NAVAJO NATION & GO VIDEO RE PROTECTIVE ORDER LIMITS

"Read literally, this provision bars all use outside of the Court of Federal Claims of any evidence covered by the CAPO [stipulated protective order]. But we do not read the Order so broadly, especially in the context of a contempt proceeding. Instead, we adopt the approach of the Ninth Circuit in assessing alleged protective order violations, and interpret the CAPO in a common sense and reasonable manner that 'connect[s] its prohibitions to its purpose.' In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 10 F.3d 693, 695 (9th Cir. 1993)" The Navajo Nation v. USA, 46 Fed Cl. 353, 359 2000 U.S. Claims,

In Go-Video v. The Motion Picture Association, 10 F.3d 693 (9th Cir. 1993), defendants moved to hold Plaintiff's counsel in contempt for alleged improper "use" of information they obtained under a protective order in a 1987 antitrust lawsuit between the same parties. Those disclosures to the plaintiffs under a “this case only” protective order revealed additional anti-trust violations by the defendants against the plaintiffs of which they learned only by the protected discovery. Plaintiffs in Go-Video unsuccessfully moved to amend their complaint to include the newly discovered antitrust violations. Go-Video then filed a second lawsuit in which the made the same anti-trust allegations, this time alleging the violations which came to light though protected discovery in the first lawsuit. When the second action was served, defendants sought to hold Go-Video and its attorneys in contempt for allegedly violating a provision of the protective order that prohibited "any use 'whatsoever' of information obtained in discovery except for preparation and trial in 'this action.'" Id., pp. 694-95. The court of appeals reversed the district court's contempt citation, noting that Go-Video's "use" in the second lawsuit was not contemplated by the protective order. "The defendants have not accused Go-Video of revealing any secrets. Instead, they argue Go-Video 'used' information in violation of the protective order that it would not have discovered so easily but for the protective order, just by filing another lawsuit and litigating. But Go-Video went to great lengths to avoid revealing in the public filings anything it had learned in discovery. Privacy of proprietary information, not immunity from suit, was the legitimate purpose of the protective order. " Ibid.(italics added)

“Because Go-Video’s lawyers cannot achieve total amnesia and all their subsequent work in antitrust litigation against the defendants (and perhaps anyone else) would be informed by what they learned during discovery in the 1987 suit,

the [protective] order would prohibit them from representing Go-Video at all in the 1990 litigation. Indeed, lawyers who learn from and use their experience obtained in discovery under such an order would have to change fields, and never do antitrust work again, lest they 'use' what they learned in a prior case in any way whatsoever in any 'other action.' For the protective order to comply with common sense, a reasonable reading must connect its prohibitions to its purpose–protection against disclosure of commercial secrets.' Go-Video, supra, 10 F.3d at 695.

"The protective order was not intended to shield from liability the party furnishing information under it, especially not as regards claims arising from the same series of events pursued by the same party." The Navajo Nation, supra, at p. 360.

"There is no merit to the contention that the fruits of discovery in one case are to be used in that case only." Williams v. Johnson & Johnson, 50 F.R.D. 31, 32 (D.C.N.Y. 1970); Jochims v. Izuzu Motors, Ltd., 148 F.R.D. 624, 631 (D.C. Iowa 1993); Nestle Food Corp. v. Aetna Sas. & Sur. Co. 129 F.R.D. 483, 486 (D.C.N.J. 1990), Cippollone v. Liggett Group, Inc., 106 F.R.D. 573 (D.N.J 1985), Olympic Refining Co. v. Carter, 332 F.2d 260, 264-265 (9th Cir. 1964).