IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: MI WINDOWS AND DOORS, INC. PRODUCTS LIABILITY LITIGATION	:	**MDL DOCKET NO: 2333**
	:	**C.A. No. 2:12-mn-00001 (DCN)**
	:	**(All Cases)**

MOTION OF DEFENDANT MI WINDOWS AND DOORS, INC.
FOR PROTECTIVE ORDER AS TO SETTLEMENT DOCUMENTS

Pursuant Federal Rule of Civil Procedure 26, Defendant MI Windows and Doors, Inc. ("MIWD") hereby moves for a protective order limiting the production of communications and documents prepared in connection with settlement negotiations. As more fully described below, the Fourth Circuit recognizes broad protection for settlement materials, and courts in various jurisdictions have recognized a settlement privilege or examined requests for settlement communications with heightened scrutiny in light of the need to promote free and frank communication in the settlement process.

BACKGROUND

MIWD seeks a protective order that would prevent the production of communications and documents it prepared in connection with settlement efforts in prior disputes. These documents include communications by e-mail and letter and summaries that were created in an effort to resolve disputes and avoid anticipated litigation. An example of such a document relating to the dispute involving TB Philly is the e-mail communication from MIWD to the supplier labeled MIWD0000134 and listed as entry 1 on MIWD's amended privilege log. Special Master Capra concluded that the matter involving TB Philly was sufficiently related to the instant case that protection under Rule 408 could apply. *See* Special Master's rulings on

Defendant's amended privilege log (Entry No. 1, hereinafter "Privilege Log Rulings") at 2. In addition, MIWD seeks protection of communications and materials compiled in connection with negotiations to resolve a dispute with another third party involving the same underlying issue. These documents include communications and summaries that address the disputed claim and that are not relevant to the claims at issue in this case. *See, e.g.,* entries 44, 45 and 46 on MIWD's amended privilege log. MIWD would be glad to provide, for *in camera* inspection, additional background materials substantiating the existence of a legal dispute and related details of that dispute.

Special Master Capra acknowledged that there may be a basis for protection of materials involving settlement and gave MIWD 30 days to seek a protective order if it would like him to consider this issue. *See* Special Master's determination of questions involving … scope of Fed. R. Evid. 408 ("Determination") at 3-6; Privilege Log Rulings at 15. Therefore, MIWD moves for a protective order that would prevent the disclosure of these and similar documents. MIWD respectfully submits that, whether these documents are afforded protection based on a "privilege" or based on the widely-recognized need to protect confidential settlement materials for the policy reasons underlying Rule 408, the bottom line is that MIWD should not be required to produce the communications and documents it prepared in connection with the settlement process.

ARGUMENT

I. SETTLEMENT MATERIALS DESERVE BROAD PROTECTION FROM DISCLOSURE.

Federal Rule of Evidence 408 precludes certain materials relating to settlement, including conduct or statements made during settlement negotiations about the claim, from being admitted into evidence. *See* Fed. R. Evid. 408(a)(2). While this rule of evidence does not *expressly*

govern the *discovery* of settlement documents, it plays a critical role in protecting these confidential materials and requiring courts to impose restrictions on discovery under Federal Rule of Civil Procedure 26(b). Indeed, a number of courts have recognized this as a "privilege." *See Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003) ("[W]e believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized.") (case involving purchasers of heating and snowmelt systems who were denied discovery of communications made in furtherance of settlement between manufacturer of systems and manufacturer of rubber hoses used in systems); *In re MSTG, Inc*., 675 F.3d 1337, 1342 & n.2 (Fed. Cir. 2012) (patent case declining to adopt a "settlement negotiation privilege," but recognizing that courts are divided on whether there is such a privilege)(citing cases).[1]

The Fourth Circuit recognizes the value of broad protection and confidentiality of settlement documents and communications, and has explained that "Federal Rule of Evidence 408 is broader than the common law exclusionary rule in many jurisdictions and excludes from evidence all statements made in the course of settlement negotiations." *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) (citing Wright & Graham, Federal Practice and Procedure: Evidence § 5302 (1980)).[2] *See also Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 227 Fed. Appx. 239, 246-47 (4th Cir. 2007) (affirming trial court's order to strike

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[1] The Federal Circuit in *MSTG* found it unnecessary to adopt a settlement "privilege" because it recognized that "there are other effective methods to limit the scope of discovery" in order to "protect the sanctity of settlement discussions and promote the compromise and settlement of dispute" – namely, protective orders like the one MIWD seeks here. *See MSTG*, 608 F.3d at 1346; *see also* Determination at page 6.

