

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, et al.)	
ex rel. JAMES GARBE,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 12-CV-881-NJR-RJD
)	
KMART CORPORATION,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

On June 19, 2017, less than two months before the start of trial in this False Claims Act case, Relator James Garbe filed a motion to compel the production of Defendant Kmart Corporation’s privileged attorney-client communications (Doc. 387). Relator contends that Kmart, despite previously disavowing a good faith reliance on advice counsel defense, waived the attorney-client privilege in responding to Relator’s motion for summary judgment on the issue of scienter. Specifically, Relator refers to the following statements made by Kmart in its response:

- “the Kmart pharmacy team testified that they understood that the enrollment-based nature of Kmart’s discount programs distinguished its discounted generic program prices from Kmart’s U&C prices for those drugs”;
- “Kmart believed its discount prices would be separate from, or kept at ‘arms-length’ from, Kmart’s U&C prices”;
- Kmart’s “pharmacy team” attempted to “create a program that did not impact its U&C price ... [and] intended to do so within the bounds of applicable regulations with no intent to mislead”;

- “not a single member of the Kmart pharmacy team testified that he intended to violate the law”;
- “each one testified that he believed Kmart’s discount program was structured in a way that did not implicate U&C price, and therefore Kmart was not required to submit the discount price as U&C”;
- the “pharmacy team’s” testimony means “Kmart did not ‘knowingly’ misrepresent its U&C price to Government payers”; and
- “Put another way, the scienter issue turns on whether Kmart employees believed Kmart’s discounted prices were different than U&C.”

Relator asserts that these statements, indicating Kmart employees acted on the “good faith” belief their conduct was within the bounds of applicable regulations, implicitly waives the attorney-client privilege because the truthful resolution of these statements requires the examination of confidential communications.

In response, Kmart avers it did not place its own attorney-client communications “at issue” in this case merely by denying scienter has been proven (Doc. 393). Kmart contends that, under Relator’s interpretation of the law, any generic assertion of good faith to contest allegations of intent to violate the law automatically waives the attorney-client privilege, which cannot be the case. Kmart maintains it has merely denied it possessed the “knowledge” required for Relator to succeed on his FCA claim.

Kmart also notes that Magistrate Judge Frazier already rejected Relator’s argument at a discovery dispute conference in May 2014 (Docs. 15, 161). Magistrate Judge Frazier addressed the question of whether Kmart had waived its attorney-client privilege because of “reliance on advice of counsel” or “good faith” and concluded no such defense had been raised and no waiver had occurred. Kmart insists nothing has

changed since that time, and it will not rely on any “advice of counsel” or “good faith” defense at trial.

The attorney-client privilege protects communications made to an attorney for the purpose of seeking legal advice, encouraging open conversations between an attorney and his or her client. *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1097-98 (7th Cir. 1987). “The privilege, however, can be waived by the client, either explicitly or by implication.” *Id.* at 1098. “Implicit disclosure can occur when a holder partially discloses a confidential communication or when a holder relies on a legal claim or defense, the truthful resolution of which will require examining confidential communications.” *Id.* (internal citation omitted). To waive the privilege, “a defendant must do more than merely deny a plaintiff’s allegations. The holder [of the privilege] must inject a new factual or legal issue into the case. Most often, this occurs through the use of an affirmative defense.” *Id.* (citations omitted). “It is the nature of an affirmative defense to raise a matter outside the scope of plaintiff’s *prima facie* case.” *Id.* (citations omitted).

The Seventh Circuit has stated that the attorney-client privilege is waived when the client asserts defenses “that put his attorney’s advice at issue in the litigation.” *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1175 (7th Cir. 1995). A party cannot use the attorney-client privilege as both a shield and a sword. *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2015 WL 5123652, at *4 (N.D. Ill. Sept. 1, 2015). In other words, “a party cannot assert reliance on advice of counsel, but then assert the attorney-client privilege to shield the disclosure of that advice.” *Id.* (citing *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (“advice of counsel is

placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication.”)). In *Rhone-Poulenc*, the Third Circuit summarized the rationale for waiving the privilege when an affirmative advice of counsel defense is asserted:

Finding a waiver of the attorney client privilege when the client puts the attorney’s advice in issue is consistent with the essential elements of the privilege. That is, in leaving to the client the decision whether or not to waive the privilege by putting the attorney’s advice in issue, . . . provide[s] certainty that the client’s confidential communications will not be disclosed unless the client takes an affirmative step to waive the privilege, and . . . provide[s] predictability for the client concerning the circumstances by which the client will waive that privilege. This certainty and predictability as to the circumstances of a waiver encourage clients to consult with counsel free from the apprehension that the communications will be disclosed without their consent.

Rhone-Poulenc, 32 F.3d at 863-64.

Here, the Court concludes that Kmart has not waived the attorney-client privilege. As an initial matter, more than three years ago, Magistrate Judge Frazier found no waiver of the attorney-client privilege (Docs. 157, 161). Magistrate Judge Frazier stated that the privilege would not be waived unless Kmart affirmatively adduced evidence at trial indicating a Kmart employee relied on legal advice (Doc. 161, 10-14). Magistrate Judge Frazier also noted that if Kmart did not intend to raise such a defense, then no witness would be allowed, under anyone’s questioning, to say they “ran it by counsel.” (*Id.*, p. 14). Since that day, Kmart has continued to affirmatively disavow a reliance on counsel defense. In its response to Relator’s motion for summary judgment on scienter, Kmart did not raise any matter outside the scope of Relator’s *prima facie* case, and it did not attempt to prove any defense by referring to attorney-client

communications. Kmart merely denied Relator's allegations that it had the requisite knowledge to establish the scienter element of Relator's case.

