WILLIAM B. CHANDLER III
CHANCELLOR

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

January 20, 2011

Kenneth J. Nachbar
William M. Lafferty
John P. DiTomo
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899

Donald J. Wolfe, Jr.
Kevin R. Shannon
Berton W. Ashman, Jr.
Potter Anderson & Corroon LLP
Hercules Plaza – 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899

Pamela S. Tikellis
Robert J. Kriner, Jr.
A. Zachary Naylor
Chimicles & Tikellis LLP
222 Delaware Ave.
P.O. Box 1035
Wilmington, DE 19899

Re: *Air Products & Chemicals, Inc. v. Airgas, Inc., et al.*
Civil Action No. 5249-CC
In re Airgas, Inc. S'holder Litig.
Civil Action No. 5256-CC

Dear Counsel:

I am in receipt of Air Products' motion filed earlier today to compel defendants' compliance with the July 13, 2010 Amended Order Governing the Protection and Exchange of Confidential Information ("Protective Order") in this matter ("Air Products' Motion to Compel"), along with defendants' response to that motion. I am also in receipt of defendants' motion *in limine* filed this afternoon to preclude Air Products from offering evidence to support the position that $70 is its "best and final" offer ("Airgas's Motion *in Limine*"). This is my ruling on both motions.

AIR PRODUCTS' MOTION TO COMPEL

The motion to compel compliance with the Protective Order relates to supplemental discovery undertaken by the parties regarding Air Products' increased $70 offer for Airgas and the Airgas board's rejection of that offer. Air Products asserts that defendants' use of the "Litigators' Eyes Only" ("LEO")[1] designation at recent depositions and on documents produced in response to my December 23, 2010 and December 30, 2010 Letter Orders is overbroad and prejudicial to Air Products.

Air Products makes three requests in its motion. First, it asks the Court to order defendants to immediately review the recently-taken deposition transcripts of all Airgas witnesses—large sections of which have been designated as LEO—and remove the LEO designation on testimony relating to non-LEO topics ("Request 1"). Second, it asks the Court to order defendants to immediately produce non-LEO versions of the minutes of Airgas board meetings that have taken place since October 2010, redacting only such information that is properly designated as LEO under the Protective Order. Specifically, Air Products requests non-LEO versions of the October 21, November 1-2, December 10 and December 21 minutes

[1] The Protective Order provides that any party may designate information as LEO "if such party in good faith reasonably believes that such Covered Material relates to (i) valuation information, financial plans, forecasts or projections, or business, strategic or management plans or strategies or (ii) communications with a governmental agency concerning Air Products' offer to acquire Airgas." Protective Order ¶ 4. Alternatively, information may be designated as "Highly Confidential" if it "(i) relates to financial plans, forecasts or projections; business, strategic or management plans or strategies; potential, considered or actual strategic transactions or business combinations, including but not limited to mergers, acquisitions, joint ventures, purchases, buy-outs, consolidations, transfers of interest and/or security issuances, and any such offers or expressions of interests; proprietary technical information; trade secrets; product development and planning; marketing plans or strategies; studies or analyses by internal or outside experts or consultants; financial, tax or accounting results or data; or competitive analyses; (ii) relates to particular customers or suppliers, the terms of particular customer or supplier transactions, pricing or costs of goods or services, and/or other highly sensitive information relating to the Disclosing Party's relationship with particular customers or suppliers; (iii) relates to assets to be divested in order to comply with antitrust laws or orders of antitrust authorities; (iv) contains information, the disclosure of which may implicate potential antitrust laws, regulations, or orders, and therefore is the type of information that should not be disclosed to a competitor, supplier or customer; and/or (v) consists of other non-public, sensitive information, disclosure of which to the adverse party, even subject to the terms governing Confidential Information under this Order, is likely to cause competitive business injury" (Protective Order ¶ 3), or as "Confidential" if it "contains non-public, confidential, proprietary or commercially or personally sensitive information that requires the protections provided in this Order." Protective Order ¶ 2.

("Request 2"). Third, Air Products asks the Court to order defendants to immediately re-review any documents produced in response to my December 23 and December 30 Letter Orders and make good faith confidentiality re-designations in accordance with the Protective Order ("Request 3"). For the following reasons, the motion is granted in part and denied in part.