[2] *See also* Wright & Graham, *supra* § 5302 (acknowledging privilege as a justification for excluding evidence of offers of compromise and noting that "it may be argued that the privilege theory means that the offers of compromise are not discoverable because of the exception in Civil Rule 26(b)(1) for 'privileged' matter").

paragraphs from original complaint pertaining to settlement discussions); *Arnold v. Owens*, 78 F.2d 495 (4th Cir. 1935) ("It is of course settled that an offer of compromise is privileged and may not be received in evidence."). "Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of 'impeachment evidence,' by some future third party." *Duncan v. Phoenix Supported Living, Inc.*, No. 05-0001, 2006 U.S. Dist. Lexis 66742, at *10 (W.D.N.C. Sept. 12, 2006) (citing *Goodyear Tire*, 332 F.3d at 980).

The Advisory Committee Notes to Rule of Evidence 408 recognize that "[t]he evidence [of settlement negotiations] is *irrelevant*, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position." Advisory Fed. R. Evid. 408 (emphasis added). Settlement negotiations are typically punctuated with instances of puffing and posturing since they are "motivated by a desire for peace rather than from a concession of the merits of the claim." *Goodyear Tire*, 332 F.3d at 981 (citing *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982), which also cites Advisory Committee Notes to recognize "promotion of the public policy favoring the compromise and settlement of disputes"). In addition, the "parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sorts of 'facts' would be highly misleading if allowed to be used for purposes other than settlement." *Id.* at 977 (citing *Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69, 71 (4th Cir. 1987)).

The important policy of maintaining confidentiality and allowing parties to communicate and negotiate freely (without concern that their statements or documents prepared in connection with the settlement process will be later revealed to others) is reflected in various contexts. *See, e.g.*, Fourth Circuit Local Rule 33 ("Confidentiality is required of all participants in the

mediation proceedings. All statements, documents, and discussions in such proceedings shall be kept confidential. The mediator, attorneys, and other participants in the mediation shall not disclose such statements, documents, or discussions without prior approval of the Standing Panel on Attorney Discipline. Any alleged violations of this rule shall be referred to the Court's Standing Panel on Attorney Discipline for a determination pursuant to Local Rule 46(g) of whether imposition of discipline is warranted. All proceedings before the Standing Panel on Attorney Discipline involving confidential information under this procedure shall be confidential."); *MTSG,* 675 F.3d at 1343 (recognizing a "mediation privilege" and stating that information prepared for purposes of mediation would be exempt from discovery); *Goodyear Tire,* 332 F.3d at 980 ("There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties.").

In *MSTG*, the Federal Circuit examined the interplay between Federal Rule of Evidence 408 and Federal Rule of Civil Procedure 26, and recognized that Rule 26 is an effective method for limiting the scope of discovery "to protect the sanctity of settlement discussions and promote the compromise and settlement of dispute." *MSTG*, 675 F.3d at 1346. The Advisory Committee's note to Rule 26 recognizes that the discovery rules "confer[] broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b)." Fed. R. Civ. P. 26 Advisory Committee's Note (1970 Amendment Subdivision (b)). Even as to such admissible or disclosed material, some protections may be appropriate. Citing the example of a tax return, the Advisory Committee proposing Rule 26 acknowledged that discovery could be limited where competing confidentiality interests are at stake. *Id*. The Advisory Committee recognized that although a party's tax return is generally held not

privileged, an individual's "interests in privacy may call for a measure of extra protection." *Id.* (citing *Wiesenberger v. W.E. Hutton & Co.*, 35 F.R.D. 556, 557 (S.D.N.Y. 1964)). This is consistent with the U.S. Supreme Court's instruction that "district courts should not neglect their power to restrict discovery where justice requires protection for a party or person…," *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (internal quotation omitted), and that "protective orders are available to limit the spillover effects of disclosing sensitive information," *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 112 (2009).

