

08 13 2012

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

_____)	
In the Matter of)	
)	PUBLIC
McWANE, INC.,)	
Respondent.)	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"). Nevertheless, 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 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 *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 of documents available to both parties. Respondent's only express justification for the Motion – so that it can "know

suit here,” Motion at 5 (emphasis in original)¹ – 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

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

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

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DECLARATION OF LINDA M. HOLLERAN

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

4.

else it would file the instant Motion. Consistent with the former'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 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. Lavery could not articulate any way in which Dr. Schumann's review of and reliance upon _____ } would prejudice Respondent at trial or otherwise. While Lavery insisted that Complaint Counsel should not be able to use _____ as a shield

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 is now too late to do so.

Pursuant to 28 U.S.C. § 1746, I declare, under 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

