

United States Bankruptcy Court
District of Delaware



CHIEF JUDGE BRENDAN LINEHAN SHANNON

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January 30, 2017

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Re: In re: Essar Steel Minnesota LLC and ESML Holdings, Inc.
Case No. 16-11626 (BLS)

Dear Counsel:

This letter follows upon a hearing held in the above matter on January 26, 2017. The matters under advisement consist of (i) Cliffs Natural Resources, Inc.'s ("Cliffs") Motion to Quash a Subpoena to ArcelorMittal USA LLC [Docket No. 636] (the "Motion to Quash") and (ii) the Debtors' Objection to the Motion to Quash [Docket No. 649]. For the reasons stated below, the Court will deny the Motion to Quash and direct production of the Cliffs Contract (as hereinafter defined) under conditions intended to minimize the risk of broader dissemination.

The factual context is straightforward. Debtors entered into a contract to provide iron ore pellets to ArcelorMittal USA LLC ("ArcelorMittal") in 2012. ArcelorMittal has filed a claim in excess of \$1 billion in these Chapter 11 proceedings for damages arising from the Debtors' alleged failure to perform under the 2012 contract. ArcelorMittal entered into a 10-year pellet sale contract in 2016 with Cliffs (the "Cliffs Contract") to provide for the product it would have otherwise received from the Debtors under the 2012 contract. A large component of ArcelorMittal's claim is for cover damages, *viz.*, the difference between what it would have paid under the Debtors' contract and what it was required to pay under the Cliffs Contract.

The Debtors have objected to the ArcelorMittal claim, and have sought to obtain the Cliffs Contract in order to obtain information regarding the calculation of ArcelorMittal's cover damages, which extend out for many years. Debtors contend that without access to the Cliffs Contract, they will be unable to assess and meaningfully oppose the ArcelorMittal claim. As an alternative, Debtors suggest that in the absence of production of the Cliffs Contract, the ArcelorMittal claim should be largely disallowed.¹

The Cliffs Contract contains provisions requiring ArcelorMittal to maintain and preserve

¹ At the hearing, ArcelorMittal displayed predictably little enthusiasm for this option.

its confidentiality. In the Motion to Quash, Cliffs argues that disclosure of its pricing formulas and related information to a potential competitor such as the Debtors would cause it great harm and place Cliffs at a competitive disadvantage in the marketplace. It is Cliffs' position that a variety of steps short of full disclosure should be sufficient, at this stage, to permit the Debtors to analyze the ArcelorMittal claim for purposes of negotiating and formulating a plan of reorganization with their primary stakeholders.

It is clear that the pricing formula and related information in the Cliffs Contract constitute trade secrets. Trade secrets are not, however, absolutely privileged from discovery. *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del., 1985). If a party against whom discovery is sought can show by competent evidence that the information is a trade secret, then the burden shifts to the party seeking discovery to establish that the disclosure is relevant and necessary to the action. *Id.* If the trade secret is both relevant and necessary, then the Court balances the necessity of the trade secret against the potential injury to the disclosing party. *Id.* at 293. Case law teaches that courts can and should fashion protective orders to limit the potential injury to the disclosing party. *Id.*

The Debtors have carried their burden to demonstrate that the Cliffs Contract is both relevant to, and necessary for, the pending contested matter with ArcelorMittal. There is simply no way for the Debtors to analyze the largest non-insider claim filed in this case without access to the Cliffs Contract. So, the Cliffs Contract must be produced to the Debtors.

The next issue is the scope of appropriate conditions governing production and dissemination to protect Cliffs' legitimate interest in its confidential information. The Court's approach is informed by the Debtors' representation that, at this stage, they do not intend or expect to commence litigation with ArcelorMittal on the merits of the claim. Rather, as noted above, they seek only to "get their arms around" the claim sufficiently to allow them to work with their stakeholders on a reorganization strategy.

Accordingly, at this stage of the proceeding, the Cliffs Contract will be made available only to (i) Mr. David Pauker, the Debtors' CRO; (ii) White & Case LLP, Debtor's outside counsel; and (iii) third-party experts and consultants who have specifically been retained by Order of the Court to provide advice and consultation in connection with this contested matter or a related adversary proceeding, provided that each signs an appropriate declaration. For the avoidance of doubt, absent further order of the Court, the Cliffs Contract is not to be shared with (i) Committee Professionals or members; (ii) any arbitrator or mediator; or (iii) any outside copying or litigation support services.

Counsel are requested to confer and promptly submit a form of order consistent with the foregoing.

Very truly yours,


Brendan Linehan Shannon
Chief United States Bankruptcy Judge