A number of courts have imposed heightened standards for discovery in order to protect confidential communications involving mediation or settlement. *See, e.g., In re Teligent, Inc.*, 640 F.3d 53, 57-58 (2d Cir. 2011) (requiring party seeking discovery of confidential mediation communications to "demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality"); *In re Anonymous*, 283 F.3d 627, 636-37 (4th Cir. 2002) (explaining that proper balance is achieved by "disallowing disclosure unless the party seeking such disclosure can demonstrate that 'manifest injustice' will result from non-disclosure"); *Lesal Interiors v. Resolution Trust Corp.*, 153 F.R.D. 552 (D.N.J.1994),[3] *cited in Ford Motor Co. v.*

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[3] In *Lesal*, the court explained the basis for applying a heightened standard as follows:

> [W]hile Congress' intent in Civil Rule 26 . . . was an acknowledgment that the "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation," it was equally affirmative in its desire, reflected in Rule of Evidence 408, to observe "the strong public interest in encouraging settlement of private litigation." It is not reasonable to suggest that Congress intended to denigrate one rule through the application of the other rule, therefore the two must somehow find reconciliation. It is the belief of this court that the most reasonable means of doing this, and one which best effectuates the aims of both rules, is to require a greater, more "particularized showing" that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence.

Id. at 562 (internal citations omitted).

Edgewood Props., Inc., 257 F.R.D. 418 (D.N.J. 2009) (explaining that party seeking discovery of settlement communications "must make a heightened, more particularized showing of relevance" and denying discovery where party "failed to make such a particularized showing that the propounded discovery will lead to the discovery of admissible evidence"); *Duncan*, *supra* at *11 (denying discovery of inadmissible settlement correspondence and documents created for purposes of settlement where plaintiffs made no showing of hardship or that the underlying data was otherwise unavailable).

Plaintiffs have made no such showing in this case and have provided no basis for production that would overcome the important need to preserve the integrity and confidentiality of the settlement process.[4]

II. PROTECTION ASSOCIATED WITH RULE 408 IS NOT LIMITED TO THE "SAME PARTIES, SAME TRANSACTION, SAME CLAIMS."

The protection of Rule of Evidence 408 is not limited to the "same parties, same transaction, same claims" as Plaintiffs have suggested. "Rule 408 applies even if the settlement is between a party to the litigation and a nonparty, where the claims in the two matters are related. … The rule is drafted to provide every incentive for compromise, and without such a broad rule of exclusion, litigants would be deterred from free-flowing settlement negotiations where multiple suits have been or might be brought." Saltzburg, Martin & Capra, Federal Rules of Evidence Manual § 408.02[3] (citing *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 297 (5th Cir. 2010)). *See also In re MSTG, Inc.*, 675 F.3d at 1343 ("The rule is clear by its text and history that it covers not only settlements and negotiations between the parties to

[4] Given the parties' joint request to strike homeowner plaintiffs' apparent inadvertent disclosure of settlement discussions, even homeowner plaintiffs recognize the importance of preserving confidentiality of the settlement process. *See* Status Hr'g Tr. 46:8-20 Feb. 21, 2013 (stricken by Order dated Mar. 26, 2013, Entry No. 81).

the lawsuit, but also settlements and negotiations involving a third party."); *Fiberglass Insulators*, 856 F.2d at 654-55 (settlement negotiations in related litigation between parties were inadmissible under Rule 408). The documents Plaintiffs seek involve confidential communications and documents prepared in the course of settlement. It does not matter that the parties or particular claims were not the same as in the present case.

WHEREFORE, Defendant MI Windows and Doors, Inc. respectfully requests a protective order that would prevent disclosure of confidential communications and documents prepared for purposes of settlement.

May 29, 2013 Respectfully submitted,

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