Motion, Respondent would not agree to forego relying at trial upon evidence concerning Mr. Long's advice regarding DIFRA, although according to Complaint Counsel, Respondent previously disclaimed any intent to offer such evidence. In addition, Complaint Counsel's Meet and Confer Statement, attached to the Motion, states that the other members of DIFRA (Star Pipe Sigma and U.S. Pipe), communicated to Complaint Counsel that they would not waive the attorney-client privilege with respect to DIFRA. (Motion Exh. A).[1] Moreover, according to the

[1] Star's response to the Motion took no position on the request to exclude evidence, and further stated that it was "unable to respond" to the request to reopen discovery but reserved the right to object in the future to specific discovery requests. The responses of U.S. Pipe and Sigma were substantially the same.

Motion, Mr. Long has refused to answer deposition questions concerning his advice as to the legality of DIFRA and the information exchange, based upon the attorney-client privilege. In addition, Complaint Counsel states that, although McWane has stated that it does not intend to call Mr. Long as a witness at trial, pre-trial discovery indicates that McWane may elicit testimony that DIFRA members acted in accordance with Mr. Long's advice.

Invoking the "sword and shield" theory regarding privileges, Complaint Counsel argues that Respondent cannot fairly use advice of counsel in defense of claims in this case yet prevent Complaint Counsel from obtaining discovery regarding the claimed advice. Complaint Counsel seeks an order prohibiting Respondent from introducing at trial, or otherwise referring to or relying upon, any evidence regarding (1) the advice or opinions of counsel to DIFRA concerning the legality of DIFRA's formation or operation, or (2) any reliance or compliance with such advice by any DIFRA member. If Respondent is not so precluded, then Complaint Counsel requests in the alternative it be allowed to fully discover the substance of DIFRA's counsel's advice and any reliance thereon by the members, by entry of an order (1) compelling production of all documents related to DIFRA that are currently being withheld by all DIFRA members and their attorneys, and (2) reopening discovery to allow Complaint Counsel to re-depose DIFRA's counsel, Mr. Long, DIFRA's president, Mr. Brakefield, and each DIFRA member.

B. Respondent

Respondent argues that Complaint Counsel's Motion should be denied for four reasons: (1) McWane has no right or ability to waive the attorney-client privilege on behalf of DIFRA or other members of the organization; (2) McWane has not impliedly waived the privilege by relying on any privileged communication with DIFRA's counsel. Rather, Respondent argues, it has presented only non-privileged, underlying facts about DIFRA's structure, purpose and data gathering functions, including non-privileged facts that DIFRA was established, and its information gathering activities were "guided by" "experienced antitrust counsel," in order to rebut Complaint Counsel's DIFRA allegations; (3) Complaint Counsel has not identified any document withheld by McWane based on attorney-client privilege with Bradley Arant or Mr. Long, or any instance in which McWane instructed any witness not to answer questions based on attorney-client privilege; rather, the privilege has been asserted only by Bradley Arant and Mr. Long; and (4) Complaint Counsel has failed to comply with the procedural meet and confer requirement because, despite several tries, it did not actually speak with Mr. Long, whose refusal to answer questions on the ground of attorney-client privilege is at issue.

McWane does not state whether or not it in fact intends to offer evidence at trial that it relied on advice of counsel as a defense to the charges in this case. Nor does McWane state whether or not it previously advised Complaint Counsel that it would not be offering evidence at trial regarding advice of DIFRA's counsel or members' reliance thereon.

III. Analysis

The "sword and shield" theory was addressed recently in *In re OSF Healthcare System*, as follows:

"[A] litigant cannot use the work product doctrine 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 Motor Up Corp., Inc.*, 1999 FTC LEXIS 262, *5 (Aug. 5, 1999) (citing *Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 (10th Cir. 1998)). . . .

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). "Subject matter waiver thus 'is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.'" 2011 U.S. Dist. LEXIS 715 at *26 (citing *Fed. R. Evid. 502* advisory comm. nn. (2007)).

Furthermore, "in the same vein of thought, 'waiver of the attorney client or work product privileges can occur when the privilege holder asserts a claim or affirmative defense which puts the privileged matter directly at issue.' 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 70, at *4-6 (March 19, 2012) (Chappell, ALJ).

As the above-cited authorities make clear, 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. Although Complaint Counsel asserts Respondent has invoked the attorney-client privilege to prevent discovery into legal advice provided regarding DIFRA, which assertion Respondent denies, Complaint Counsel has not supported the assertion. Complaint Counsel attaches Respondent's privilege log as an exhibit to the Motion, but fails to cite any document allegedly being improperly withheld by Respondent. Moreover, based upon the document descriptions on McWane's privilege log, which are not challenged by Complaint Counsel, there do not appear to be any withheld documents regarding DIFRA, Bradley Arant, or Mr. Long. In addition, Complaint Counsel fails to identify any deposition testimony as to which McWane asserted a privilege or instructed a witness not to answer. Rather, it appears from Complaint Counsel's

exhibits that Bradley Arant and Mr. Long invoked the privilege to withhold documents and/or testimony. Thus, regardless whether or not Respondent seeks to use advice of counsel as a "sword" at trial, Complaint Counsel has not demonstrated that Respondent has invoked the attorney-client privilege as to such advice as a "shield" against discovery.[2] Thus, the sword and shield theory is inapplicable.

It would be unfair, based on the record presented by the Motion, to limit Respondent's defenses at trial because of the assertion of privilege by non-parties. However, based upon the sword and shield theory, it would also be improper to allow Respondent to offer evidence at trial which Respondent withheld from discovery on privilege grounds. Therefore, Respondent will be prohibited from doing so by this Order, as set forth *infra*. Accordingly, Complaint Counsel's Motion to Exclude is GRANTED IN PART and DENIED IN PART.[3]

Moreover, because Complaint Counsel has not shown that Respondent is withholding any discovery from Complaint Counsel, there is no basis in law or fact for an order compelling discovery from Respondent. Indeed, Complaint Counsel's proposed order would have the effect of compelling production of documents and testimony from persons and entities other than McWane. If Complaint Counsel believes that privileged information is being withheld improperly by Bradley Arant, Mr. Long, DIFRA's president, or DIFRA members other than Respondent, it is unclear why Complaint Counsel directed the instant Motion only to McWane. Thus, Complaint Counsel's Motion to Compel is DENIED.

Finally, Complaint Counsel has not demonstrated any basis for modifying the Scheduling Order in this case to re-open discovery, which closed June 1, 2012, for the purpose of inquiring further into legal advice given to DIFRA, and reliance thereon by its members. Complaint Counsel appears to rely on alleged unfairness, asserting that Respondent previously disclaimed reliance on an advice of counsel defense, but now appears to be asserting just such a defense. However, Complaint Counsel's assertion that Respondent previously disclaimed reliance on an advice of counsel defense is not supported by Complaint Counsel's Motion or attachments thereto. The Meet and Confer Statement, upon which Complaint Counsel relies, states:

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[2] Complaint Counsel does not allege, nor is there any evidence indicating, that Respondent has caused others to invoke the privilege.

[3] Complaint Counsel also asserts, without citing any legal authority, that reliance on advice of counsel is not a legally valid defense to the claims in this case and, therefore, evidence relating thereto should be excluded as irrelevant. In this regard, Complaint Counsel's Motion to Exclude is akin to a motion *in limine*. It is well established that 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). Based on the motion papers, and outside the context of trial, it cannot be determined that evidence of advice of counsel or reliance thereon is irrelevant and inadmissible for all purposes, and therefore will not be precluded prior to trial. This determination should not be construed as a ruling on the admissibility of such evidence, should it be offered at trial. *See In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009) (Chappell, ALJ) ("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.")

"Complaint Counsel discussed its concern that McWane was relying on the advice of counsel while still asserting privilege to prevent fair discovery on the issue. McWane claimed that it did not think that the attorney-client privilege had been waived, and that it would not agree to forego relying upon evidence at trial related to Mr. Long's advice regarding DIFRA, or any reliance thereof by any of the DIFRA members." (emphasis added). Complaint Counsel also notes that none of the DIFRA members would agree to waive the attorney-client privilege. Neither a refusal to forego a defense, nor a refusal to agree to a privilege waiver, establishes that Complaint Counsel has been unfairly misled so as to provide good cause to reopen discovery. *See* 16 C.F.R. § 3.21(c)(2) ("Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause."). Moreover, it is not clear from the Motion papers that Respondent will, in fact, rely on the defense at trial. In addition, reopening discovery at this time -- less than two months before the commencement of trial -- for the purposes identified by Complaint Counsel threatens to delay disposition of the proceedings. *See id.* ("In determining whether to grant the motion, the Administrative Law Judge shall consider . . . the need to conclude the evidentiary hearing and render an initial decision in a timely manner."); *see also* 16 C.F.R. § 3.42(c) ("Administrative Law Judges shall have the duty . . . to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order."). Accordingly, Complaint Counsel's request to reopen the discovery deadline is DENIED.

IV. Conclusion

Having fully considered the Motion and the Opposition, exhibits in support thereof, and for the foregoing reasons, it is hereby ORDERED:

1. Complaint Counsel's Motion to Exclude is GRANTED IN PART and DENIED IN PART. Respondent is hereby precluded from offering at trial in this case, by documents or testimony, including deposition testimony, or by any other method or means, any evidence regarding legal advice related to DIFRA and its operations, or reliance thereon, that Respondent has previously withheld from Complaint Counsel on the basis of attorney-client privilege;

2. Complaint Counsel's Motion to Compel is DENIED; and,

3. Complaint Counsel's request to re-open discovery is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 13, 2012