IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
MET-COIL SYSTEMS CORPORATION,	)	Case No. 03-12676 (MFW)
Debtor.	)	**Objection Deadline: To Be Determined** **Hearing Date: To Be Determined**

MESTEK, INC.'S MOTION TO QUASH SUBPOENAS ISSUED TO MESTEK, INC. AND TO THE FUTURE CLAIMANTS' REPRESENTATIVE AND FOR A PROTECTIVE ORDER BARRING DISCOVERY FROM THE DEBTOR

Mestek, Inc. ("Mestek") hereby moves this Court for entry of an order quashing certain subpoenas for deposition and production of documents and for a protective order pursuant to Rule 7026(c) of the Federal Rules of Bankruptcy Procedure barring the notice of deposition and request for production of documents served by certain tort plaintiffs (the "Mejdrech Plaintiffs") in connection with their pending motion before this Court to modify the automatic stay ("Motion to Modify the Stay").

By their subpoenas and notice of deposition, the Mejdrech Plaintiffs seek broad discovery of all documents and communications relating to the analysis of the Debtor's potential future tort liability as performed by or for Eric Green, the legal representative appointed by this Court as the representative of the as-yet unknown future claimants (the "FCR" and the "Future Claimants") who may claim personal injury from exposure to the environmental contamination that gave rise to this chapter 11 case. The Mejdrech Plaintiffs also seek discovery of all discussions between the FCR and the Debtor or Mestek, concerning the funding of the trust for such Future Claimants. Because the discovery requested by the Mejdrech Plaintiffs has no legitimate connection to the issues raised by their Motion to Modify the Stay, is privileged from discovery,

and is sought solely to harass and prejudice the Debtor and Mestek, and because the subpoenas are procedurally defective, Mestek respectfully requests that this Court bar the Mejdrech Plaintiffs from proceeding with discovery. In support thereof, Mestek state as follows:

BACKGROUND

1. At 5:20 p.m. on the afternoon of Friday, February 27, 2004, the Mejdrech Plaintiffs faxed a subpoena for deposition and production of documents to Mestek's corporate headquarters in Westfield, Massachusetts. About the same time, a similar subpoena was faxed to the office of the FCR, located in Waltham, Massachusetts. The subpoenas demanded that Mestek and the FCR appear for their respective depositions and produce the requested documents less than two business days later, on March 2, 2004.[1] True and correct copies of the subpoenas faxed to the FCR and to Mestek are attached hereto as Exhibits A and B, respectively. At about the same time, the Mejdrech Plaintiffs also faxed a notice of deposition with attached document requests to the Debtor demanding its Rule 30(b)(6) deposition, also on Tuesday, March 2, 2004. A true and correct copy of the deposition notice faxed to Met-Coil is attached as Exhibit C.

2. The scope of the examinations and document requests is very broad. The Mejdrech Plaintiffs seek to examine representative deponents "regarding the creation and funding of the TCE Trust" and demand that Debtor, Mestek, and the FCR produce all documents relating to "Eric D. Green's work as Court appointed Future Claims Representative and the funding of a TCE Trust...including without limitation communications between or among Eric D. Green, Debtor and/or Mestek." (See Exhibit A attached to the subpoenas).

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[1] Green voluntarily appeared for his deposition on March 2, 2004, and simultaneously filed a motion for protective order as to the document requests and the scope of the oral testimony sought. The deposition proceeded over the objection of Mestek as stated by Mestek's counsel on the record at the commencement of the deposition.

3. The Mejdrech Plaintiffs purportedly require this broad discovery to support their Motion to Modify the Stay. Apparently, the Mejdrech Plaintiffs believe this discovery will reveal that Debtor and Mestek, the co-proponents of the current plan, have been unable to reach agreement with the FCR regarding the plan's funding of a contemplated trust for the Future Claimants and that this supposed impasse calls into question Debtor's ability to reorganize.

