

II.

AHP moves for a protective order (i) compelling Complaint Counsel to return to AHP or destroy all copies of nine documents it claims are privileged and work product and were

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

current outside counsel, Arnold & Porter, produced more than 27,000 pages to the FTC during

~~the same period of investigation.~~ ~~It is not clear how many of these pages were relevant to the~~

~~investigation.~~

~~As a result of the investigation, the Commission has concluded that the Commission's~~
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Weaver Popcorn Co., Inc., 132 F.R.D. 204, 207 (N.D. Ind. 1990)). Whether or not a privilege has been waived can be determined by assessing the circumstances under which the documents were

produced. See *Id.*, 132 F.R.D. at 207. 2000 PTOLBY 165 (11/15/00) (11/15/00)

[REDACTED]

17110, *7-8 (N.D. Ill. 1995) (finding waiver where reviewing attorneys applied inconsistent standards for determining privilege).

There are cases where the procedures in place at the time of production were less rigorous than those employed by counsel for AHP and the court found the procedures to be reasonable. *E.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985). However, in the instant case, counsel for AHP failed to take reasonable precautions to preserve

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

with the FTC's subpoena *duces tecum*. Shaheen Decl. at ¶¶ 2,7. *See F.C. Cycles*, 184 F.R.D. at 70.

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

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[REDACTED]

AHP has not met its burden of showing that, under the totality of these circumstances, AHP did not waive any privileges. Accordingly, AHP has waived its right to assert the work product or attorney-client privileges as to these nine documents and to Dey's testimony regarding five of the documents. For the above stated reasons, AHP's motion is DENIED. Although AHP is found to have waived any privileges, this order does not constitute an admission that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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