

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



\_\_\_\_\_) )  
In the Matter of ) )  
 ) )  
McWANE, INC., ) )  
Respondent. ) )  
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**PUBLIC**

DOCKET NO. 9351

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

**Introduction**

McWane, Inc.’s Motion *in Limine* to Preclude Complaint Counsel from Using Privilege as a Sword and a Shield (“Motion”) should be denied as a poorly disguised motion to compel documents that Complaint Counsel properly withheld as privileged. It is untimely, *see* February 15, 2012 Scheduling Order, *as amended*, at ¶ 9 (“Scheduling Order”), and meritless: Respondent does not claim that any documents on Complaint Counsel’s privilege log are not privileged, or that Complaint Counsel waived any privilege. Nor does Respondent claim that Complaint Counsel intends to introduce at trial any withheld information. Instead, Respondent argues that because Complaint Counsel produced some documents from its Part 2 investigation, it should have to produce *all* documents – including privileged ones – or be barred from using any such documents. Respondent’s position is inconsistent with this Court’s decision in *In re MSC Software Corp.*, 2002 WL 31433972 (F.T.C. May 7, 2002). Moreover, Respondent does not claim it will suffer any prejudice from Complaint Counsel’s use at trial of documents available to both parties. Respondent’s only express justification for the Motion – so that it can “know *exactly* what information the Commission and Complaint Counsel used in their decision to bring

suit here,” Motion at 5 (emphasis in original)<sup>1</sup> – is clearly shielded by the deliberative process privilege and not subject to discovery. Accordingly, Respondent’s Motion should be denied.

### Analysis

#### A. Respondent’s Motion to Compel Should Be Denied

Respondent’s Motion seeks to compel the production of *all* Part II submissions from Complaint Counsel’s privilege log. *See* Motion at 2, 5 (“Complaint Counsel should produce all [Part 2] submissions immediately”). This Motion is untimely and meritless.

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. This privilege log identified documents and IH transcripts that Complaint Counsel had withheld from its document production on the basis of various privileges, including government investigatory privilege, informer privilege and attorney work product. Holleran Decl., at ¶ 2 (noting that privilege log was never amended). Respondent therefore had notice as of March 30, 2012, that Complaint Counsel had not produced the documents that are now the subject of its Motion. Paragraph 9 of the Scheduling Order requires any motion to compel to be filed within 30 days of service, or within 20 days after the close of discovery, whichever occurs first. Under either deadline, Respondent’s Motion is untimely.

Respondent’s Motion is also meritless. Respondent never argues that any of the withheld documents are not privileged, or that Complaint Counsel waived any of its properly asserted privileges. Accordingly, Respondent’s demand that Complaint Counsel produce Part 2 materials from its privilege log should be denied.

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<sup>1</sup> Respondent’s Motion is an improper effort to prove its unconfirmed theory that Star Pipe Products LLP was one of the complainants that prompted the investigation in this matter. *See* Motion at 4-5; Holleran Decl., at ¶ 7-9. A complainant’s identity is protected by the informer’s privilege, and Complaint Counsel has properly protected that privilege by neither confirming nor denying the identity of any protected informers. *See* Holleran Decl., at ¶ 3, 7.

**B. Respondent's "Sword" and "Shield" Argument For Excluding Evidence Is Without Merit**

In the alternative, Respondent seeks to preclude Complaint Counsel "from using any submissions to the Commission during its Part 2 investigation by any party or non-party during trial." Motion at 2, 5. Respondent bases its argument on the fact that Complaint Counsel did not produce *all* documents submitted in Part 2, but withheld some as privileged. *Id.* at 1. Contrary to Respondent's characterization of this as "improper game-playing," Complaint Counsel was following this Court's precedent.

In *MSC*, this Court recognized the Commission's interest in protecting the identity of informers, and specifically held that producing some Part II materials does not waive the privilege with respect to all Part II materials:

Complaint Counsel's identification of some of the individuals with whom it communicated during the investigatory stage and Complaint Counsel's production of the investigational hearing transcripts of those individuals does not waive the privilege as to other individuals' identities that have not yet been disclosed.