4. The FCR was appointed by this Court to protect the rights of the Future Claimants. On or about September 23, 2003, the Debtor filed a motion for entry of an Order authorizing the appointment of Eric D. Green as the Legal Representative for the Future Claimants. On October 20, 2003, the Court granted the Debtor's motion.

5. The FCR has been assisted in his work by legal counsel and a number of retained scientific experts. On or about September 23, 2003, the FCR sought authority to employ Young Conaway Stargatt and Taylor, LLP as his counsel, which the Court granted on October 20, 2003. On October 10, 2003, the FCR sought authority to retain Analysis, Research & Planning Corporation, as a consultant, to assist the FCR in analyzing and quantifying the Debtor's future TCE liability. Additionally, on October 24, 2003, the FCR filed an application for an Order authorizing the retention and employment of Exponent as toxicologists and epidemiologists. Exponent is to provide consulting services and to analyze and produce studies and estimates of potential health problems and accompanying damages resulting from the alleged release of TCE from the Lockformer Site, and provide other services or litigation support as may be necessary. The Bankruptcy Court granted the retention of Analysis, Research and Planning and Exponent on November 18, 2003.

6. Under the proposed plan of reorganization filed by the Debtor on November 5, 2003, a Future Claimants' trust would be funded by a portion of the proceeds from sale of 100%

of the reorganized Debtor's new common stock. The successful bidder would also receive the protection of a channeling injunction under which personal injury claims by Future Claimants would be channeled to the trust. Mestek has indicated that it intends to make an opening bid for Debtor's new equity.

7. As the Debtor has previously reported to the Court, Met-Coil, Mestek, and the FCR have engaged in extensive discussions and analysis of the potential liability for claims against the trust. To date, the parties have not been able to reach agreement upon the appropriate level of funding for the trust. At the February 17, 2004 omnibus hearing in this case, Debtor's counsel advised this Court that the parties would make a final attempt to reach an agreement and, if successful, be ready to proceed with the disclosure statement hearing for the current plan on March 22. If unsuccessful, the Debtor would promptly abandon the contemplated Future Claimant's trust and develop a new plan of reorganization without any such trust. In short, by March 22, the Debtor and Mestek will have announced an agreement with the FCR, or the Debtor will have abandoned creation of a Future Claimants' trust and focused its efforts upon developing an alternative plan.

DISCUSSION

I. The Mejdrech Plaintiffs Seek Discovery That Is Irrelevant, Overbroad, And Harassing.

8. Federal Rule of Evidence 408 excludes from admission "[e]vidence of conduct or statements made in compromise negotiations." Fed.R.Evid. 408. The policy considerations behind Rule 408 are to protect frank disclosure for the purpose of compromise and settlement of disputes. *See Commodity Futures Trading Com. v. Rosenberg,* 85 F. Supp. 2d 424, 434 (D. N.J. 2000) (citing Advisory Committee Note, Fed. R. Evid. 408) (additional citations omitted). Rule 408 does not protect the settlement discussions from discovery but only determines whether the

evidence is admissible. *See In re RDM Sports Group, Inc. v. Equitex*, 277 B.R. 415, 433 (Bankr. N.D. Ga. 2002). However, "while admissibility and discoverability are not equivalent, it is clear that the object of the inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue." *Id.* (citing *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 159 (E.D.N.Y. 1982) (additional citations omitted). Several courts have held that the same public policy concerns that support Federal Rule of Evidence 408 also support protection from discovery into confidential settlement negotiations. *See id.* (citing *Allen County, Ohio v. Reilly Indus.*, 197 F.R.D. 352 (N.D. Ohio 2000) (refusing to allow the discovery of correspondence between counsel for settling parties that did not contain statements of witnesses or the parties).

