



*Healthcare & Rockford Health Sys.*, 2012 FTC LEXIS 70, at \*4-5 (Mar. 19, 2012.)

Case law is clear that Complaint Counsel cannot

\_\_\_\_\_

\_\_\_\_\_



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 - [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] 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 esved

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.<sup>1</sup> Accordingly, Complaint Counsel should produce all such submissions immediately, or be precluded from using any submissions 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: 202.639.7890

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

#\$%&' (

(+2\*'0' (. \*+" / 0"-+24' (+"

I hereby certify that on A

---

\$ ) ' \* + , " - \* . \* + - " / 0 " . 1 + 2 ' ( .  
% + 0 / 2 + " \* 3 + " 0 + , + 2 . & ' \* 2 . , + " ( / 1 1 ' - - ' / )  
/ 0 0 ' ( + " / 0 " . , 1 ' ) ' - \* 2 . \* ' 4 + " & . 5 " 6 \$ , 7 + -

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

# 2 / # / - + , " / 2 , + 2 "

On July 27, 2012, McWane, Inc. filed its Motion in Limine to Preclude Complaint Counsel From Using Privilege as a Sword and a Shield. Upon consideration of this motion, it is hereby GRANTED.

ORDERED:

\_\_\_\_\_, 2012

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge



\$ ) ' \* + , " - \* . \* + - " / 0 " . 1 + 2 ' ( .  
% + 0 / 2 + " \* 3 + " 0 + , + 2 . & ' \* 2 . , + " ( / 1 1 ' - - ' / )  
/ 0 0 ' ( + " / 0 " . , 1 ' ) ' - \* 2 . \* ' 4 + " & . 5 " 6 \$ , 7 + -

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

---

# \$ % & ' & ( " )

( \* + , " - . \* + / + 0 " \* 1 , " / - - - 2 "

3 1 4 5 - 6 " 7 8 2 9 + 6 - 2 0 + 1 : "

1 2 6 " 4 - 6 1 ; 0 - 6 " + 2 " + 0 , "

- 2 0 + 4 - 0 <



# \$ % & ' & ( " >

( \* + , " - . \* + / + 0 " \* 1 , " / - - 2 "

3 1 4 5 - 6 " 7 8 2 9 + 6 - 2 0 + 1 : "

1 2 6 " 4 - 6 1 ; 0 - 6 " + 2 " + 0 , "

- 2 0 + 4 - 0 <



