

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

TG PLASTICS TRADING CO., INC., :  
d/b/a NATIONAL PLASTICS :  
TRADING CO. :  
 :  
v. : C.A. No. 09-336M  
 :  
TORAY PLASTICS (AMERICA), :  
INC. :

**MEMORANDUM AND ORDER**

Pending before me for determination (28 U.S.C. § 636(b)(1)(A), LR Cv 72(a)) are the parties' cross-motions for the entry of a Protective Order regarding the Confidentiality of Discovery Materials. (Document Nos. 77 and 81). A hearing was held on February 15, 2012.

This case is part of an ongoing commercial dispute between Toray, a major international manufacturer and supplier of plastic film, and National Plastics, a company which buys scrap plastic for recycling/resale purposes. A prior litigation (Toray v. National Plastics, C.A. No. 06-219ML) was settled in 2007 pursuant to an agreement which, in part, established a long-term, exclusive "business relationship" between the parties for the purchase and sale of certain scrap plastic and other, in my words, "excess-type" product. In this case, National Plastics alleges, inter alia, that Toray breached the exclusive sales and audit provisions of the 2007 Settlement Agreement. Toray has counterclaimed alleging, inter alia, that National Plastics has failed to make certain settlement payments to it and failed to use best efforts to maximize pricing as required by the 2007 Settlement Agreement.

**Discussion**

Both sides agree that a protective order is appropriate, and they stipulated to the entry of one in the prior suit. (See Document No. 29 in C.A. No. 06-219ML). They also agreed to abide by the terms of 2007 Protective Order in this suit. (Document No. 53, p. 2). Now, however, there is a dispute as to the scope of the Protective Order.

In late 2009, National Plastics “provided Brian Dersovitz, an individual it had hired as a consultant, with the sales information that it had received from Toray” in discovery. Id., pp. 2-3. “Mr. Dersovitz is employed by American Trading International (ATI), a company to which National Plastics sells Toray scrap material.” Id., p. 3. After learning of the disclosure, Toray moved on August 30, 2011 to hold National Plastics in civil contempt and for sanctions because it shared confidential sales information with Mr. Dersovitz, an employee of ATI that purchases Toray’s scrap. (Document No. 47). Toray argued that the disclosure violated the 2007 Protective Order and that “[i]t is impossible to fathom how National Plastics can maximize pricing [as required by the 2007 Settlement Agreement] when it provides Toray’s confidential pricing to the very entity that purchases Toray’s scrap materials from National Plastics, supposedly at the highest possible price.” (Document No. 47, p. 14).

On November 3, 2011, Judge McConnell denied Toray’s requests for a contempt finding and for the imposition of sanctions. (Document No. 53). First, he concluded that the 2007 Protective Order did not apply to the current litigation. Id., p. 5. Second, he found that, even if the 2007 Protective Order still governed in this case, National Plastics did not violate the Order

“because information was disclosed to Mr. Dersovitz, an independent consultant, only after he had signed an acknowledgment<sup>1</sup> as required by the [2007] Protective Order.” Id., p. 6.

Displeased with this outcome, Toray sent a proposed Confidentiality Order to National Plastics which placed certain restrictions and notice requirements on the disclosure of confidential information to independent consultants or experts such as Mr. Dersovitz. National Plastics rejected Toray’s proposed version, and the instant Motions followed.

After thoroughly reviewing the parties’ legal memoranda and proposed Protective Orders, I conclude that Toray’s proposed version goes too far to address its legitimate concerns, and National Plastics’ proposed version does not go far enough. For instance, Toray’s proposed version contains a paragraph that broadly precludes disclosure “to any independent expert or independent consultant who is an employee or affiliated with a current or former business competitor, customer, producer, supplier, broker, distributor, or wholesaler of products manufactured or sold by Toray or National Plastics.” (Document No. 81-2, ¶ 11). It also established a complex mechanism for filing applications with the Court seeking approval of otherwise precluded experts or consultants, or approval on a confidential basis. Id., ¶ 13. The mechanism includes a list of criteria the Court may consider in ruling on such applications. Id. On the other hand, National Plastics’ proposed version seeks to maintain the status quo and allow a party to retain independent experts and consultants without limitation and to disclose confidential information to such experts and consultants without any advance notice or opportunity to object.

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<sup>1</sup> The acknowledgment prohibited the recipient from using confidential information “for any purpose other than for purposes of this litigation” and from disclosing the “information and/or the contents of such documents to anyone not specified under the terms of the Order.” (Document No. 77-3, p. 10).

Balancing the parties' competing interests, the nature of this dispute and the resultant exchange of confidential sales and pricing data, I conclude that the Protective Order should require that the identity of retained consultants/experts be disclosed prior to disclosure of confidential materials to them and contain a reasonable, straight-forward mechanism to object and, if necessary, resolve disputes. (See, e.g., Document No. 20, ¶ 4(c) in C.A. No. 09-565ML (D.R.I. June 30, 2010)).

Accordingly, the parties are ORDERED to promptly confer in a good faith effort to agree on a "middle ground" Protective Order for entry by the Court which is consistent with the guidance provided herein and applies prospectively in this litigation.<sup>2</sup> If the parties are unable to reach agreement and submit an Agreed Protective Order to the Court within fourteen (14) days, each shall submit its proposed version to me for review and consideration. In an effort to encourage reasonableness in the parties' discussions and, if no agreement is reached, in their submissions, I will not rewrite the proposed versions but will, akin to baseball arbitration, choose and enter the version, without modification, that I find to be the most clear, reasonable, concise and consistent with the Court's guidance.

SO ORDERED

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
February 24, 2012

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<sup>2</sup> Toray's proposed version at paragraph 12 appears to contemplate retroactive application of the "new" Protective Order to materials previously produced to experts or consultants under either the Court Order in the 2007 case or the parties' subsequent agreement to abide by such Order in this case. However, Toray provides no legal authority in support of retroactive application of a Protective Order under these circumstances, and offers no practical explanation as to how such eggs could be efficiently and effectively unscrambled at this point.