9. In *In re RDM*, the court stated that "[a]llowing discovery of negotiations between parties to an ongoing litigation can have a chilling effect on the parties' willingness to enter in to settlement negotiations." *Id.* (citing *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 364 (N.D. Ill. 2001) (where the plaintiff sued multiple defendants and entered a confidential settlement with one, the court refused to compel disclosure of the documents relating to the settlement agreement; despite the argument that the documents were relevant to the question of liability due to the plaintiff's overlapping claims, the court found that the "negotiations themselves do not impact on the scope of liability and have no probative value"). The court in *In re RDM* stated that the party seeking discovery of an inadmissible settlement agreement or related statements is required to make a "particularized showing of a likelihood that admissible evidence will be generated" by the discovery of the information sought. 277 B.R. at 433 (citing *Bottaro*, 96 F.R.D. at 160) (additional citation omitted); *but see Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 1996 WL 71507 (finding that Fed. R. Evid. 408 places no restriction on the

discovery of an executed settlement agreement) (additional citation omitted). The court in *In re RDM*, however, further noted that most of the cases that have allowed the disclosure of settlement documents have only been asked to compel production of the settlement agreement itself. *Id.* (citations omitted).

10. In the present case, the deposition subpoena and notice are seeking broad discovery of sensitive information pertaining to settlement negotiations, and should be quashed for the reasons indicated in *In re RDM* as well as for a number of other reasons. Where the subject matter of the testimony and documents sought pertains to sensitive information provided in the course of private settlement discussions, such matters are confidential and protected by public policy from disclosure. *See Commodity Futures Trading Comm'n v. Rosenberg*, 85 F. Supp. 2d 424; *In re RDM*, 277 B.R. at 433-34. The discovery sought here is of the confidential settlement discussions and documentation pertaining to the creation and funding of the Future Claimants' trust by and between the FCR, the Debtor, and Mestek. The negotiations and any documentation thereto have taken place in the context of developing the Debtor's plan of reorganization, and are not relevant to the Mejdrech Plaintiffs' claims nor reasonably calculated to lead to the discovery of admissible evidence. It is long established that settlement negotiations are not admissible as evidence for <u>any</u> purpose.

11. The Mejdrech Plaintiffs have admitted that they seek this information to show that a settlement agreement regarding the Future Claimants' Trust will not take place by the scheduled March 22, 2004 hearing date and, therefore, there should be no further delay in lifting the stay on the Mejdrech Plaintiffs' pending actions. This logic defies reason. Certainly if the Mejdrech Plaintiffs are permitted to take depositions and obtain documentation probing into the settlement discussions between the FCR, the Debtor, and Mestek regarding the creation and

funding of the Future Claimants' trust, the Mejdrech Plaintiffs' actions will succeed in accomplishing the very outcome that the Mejdrech Plaintiffs charge, that is, that no settlement will take place.

12. The Mejdrech Plaintiffs' motives for burdening the FCR, the Debtor, and Mestek at this time with these discovery requests are suspect. The negotiations pertaining to the creation and funding of the Future Claimants' trust under the Reorganization Plan are very complex. The discovery the Mejdrech Plaintiffs seek surely will sabotage the momentum and good faith of the negotiations that are in progress, chill the free flow of information between the settling parties pertaining to the Trust, and deflect the time and focus of the settling parties from the settlement discussions to these discovery requests.

13. Moreover, it is premature for the Mejdrech Plaintiffs to make the charge that legitimate settlement discussions are not progressing and that no settlement will take place. The parties to the Trust have a scheduled hearing date of March 22, 2004, several weeks away, up to which time they will continue to seek to hammer out their differences and come to a settlement resolution. The Debtor has already stated that it will abandon this approach before March 22, 2004, if no agreement is likely to be reached by that time. To invade the privacy of the negotiations and prematurely abrogate the possibility of their success, would serve no legitimate end. To the contrary, permitting the discovery requests would gravely prejudice the Debtor's reorganization.

