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It is now clear that Complaint Counsel intends to affirmatia ade

ivileged." That, by definition, is improper game-playing because it uses the d (selectively waiving it when Complaint Counsel believes it suits its interest) oking it to withhold submissions from McWane when its suits Complaint. This Court has already noted that such game-playing is improper: "the theory applies to a litigant that seeks to use information as a 'sword,' in tim or defense, but at the same time 'shields' such information from discovery ilege." (See July 13, 2012 Order at 4.) Indeed, Complaint Counsel has also a party cannot use privilege as "both a sword and shield by selectively using timents to prove a point but then invoking the privilege to prevent an opponent me assertion." (see CC's June 25, 2012 Motion to Exclude quoting In re OSF

Healthcare	& Roc	kford Heal	th Sys.	2012	FTC I	LEXIS 70	. at *4-5	(Mar. 1	9, 2012)	.)

Case law is clear that Complaint Counsel canno

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 -

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 (use esweð

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 <u>any submissions</u> tthu Compissions

OF COUNSEL:
Joseph A. Ostoyich
William C. Lavery
Baker Botts L.L.P.
The Warner
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2420
Phone: 202.639.7700

Fax: 202.639.7700 Fax: 202.639.7890 joseph.ostoyich@bakerbotts.com andreas.stargard@bakerbotts.com

J. Alan Truitt Thomas W. Thagard, III Julie S. Elmer Maynard, Cooper & Gale, P.C. 1901 Sixth Avenue North 2400 AmSouth/Harbert Plaza Birmingham, AL 35203-2608 (205) 24 t

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In the Matter of)
McWANE, INC.,)
a corporation, and)) DOCKET NO. 9351
STAR PIPE PRODUCTS, LTD., a limited partnership,)))
Respondents.))
#2/#	/ -+ , " / 2 , + <u>2</u> "
On July 27, 2012, McWane, Inc. f	filed its Motion in Limine to Preclude
Complaint Counsel From Using Privileg	e as a Sword and a Shield. Upon
consideration of this motion, it is hereby GR	ANTED.
ORDERED:	
	D. Michael Chappell Administrative Law Judge

_____, 2012

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