IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONSTAR INTERNATIONAL, INC.,

Plaintiff,

v.

BALL PLASTIC CONTAINER CORP.

Defendant.

ORDER

05-C-669-C

Before the court is defendant Ball Plastic Container Corporation's motion to compel discovery. *See* dkt. 35. Ball seeks an order compelling plaintiff Constar International, Inc. to disclose documents relating to Constar's settlement with former defendant Honeywell International, Inc. Ball contends that the requested information is relevant to compute royalties on Constar' patent claim, and to prove Ball's counterclaim for tortious interference with contractual relations. *See* dkt. 37 (sealed). Constar already has produced its settlement agreement with Honeywell (dkt. 41, under seal), but declines to provide additional documents, asserting that they irrelevant and are protected by F. R. Ev. 408.

I am granting Ball's motion for disclosure. Although Rule 408 might forbid Ball from using any of the requested disclosures to prove damages at trial, the rule does not forbid disclosure of settlement information if it is used for other purposes, such as to prove a tortious interference claim. Even if Ball's claim is marginal, Ball is not foreclosed from attempting to develop evidence to support it.

Courts are all over the map on how to apply Rule 408. The salient question today is whether Rule 408 bars the *discovery* of documents that might support Ball's claim of tortious interference. At least one court might seem to favor a bar. *See Goodyear Tire Rubber & Co. v. Chiles Power Supply, Inc.,* 332 F.3d 976, 982 (6th Cir. 2003) (settlement privilege necessary to prevent undesirable results from third-party discovery of negotiation communications; also, the evidence sought was not relevant to the claim of bias). I say "might seem" because the Sixth Circuit stated in an earlier case:

> We hold that Rule 408 does not exclude evidence of alleged threats to retaliate for protected activity when the statements occurred during negotiations focused on the protected activity and the evidence served to prove liability either for making, or later acting upon the threats.

Uforma/Shelby Business Forms, Inc. v. NLRB, 111 F.3d 1284, 1294 (6th Cir. 1997).

Although the fact in *Uforma* were different from those presented here, the concept is similar: Rule 408 should not protect improper threats made during settlement negotiations between two businesses.

This seems to be the majority view. In the Fourth Circuit, settlement offers are inadmissible only when offered to prove liability or damages; therefore, a court may consider such evidence to determine the parties' intent. *See Coakley & Williams Construction, Inc. v. Structural Concrete Equip. Inc.*, 973 F.2d 349, 353-54 (4th Cir. 1992). The Seventh Circuit, citing to the Advisory Committee Comment to Rule 408, has held that Rule 408 does not require exclusion of evidence otherwise discoverable merely because it was presented in the

course of compromise negotiations and when it is offered for another purpose. *See United States v. Havert*, 40 F.3d 197, 199-200 (7th Cir. 1994). There is further support for Ball's position in the district courts. *See, e.g., Victor G. Reiling Assoc. v. Fisher-Price, Inc.*, 407 F.Supp. 2d 401, 403 (D. Conn. 2006) (plaintiffs would be entitled to present evidence of defendant's motivation to terminate its relationship or of its threats of retaliation to the extent they constitute an additional wrong without implicating the strictures of Rule 408); *Carolina Industrial Products, Inc. v. Learjet Inc.*, 168 F.Supp. 2d 1225, 1229 (D. Kan. 2001) (statements made during settlement negotiations or in claim compromise are admissible in a suit asserting fraudulent inducement).

Ball's fourth counterclaim alleges that Constar intentionally and improperly interfered with Ball's current and prospective business relationship with Honeywell. *See* dkt. 34 at 10. The related torts of interference with an existing contract and interference with a potential contract each require Ball to prove, among other things, that Constar intentionally and unjustifiably induced a contract breach or interfered with Ball's legitimate expectancy of a valid business relationship with Honeywell. *See Cromeens, Holloman Sibert, Inc. v. AB News Volvo*, 349 F.3d 376, 398 (7th Cir. 2003). Ball contends that it might find evidence of such intent in the documents surrounding the settlement negotiations between Constar and Honeywell.

Constar disagrees, labeling Ball's counterclaim specious and its discovery request a waste of time. Constar knows how to invoke F. R. Civ. Pro. 11 if it feels that strongly about

the matter. Indeed, a quick perusal of the settlement agreement between Constar and Honeywell hints that Ball's tortious interference claim may be on a road to nowhere. That said, it is not this court's prerogative to prejudge a claim based on partial information, and Ball is entitled under Rule 26 to attempt to develop supporting evidence if it exists. In sum, the requested information is relevant to Ball's counterclaim and discovery is not barred by Rule 408.

Given this finding, there is no need to dwell on Ball's claim that it is entitled to this information to perform a royalties analysis, but it appears this issue is mooted by Constar's voluntary production of its settlement agreement with Honeywell.

Any additional information disclosed in response to this order shall be designated "highly confidential" pursuant to the parties' stipulated protective order (dkt. 27). Otherwise, I leave it to the parties to work out the details of prompt disclosure.

ORDER

It is ORDERED that Ball Plastic Container Corporation's motion to compel discovery is GRANTED for the reasons and in the fashion set forth above.

Entered this 27th day of March, 2006.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge