IN THE IOWA DISTRICT COURT FOR MONROE COUNTY

WINGER CONTRACTING COMPANY, Plaintiff, vs. CARGILL, INCORPORATED; HARRIS AND FORD LLC; HF CHLOR-ALKALI, LLC, SOUTHLAND PROCESS GROUP, LLC, CARL A. NELSON & COMPANY; AMERICA PIPING GROUP and JEFF BOITNOTT ENTERPRISES,INC., Defendants.	EQEQ009184 RULING ON COMBINED MOTION FOR LEAVE TO SERVE DISCOVERY AND MOTION TO COMPEL RESPONSE
CARGILL, INCORPORATED, Defendant/Cross-Claim Plaintiff, vs. HF CHLOR-ALKALI, LLC, Cross-Claim Defendant.	
HF CHLOR-ALKALI, LLC, Plaintiff, v. CONVE & AVS, INC., GILBERT INDUSTRIES, INC.L, SUPERIOR COATINGS OF ILLINOIS, LLC, BRACE INTEGRATED SERVICES, TRACER CONSTRUCITON, LLC, Defendants.	LALA003789
CONVE & AVS, INC., Third-Party Plaintiff v.	

LEMARTEC ENGINEERING & CONSTRUCTION CORPORATION n/k/a LEMARTEC CORPORATION; WINGER COMPANIES; and EDWARD FIBERGLASS, INC., Third-Party Defendants	
LEMARTEC ENGINEERING & CONSTRUCITON n/k/a LEMARTEC CORPORATION, Third-Party Plaintiff v. ADVANCE CONVEING TECHNOLOGIES, LLC, BRPH ARCHITECTS ENGINEERS, INC., CARL A. NELSON & COMPANY And AA PAINTING SERVICE, CORP, Third-Party Defendants.	
LEMARTEC ENGINEERING & CONSTRUCTION n/k/a LEMARTEC CORPORATION, Cross-Claimant, vs. HF CHLOR-ALKALI, LLC, Defendant to Cross-Claim	
WINGER CONTRACTING COMPANY Plaintiff, vs. CONVE & AVS, INC., Defendant	LALA003743
HF CHLOR-ALKALI, LLC, Plaintiff,	

vs.	)	LALA003766
EDWARDS FIBERGLASS, INC.,	)	
Defendant.	)	

On September 17, 2018, Conve filed its combined Motion to Serve Discovery and Motion to Compel Production, seeking an order compelling production of a confidential settlement agreement between HFCA and Cargill whereby HFCA's interest in the Eddyville Chlor-Alkali facility was transferred to a newly formed entity, Eddyville Chlor-Alkali LLC ("ECA"). HFCA filed their Resistance on September 27, 2018, along with a Motion for Protective Order and Conditional Request for In Camera Review of the Confidential Settlement Agreement if the Court was convinced Conve's Motion to Compel possessed some degree of merit.

Conve filed its Reply on October 16, 2018, and Lemartec and Gilbert/Superior filed their respective Joinders to Conve's Motion on October 16, 2018, and October 24, 2018, respectively. Finally, HFCA filed their Resistance to the Joinders on November 6, 2018. The Court has also considered Conve's Reply filed November 16, 2018, HFCA's Motion to Strike filed November 20, 2018, Conve's Resistance to Motion to Strike filed November 30, 2018, HFCA's Resistance to Motion to Compel filed December 17, 2018, and Cargill's Joinder filed December 18, 2018. The Court,

having considered the above, enters the following Ruling and Order.

Conve objects to HFCA's refusal to produce a copy of a confidential settlement agreement entered between Cargill and HFCA. HFCA and ECA have informed the Court and parties that as a result of a confidential settlement reached May 8, 2018, HFCA's interest in the plant was transferred to a newly formed entity, Eddyville Chlor-Alkali, LLC ("ECA"). Neither Cargill nor ECA are parties to these "LALA actions" that have been consolidated, nor do any of the parties that were involved in constructing the plant (setting aside HFCA) have any contractual relationship with Cargill or its newly formed subsidiary, ECA, which is now the owner of the plant.

HFCA has informed the parties and the Court that "Notwithstanding the confidential settlement agreement, the respective roles of Cargill and HFCA in the litigation were largely unchanged. The right to pursue claims against third-parties for negligent work at the plant and for breach of contract remains with HFCA."

As an initial matter, the Court will briefly address HFCA's objection to the production on the grounds that Conve's Motion is not ripe under the Court's Case Management Order. While HFCA is correct that the Case Management Order states that the parties "reserve the right to propound individualized discovery

upon completion of the initial discovery set forth in this paragraph 1", and initial discovery is not complete, the controversy at issue has been fully briefed and there is little point in kicking the can down the road.

The parties have not been able to direct the Court to any Iowa case regarding discovery of confidential settlement agreements that is directly on point. HFCA has directed the Court to decisions of a number of other jurisdictions that have ruled such documents are not discoverable. See *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1071 (5th Cir. 1986) (denying discovery partly on Federal Rule 408 policy grounds); *Hasbrouck v. Bank America Housing Servs.*, 187 F.R.D. 453, 458-62 (N.D.N.Y. 1999) (prohibiting discovery of confidential settlement agreement because of strong public interest in encouraging settlements); *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158 (E.D.N.Y. 1982). See also *Olin Corp. v. Ins. Co. of N. Am.*, 603 F. Supp. 445, 449-50 (S.D.N.Y. 1985) (holding that a settlement privilege exists which prohibits discovery of settlement communications absent a clear showing that Federal Rule 408 would not prohibit admission of the settlement evidence at a subsequent trial); *Dunlop v. Bd. of Governors*, 1975 WL 309, at *1 (N.D. Ill. Dec. 11, 1975) (opining that settlement communications privilege is necessary to effectuate Federal Rule 408's purpose of encouraging settlements). The reason for this is simple: as a

federal court of appeals has held, "the incentive for parties to settle cases involving many [parties] would be undermined if their settlement with one . . . could come back to haunt them in later suits." *McHann v. Firestone Tire & Rubber Co.*, 713 F.2d 161, 167 (5th Cir. 1983).

The public has a strong interest in "protect[ing] the finality of prior suits and the secrecy of settlements when desired by the settling parties." *Kalinauskas v. Wong*, 151 F.R.D. 363, 364 (D. Nev. 1993); *Cf. Miller v. Component Homes*, Inc., 356 N.W.2d 213, 216 (Iowa 1984) (Iowa has a public policy favoring settlement of disputes).

> Confidential settlements benefit society and the parties involved by resolving disputes relatively quickly, with slight judicial intervention, and presumably result in greater satisfaction to the parties. Sound judicial policy fosters and protects this form of alternative dispute resolution. See, e.g., Fed. R. Evid. 408 which protects compromises and offers to compromise by rendering the inadmissible to prove liability. The secrecy of a settlement agreement and the contractual rights of the parties thereunder deserve court protection.

Kalinauskas, 151 F.R.D. at 365. The court in *Kalinauskas* gave effect to this well-stated affirmation of the important ways confidential settlements serve the public interest by allowing the deposition of the employee-party to the settlement agreement but precluding her deposition from delving into "any substantive terms of . . .the settlement agreement." *Id.* at 367.

Lemartec's Joinder points out that there are two different approaches to the question of whether or not confidential settlements are discoverable, citing *Bennet v. LaPere*, 112 F.R.D. 136, 139 (D.R.I. 1986). Under the first approach, the party *resisting* discovery must demonstrate that the request for the settlement agreement is not relevant. *Simmons v. Foods, Inc. v. Willis*, 2000 WL 204270, *6(D.Kan.2000). With this approach, HFCA has the burden of establishing some good cause or sound reason for blocking the disclosure of the settlement agreement at issue. *Bennet*, 112 F.R.D. at 140. Courts that follow this approach have noted that the settlement agreement sought need only be relevant and need not actually be admissible at trial." *Multi-Tech Systems, Inc. v. Dialpad.com, Inc.*, 2002 WL 27141, *2(D.Minn.2002)(citing Fed.R.Civ.P.26(b)(1)). Lemartec goes on to argue that when the damages sought depend on or relate to the terms, amount or value of a settlement agreement, courts have found the agreements discoverable, citing *Bennet*, 112 F.R.D. at 138.

Lemartec's Brief acknowledges that, under the second approach to the discoverability of confidential settlement agreements, the party seeking the agreement must make a "particularized showing" before the resisting party is compelled to produce. See *Brottaro v. Hatton Associates*, 96 F.R.D. 158, 159 (E.D.N.Y. 1982). A "particularized showing" simply means

the evidence sought in the settlement agreement is relevant and calculated to lead to the discovery of admissible evidence. *Lesal Interiors, Inc. v. Resolution Trust Corp.*, 153 F.R.D. 552, 562 (D.N.J. 1994); *Morse/Diesel, Inc. v. Fidelity and Deposit Co.*, 122 F.R.D. 447 (S.D.N.Y.1988). Under this second approach, courts in other jurisdictions have also balanced the interests of the party who needs the discovery versus the "effects that may flow from their discovery." *Id.*

The Court has reviewed the authority cited by the parties and it appears *Brottaro* represents the majority view. However, the Court is not convinced that the Court's decision requires that it conclude whether *Brottaro* or *Bennet* should be applied.

Conve, Lemartec and the other parties seeking disclosure of the confidential settlement agreement advance a number of reasons why they believe the settlement agreement is reasonably calculated to lead to the discovery of admissible evidence. Conve asserts that they need to review the agreement to assure that HFCA is the real party in interest and protect Conve from multiple suits. In this regard, the Court notes that HFCA and ECA have represented that HFCA retains the right to pursue all damage/defect claims and offer to enter into a stipulation memorializing that assurance.

Conve sets forth various alleged improper and tortuous acts by Cargill designed to avoid paying HFCA millions of dollars and

take away an operational and productive manufacturing plant built by HFCA. Conve seeks to inquire into whether HFCA has been paid by Cargill/ECA for delayed damages or loss profits which HFCA seeks to recover from Defendants. Conve seeks to know who is responsible for the cost of repairs of the plant post-settlement and who is making the repair decisions. Conve inquires into the value exchange by and between HFCA and Cargill/ECA for the plant. They want to know what is the underlying value of the plant.

Similarly, Lemartec argues that HFCA seeks damages for "completion, repair, replacement or other remediation" and inquires whether those damages were addressed in the settlement agreement. HFCA seeks damages caused by a pipe burst resulting in a caustic liquid spill. Lemartec argues that terms of the settlement agreement, particularly those that relate to the transfer of the plant ownership, are undeniably relevant.

Gilbert/Superior is particularly concerned with HFCA's claim for damages for alleged defective work on tanks A and B, resulting in a hydro-chloric acid spill and significant resulting damages. Gilbert/Superior argue that without reviewing the settlement agreement, the parties do not know what consideration was paid to HFCA for the plant, the parties do not know what concessions were exchanged given the claimed defects in the plant or how the transfer of the plant impacts HFCA's

claims for lost profits. Additionally, Gilbert/Superior argue that it is unknown whether ECA will continue to utilize both tank A and B for which HFCA claims damages from Gilbert/Superior. They argue it would be prejudicial for the defending parties to defend against claims for alleged plant defects and repairs without allowing the parties the opportunity to discover how these same claimed damages and related issues were addressed by HFCA and Cargill in the settlement agreement.

HFCA has moved for a protective order. Iowa R.Civ.P. 1.504 allows the Court, for "good cause shown", to enter a protective order "which justice requires to protect a party from annoyance, embarrassment, oppression or undue burden or expense." While the discovery rules are to be liberally construed, a court may still order a protective order "that discovery not be had." Iowa R.Civ.P. 1.504(1)(a)(1). The Court may also issue a protective order directing that "trade secret or other confidential research, development or *commercial information* not be disclosed or be disclosed only in a designated way." Iowa R.Civ.P. 1.504(1)(a)(7). In issuing a protective order, the Court must consider three criteria in determining if the moving party has established "good cause." Those criteria are: "(1) whether the harm posed by dissemination will be substantial and serious; (2) whether the protective order is precisely and narrowly drawn; and (3) whether any alternative means of

protecting the public interest is available that would intrude less directly on expression." *Comes v. MicroSoft Corp.*, 775 N.W.2d 302, 305 (Iowa 2009).

HFCA asserts it is invoking the "public interest" in "protecting the finality of prior suits and the secrecy of settlement when desired by the settling parties", citing *Kalinauskas v. Wong,* 151 F.R.D. at 363, 364 (D.Nev.1993); *Miller v. Component Homes, Inc.,* 356 N.W.2d 213, 216 (Iowa 1984)(Iowa has a public policy favoring settlement of disputes). HFCA asserts "a protective order barring production of the HFCA-Cargill settlement is necessary to prevent individual harms to each as well as the harms to the boarder Iowa public by defeating its policy favoring settlement of disputes." HFCA asserts the HFCA-Cargill settlement contains specific dispute resolution terms and conditions negotiated by and between HFCA and Cargill that it asserts exclusively impact those entities' rights and responsibilities. They argue that if Conve or the other parties learn of the terms and conditions, they might develop a litigation strategy that utilizes the information to the disadvantage of HFCA or might secure a more favorable litigation outcome than would otherwise have been possible.

The nub of the problem is that Conve and the others joining Conve's Motion set forth various types of admissible evidence they speculate may be potentially touched on or addressed in the

settlement agreement without any real proof that such information is contained in the settlement agreement and HFCA/ECA set forth legitimate reasons why disclosure of the agreement's terms could place HFCA at a strategic disadvantage. The terms of HFCA's settlement with Cargill, if discovered, may potentially set the tone of how Conve and the others will negotiate with HFCA. This is particularly problematic when external factors may well have motivated HFCA's settlement with Cargill. Such factors may include HFCA's financial status, need for cash flow or impending deadlines. HFCA's litigation with Cargill involved vastly different claims than HFCA's claims against Conve and the other defendants. Cargill is not a party to HFCA's design-built claims and the HFCA-Cargill settlement resolved a Minnesota Federal Court action solely between Cargill and HFCA. Therefore, this is not analogous to an auto accident case in which a plaintiff settled against some but not all defendants and the remaining defendants desire to assess the extent of their liability or determine contribution. At least at this point in this litigation, it does not appear Cargill was ever a defendant subject to common liability like Conve or Lemartec.

HFCA represents that the HFCA-Cargill settlement carved out HFCA's claims against Conve, Lemartec and the other parties to this litigation and these claims remain with HFCA. HFCA argues

with some justification that it would be irrational for Cargill to pay HFCA for the allegedly defective work at issue because it would be irrational for Cargill to pay HFCA for what could be recovered in this litigation without taking an assignment of such claims. At this point it is also not clear that the HFCA-Cargill settlement agreement would address issues of plant defects and repairs when the settlement agreement allowed HFCA to retain those claims.

The Court understands that the plant was transferred to ECA as a part of a settlement which was not simply an ECA purchase of the plant. The HFCA-Cargill settlement transaction undoubtedly accounted for perceived claims and liabilities on many issues unrelated to the alleged construction defects. For instance, the Court is aware of HFCA's claims that Cargill wrongfully withheld salt and water. HFCA and Cargill were litigating their respective right under a complex series of related agreements including the Lease Agreement, the Chemical Purchase and Supply Agreement and Process Water Agreement among others. HFCA asserts that, assuming arguendo, that the HFCA-Cargill settlement agreement specified a value for the plant there is no reason to assume that it reflects what a buyer and seller would negotiate in an arms-length transaction for a non-distressed asset. Further, in the Court's view, it is unlikely that the settlement agreement specifically addressed damages for

such things as a hydrochloric acid leak from tank A, a burst pipe, etc., but of course, that is speculation at this point.

The Court concludes that the best course of action at this point is for HFCA to produce the settlement agreement to the Court for its in-camera review. The Court will then be in a better position to make a determination as to whether the settlement agreement should be produced at this time, produced only in a redacted fashion disclosing only those portions the Court deems relevant, not disclosed to the moving parties at all, or perhaps disclosed post-trial if necessary to prevent double recovery.

IT IS ORDERED that the Court reserves ruling on the pending Motions to Compel and Motion for Protective Order and that HFCA shall produce the settlement agreement with Cargill for the Court's in-camera review within fifteen (15) days of the date of this Order.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
EQEQ009184	WINGER CONTRACTING COMPANY VS CARGILL INCORPORATED

So Ordered

John Telleen, District Court Judge,
Seventh Judicial District of Iowa