14. Accordingly, this Court should quash the subpoenas served upon Mestek and the FCR and enter a protective order barring discovery from the Debtor.[2]

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[2] It is unclear whether the Mejdrech Plaintiffs also seek in discovery the underlying documents reviewed by the FCR or his retained advisors during the course of their work, some of which documents were provided by Mestek and Met-Coil to the FCR subject to a confidentiality agreement. None of these documents is at all relevant

II. The Subpoenas Are Procedurally Defective.

15. Rule 45 of the Federal Rules of Civil Procedure is made applicable in bankruptcy cases by Bankruptcy Rule 9016. The Mejdrech Plaintiffs' subpoenas that were broadcast by fax on February 27, 2004, fail to comply with Rule 45 and must be quashed.

16. Rule 45 provides in relevant part:

> (c)(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
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> (i) fails to allow reasonable time for compliance;
> (ii) requires a person who is not a party...to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person... or
> (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
> (iv) subjects a person to undue burden.
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> (c)(3)(B) If a subpoena
> (i) requires the disclosure of ...confidential research, development, or commercial information, or...
> (iii) requires a person who is not a party...to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena... .

Fed.R.Civ.P. 45.

17. Accordingly, a subpoena to appear for oral deposition will be quashed under Rule 45 (c)(3) if it subjects a person to an undue burden, requires the disclosure of privileged matters, or fails to allow for a reasonable time to comply. The subpoenas in this case were faxed to the deponents after the close of business on Friday, February 27, 2004, and requested them to appear to testify in Delaware in fewer than two business days. As a threshold matter, the Mejdrech Plaintiffs failed to provide the appropriate 5-day notice for the depositions required by the Local Rules of this Court. Rule 30.1 of the Local Rules of Civil Practice and Procedure of the United

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to the Mejdrech Plaintiffs' stated purpose of determining the progress of the parties' negotiations. Mestek reserves the right to raise any and all objections to the production of any such documents.

States District Court for the District of Delaware provides that "'reasonable notice' for the taking of depositions under Fed. R. Civ. P. 30(b)(1) shall not be less than five days." Rule 45 expressly provides that a subpoena that does not afford reasonable notice should be quashed. *See* Fed. R. Civ. P. 45 (c)(3)(A)(i).

18. In addition, the subpoenas order the Massachusetts witnesses to travel over 300 miles to Wilmington, Delaware to attend the depositions, contrary to the 100-mile limitation provided in the rules. *See* Advisory Committee Note to Bankruptcy Rule 9016 ("[A]lthough Rule 7004(d) authorizes nationwide service of process, Rule 45 limits the subpoena power to the judicial district and places outside the district which are within 100 miles of the place of trial or hearing"); *In re Texas Int'l Co.*, 97 B.R. 582 (Bankr. C.D. Cal. 1989).

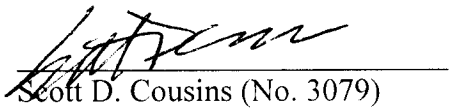
19. The Mejdrech Plaintiffs additionally failed to tender the appropriate witness and mileage fees at the time the subpoena was allegedly served. The failure to tender witness and mileage fees to a non-party witness at the time of issuance of a subpoena, as required by Rule 45, cannot be cured by subsequent tender. *See Klockner Namasco Holdings Corp. v. Daily Access.com, Inc.*, 211 F.R.D. 685, (N.D. Ga. 2002). The witness is not required to rely on the good faith of the party who subpoenas him to pay the fees when he appears. *Id.* When a party subpoenas a witness without tendering the fees, the party is assuming the risk that the witness will not appear and is not entitled to sanctions when that occurs. *Id.*

CONCLUSION

WHEREFORE, Mestek respectfully requests entry of an order quashing the Mejdrech Plaintiffs' subpoenas served upon Mestek, Inc. and Eric D. Green, entry of a protective order barring discovery from the Debtors, and an award of Mestek's fees, costs and expenses for the Mejdrech Plaintiffs' failure to take reasonable steps to minimize the burden upon the respondents, and for such other relief as this Court deems appropriate.

Dated: March 3, 2004

GREENBERG TRAURIG, LLP



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