2002 WL 31433972, at \*2. In addition to being protected by the informer privilege, this Court also held that IH transcripts were protected by the work product doctrine because "[t]he attorney in an investigational hearing questioning a third party witness should be able to ask questions, lead the witness, comment and summarize without fear that the latter would later be turned over to his adversary...". *Id.* at \*3.

Consistent with *MSC* and the cases cited therein, Complaint Counsel withheld documents as necessary to protect the government informer privilege, government investigatory privilege, and work product privilege, but produced non-privileged Part 2 submissions. For example, Complaint Counsel produced all prior sworn testimony, including any IH transcripts and declarations, for any individuals who appeared on Complaint Counsel's preliminary witness list.

*See id.*; *see also Harper & Row*, 1990 FTC LEXIS 213, at \*15 (June 27, 1990) (ruling that complaint counsel must reveal the identities of witnesses they expect to call).

Importantly, Respondent does not identify any prejudice whatsoever that it would suffer from the use at trial of non-privileged materials from the Part 2 investigation produced to it by Complaint Counsel (the alleged “sword”). Holleran Decl. at ¶ 9. For example, Respondent criticizes Complaint Counsel’s expert for relying on { }, but it never explains how this prejudices Respondent. *Id.* Respondent has { } Complaint Counsel’s expert reviewed, and { } Dr.

Schumann’s review of those materials inured to Respondent’s benefit. Respondent’s only express justification for its Motion – that it has “a clear interest to know *exactly* what information the Commission and Complaint Counsel used in their decision to bring suit here,” Motion at 5 (emphasis in original) – is irrelevant to the issues in this case, is protected by the deliberative process privilege, and does not justify excluding any evidence. *See FTC v. Warner Communics., Inc.*, 742 F. 2d 1156, 1161 (9th Cir. 1984) (citations omitted) (deliberative process privilege protects from discovery all deliberations comprising the process by which government decisions and policies are formulated); *see also MSC*, 2002 WL 31433972, at \*3 (noting that results of Complaint Counsel’s investigation is not a “‘need,’ nor a right recognized by the Commission’s rules”).

Respondent acknowledges that both parties will try this case on the same discovery record. Holleran Decl., at ¶ 6. Consistent with this Court’s earlier ruling, neither Complaint Counsel nor its expert have relied upon during discovery -- nor will rely upon at trial -- any Part 2 materials withheld from Respondent. *Id.* at ¶ 5; *see also In re McWane, Inc.*, Dkt. 9351, Order

at 6 (July 13, 2012) (ruling that “Respondent may not offer evidence at trial which Respondent withheld from discovery on privilege grounds.”). Respondent has thoroughly used non-privileged Part 2 materials throughout the discovery process, and precluding Complaint Counsel from similarly relying on materials that have been fully available to Respondent for months would be unfair and prejudicial. *See* Holleran Decl., at ¶ 10.

**Conclusion**

For the above reasons, Respondent’s Motion should be DENIED.

Dated: August 13, 2012

Respectfully submitted,

s/ Linda M. Holleran  
Edward D. Hassi, Esq.  
Geoffrey M. Green, Esq.  
Linda M. Holleran, Esq.  
Thomas H. Brock, Esq.  
Michael J. Bloom, Esq.  
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**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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In the Matter of	)	
	)	
<b>McWANE, INC.,</b>	)	<b>PUBLIC</b>
<b>Respondent.</b>	)	
	)	DOCKET NO. 9351
	)	

**DECLARATION OF LINDA M. HOLLERAN**

Pursuant to 28 U.S.C. § 1746, I make the following statement:

1. My name is Linda M. Holleran. I am making this statement in *In the Matter of McWane, Inc.*, FTC Docket No. 9351, in support of Complaint Counsel’s opposition to McWane, Inc.’s Motion *in Limine* to Preclude Complaint Counsel from Using Privilege as a Sword and a Shield (“Motion”). All statements in this Declaration are based on my personal knowledge as Attorney for the U.S. Federal Trade Commission, Bureau of Competition, and if called upon to testify, I could competently do so.
2. After completing its document production in response to Respondent’s First Set of Requests for Documents, Complaint Counsel produced to Respondent a privilege log on or about March 30, 2012. This privilege log identified documents and IH transcripts that Complaint Counsel had withheld from its document production on the basis of various privileges, including government investigatory privilege, informer privilege and attorney work product. This privilege log was never amended.
3. To protect those firms and individuals whose identities are protected by the informer’s privilege, Complaint Counsel has never confirmed or denied whether a specific firm or individual assisted Complaint Counsel during the Part 2 investigation.

4. Complaint Counsel produced to Respondent at the beginning of the discovery period all non-privileged materials from the Part 2 investigation. For example, Complaint Counsel issued subpoenas *duces tecum* for third party documents, and subpoenas *ad testificandum* for numerous investigational hearings (“IH”) during the Part 2 investigation. Complaint Counsel produced to Respondent all responsive third-party document productions. Complaint Counsel also produced any IH transcripts (and all of their exhibits), any declarations (and their attachments), or any other prior sworn testimony for the individuals who were identified on Complaint Counsel’s Preliminary Witness List.
5. Complaint Counsel has assured counsel for Respondent that Complaint Counsel would not rely on any Part 2 materials – either in discovery or at trial – that were withheld as privileged and not produced to Respondent. Complaint Counsel also has assured counsel for Respondent 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.
6. Counsel for Respondent has acknowledged these assurances, and has admitted that Respondent does not dispute that both Respondent and Complaint Counsel, including Complaint Counsel’s economic expert, are relying on the exact same discovery record for trial.
7. On July 26, 2012, William Lavery, counsel for Respondent, called me to meet and confer about the Motion. In the telephone call, Mr. Lavery informed me that Complaint Counsel had to produce all alleged white papers from Star Pipe Products LLP (“Star”) that Complaint Counsel allegedly had withheld as privileged from the Part 2 investigation or

else it would file the instant Motion. Consistent with the informer's privilege, I did not confirm or deny whether any such white papers existed.

8. When I explained that a motion *in limine* was to exclude evidence, and that the time for motions to compel had passed, Mr. Lavery finally identified that they would move to strike six exhibits from Complaint Counsel's Proposed Trial Exhibits (CX 0015-0020), and the references in the expert report of Complaint Counsel's economic expert, Dr. Schumann, that reflected Dr. Schumann's review and reliance on {
- } during the Part 2 investigation.

9. I queried Mr. Lavery as to how Dr. Schumann's reliance on {
- } would prejudice Respondent as that appeared to only benefit Respondent. Mr. Lavery could not articulate any way in which Dr. Schumann's review of and reliance upon {
- } would prejudice Respondent at trial or otherwise. While Mr. Lavery insisted that Complaint Counsel should not be able to use privilege as a shield and a sword, he also could not explain how Respondent would be prejudiced by the introduction of CX 0015-0020 as trial exhibits. Nevertheless, Mr. Lavery reiterated his original statement that the only way Complaint Counsel could avoid this Motion was to produce any alleged white papers from Star.

10. Complaint Counsel would be unfairly prejudiced if, on the eve of trial, it suddenly could not use non-privileged discovery from the Part 2 investigation that had been equally available to Respondent for months. Both parties regularly used Part 2 materials throughout the discovery period. If Respondent had raised its objection to Complaint



Counsel's privilege log earlier, Complaint Counsel could have used the discovery period to develop alternate evidence that would have established the facts contained in the Part 2 materials Respondent now wishes to exclude. It is now too late to do so.

Pursuant to 28 U.S.C. § 1746, I declare, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Respectfully submitted,

s/ Linda M. Holleran  
Linda M. Holleran, Esq.  
Counsel Supporting the Complaint  
Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580

**CERTIFICATE OF SERVICE**

I hereby certify that on August 13, 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 electronic mail and 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:

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*Counsel for Respondent McWane, Inc.*

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 13, 2012

By: s/ Thomas H. Brock  
Attorney