Furthermore, the cases cited by Relator are distinguishable, as they all involve cases where the defendant affirmatively sought to use the attorney-client privilege as both a sword and a shield. In *United States v. Bilzerian*, a criminal case, the defendant relied on the advice of counsel to interpret complex securities law before taking certain actions. *United States v. Bilzerian*, 926 F.2d 1285, 1291 (2d Cir. 1991). He then sought to use counsel's advice as a shield at trial, but filed a motion *in limine* to exclude evidence of those communications with counsel. *Id.* The Second Circuit found that the defendant put his attorney's advice at issue by relying on it as a defense. *Id.* at 1292. As a result, the attorney-client privilege was waived.

The district court cases cited by Relator are similarly unpersuasive. In *Scott v. Chipotle Mexican Grill, Inc.*, a Fair Labor Standards Act case, Chipotle invoked affirmative defenses requiring a showing of good faith. In finding Chipotle waived its attorney-client privilege, the court pointed to Chipotle's corporate representative's testimony that decisions regarding its employment classifications were made "in the context of communications and discussions with our lawyers." *Scott v. Chipotle Mexican Grill, Inc.*, 67 F. Supp. 3d 607, 615 (S.D.N.Y. 2014). Because Chipotle's affirmative defense was based on its good faith reliance on counsel, the court found the plaintiffs were entitled to discovery of Chipotle's attorney-client communications. *Id.*

In *Hamilton v. Yavapai Community College*, the court found the attorney-client privilege waived where the defendants asserted an affirmative defense of "good faith"

belief in the legality of their actions in their Answer, but then refused to disclose relevant attorney-client communications. *Hamilton v. Yavapai Cmty. Coll. Dist.*, No. CV-12-08193-PCT-GMS, 2016 WL 8199695, at *2 (D. Ariz. June 29, 2016). Similarly, in *Carson v. Lake County*, the defendant asserted an affirmative defense of acting in good faith and in compliance with the law. *Carson v. Lake Cty.*, No. 2:14-CV-117-PRC, 2016 WL 1567253, at *6 (N.D. Ind. Apr. 19, 2016). The defendant also testified that its attorney gave legal advice regarding the termination of plaintiffs' employment and age discrimination laws, which was considered when deciding to terminate Plaintiff. *Id.* Thus, the court found the plaintiff was entitled to discover what that advice was. *Id.* In *McLaughlin v. Lunde Truck Sales, Inc.*, 714 F. Supp. 916 (N.D. Ill. 1989), again, the defendants explicitly asserted "good faith reliance" on the opinions of the Department of Labor as a defense, then filed an affidavit by their attorney as evidence of their good faith. *Id.* at 917, 919. For those reasons, the court found the privilege was waived. *Id.* at 920.

Finally, Relator's reliance on *Van Straaten v. Shell Oil Products Co., LLC*, to support his argument that it "remains to be seen" whether Kmart will introduce evidence of consultation with an attorney as proof of its good faith efforts at legal compliance is unavailing. In *Van Straaten*, the defendants insisted they were not asserting an advice of counsel defense "as of right now." *Van Straaten v. Shell Oil Products Co., LLC*, No. 09-C-1188, 2010 U.S. Dist. LEXIS 98604, *3 (N.D. Ill. June 8, 2010). Then, at summary judgment, the defendants argued they reviewed the relevant statutes *and consulted with their in-house lawyers* in an effort to comply with state law. *Id.* As a result, defendants believed they were in compliance with all applicable laws. *Id.* at *3-4. Defendants

maintained they had not waived the attorney client privilege because there is a difference between an affirmative defense (reliance on counsel) and evidentiary facts refuting scienter. *Id.* at *4.

In rejecting this argument, the court noted that to make a sufficient showing of good faith, the defendants would need to show they consulted with an attorney, the nature of the advice they received, and whether they followed counsel's advice. *Id.* By allowing the defendants to make the "naked assertion that they consulted with their attorneys would leave the fact finder with the impression that they had satisfied the aforementioned conditions even in situations where they had not." *Id.* Permitting defendants to do so while still maintaining the attorney-client privilege "would effectively be abusing the privilege—using it both as a shield and a sword. This is not allowed." *Id.* at *4-5; *see also Dorr-Oliver Inc. v. Fluid-Quip, Inc.*, 834 F. Supp. 1008, 1011 (N.D. Ill. 1993) (a defendant cannot claim it consulted with counsel to bolster a good faith defense, but then claim privilege with regard to those communications); *Claffey v. River Oaks Hyundai*, 486 F. Supp. 2d 776 (N.D. Ill. 2007) (defendant waived the privilege by asserting that its "normal procedure" was to consult with counsel; even if defendant did not plan to argue it actually consulted with counsel, the evidence would create the impression that defendant had, indeed, relied on the advice of counsel while depriving plaintiff of the opportunity to discover the substance of the communications).

As previously discussed, Kmart is not wielding any swords in this case. Kmart has assured the Court on multiple occasions that it will not assert a good faith reliance on counsel defense at trial. It has not affirmatively placed its communications with

counsel at issue in the case. Therefore, Kmart has not waived the attorney-client privilege. Accordingly, Relator's motion to compel is **DENIED**.

IT IS SO ORDERED.

DATED: July 17, 2017

Handwritten signature of Nancy J. Rosenstengel in black ink, written over a faint circular seal of the United States District Court for the District of Columbia.

NANCY J. ROSENSTENGEL
United States District Judge