The parties are in the process of resolving Request 1. This ruling clarifies and confirms the process for resolving that Request. Essentially, Air Products argues that defendants have designated huge portions of the deposition transcripts of Airgas witnesses as LEO—even when, it seems, much of the transcripts deal with non-LEO information.[2] This problem, however, is (at least in part) one of Air Products' own making. When Airgas's counsel questioned Air Products' witnesses in depositions, it separated the LEO material from the non-LEO material and saved the LEO questions for the end of the depositions. Air Products' counsel, on the other hand, asked questions about LEO material throughout the depositions. During the depositions, defendants' counsel thus designated transcripts as LEO at the outset of questioning about LEO material, and then did not seek to review the transcripts afterwards in order to de-designate those portions that did not deal with LEO material. Air Products is correct that, as a general matter, defendants bear the burden of showing that their LEO designations are appropriate and should be sustained.[3] As a practical matter, though, the situation Air Products finds itself in could have been avoided. Thus, although I regret the imposition on Air Products' Delaware counsel, the "protocol" suggested by Airgas in its January 20, 2011 letter to Air Products seems to be the most fair way to address the re-designation of the Airgas witness deposition transcripts. That is, Air Products will send defendants the deposition transcripts it wants reviewed with notations to show what sections Air Products believes are properly designated LEO.[4] Airgas will respond within 5 hours of receipt of each transcript.

With respect to the Airgas board minutes (Request 2), defendants have already indicated that they will "review the October, November and December minutes and produce non-LEO versions of these minutes."[5] Indeed, Air Products

---

[2] *See* Air Products' Motion to Compel 3-4 ("[O]f the 1,034 pages of testimony taken from Airgas witnesses thus far, only 109 pages have been designated non-LEO.").

[3] *See ID Biomedical Corp. v. TM Techs. Inc.*, 1994 WL 384605, at *2.

[4] *See* Air Products' Motion to Compel, Exhibit F (Jan. 20, 2011 letter from Jasand Mock to Ryan D. Stottman), at 2; Air Products' Motion to Compel 5 n.2; Defs.' Response to Air Products' Motion to Compel 2.

[5] Air Products' Motion to Compel, Exhibit F (Jan. 20, 2011 letter from Jasand Mock to Ryan D. Stottman), at 2.

suggested that the parties may be able to resolve this issue on their own,[6] and defendants have now represented to the Court that they have "undertaken to reproduce [Airgas's] board minutes to provide a Highly Confidential version that Cravath, Swaine & Moore LLP will be able to see."[7] This representation thus appears to resolve Request 2. Defendants shall produce those non-LEO versions of the minutes (redacting only such information that is properly designated as LEO under the Protective Order) by 5 p.m. on January 22, 2011.

Request 3 is granted in part. Airgas shall produce a non-LEO version of the shareholder letter.[8] I view this letter—a letter from a shareholder of Airgas (an institutional investor) to the Airgas board, expressing its view as to Airgas's value—as irrelevant to the core issue before me, and I do not see how this letter would fall within the definition of LEO material under the Protective Order. Defendants argue that the letter "is a confidential communication with a large shareholder of Airgas regarding the shareholder's view of value in a sale transaction, the disclosure of which would give Air Products information that could unfairly assist it in the formulation of its takeover strategy in approaching that shareholder with respect to the shareholder's investment decision."[9] Defendants further assert that it "is properly designated LEO because it reflects a shareholder's privately held views of the value of Airgas in a sale transaction—information that bears on the value of Airgas and on Airgas's strategy in a proxy contest."[10] An institutional shareholder's privately held views and non-exhaustive analyses on the "fair value" of Airgas based on publicly-available information, though, are just that—privately held views by a shareholder based on information that can be accessed by others. The letter in no way provides a fairness opinion or is "even intended to be a substitute for a full fairness review," nor does it purport to provide the type of valuation of Airgas that a financial advisor would provide. Thus, it is not, in my view, properly designated as LEO.

As far as re-reviewing and re-designating "any documents produced in response" to the December 23 and December 30 Letter Orders, however, given that the supplementary evidentiary hearing is scheduled to begin next week and I

---

[6] Air Products' Motion to Compel 7 n.3.
[7] Defs.' Response to Air Products' Motion to Compel 2.
[8] Air Products' Motion to Compel, Exhibit C. Defendants may designate the non-LEO version as Confidential or Highly Confidential if they make a good faith determination that it warrants such a designation.
[9] Air Products' Motion to Compel, Exhibit E (Jan. 12, 2011 letter from Charles D. Cording to Ryan D. Stottman).
[10] Defs.' Response to Air Products' Motion to Compel 4.

understand that time is of the essence, the broader relief Air Products seeks in Request 3 is denied. If Air Products wants to request that specific documents be re-reviewed and re-designated because they are wrongly designated as LEO, they may do so, but Airgas is not otherwise required to re-review and re-designate all of the documents produced after December 2010.

AIRGAS'S MOTION *IN LIMINE*

Lastly, I turn to Airgas's motion *in limine*, filed late this afternoon. In this application, Airgas asks that I preclude Air Products from offering testimony or documentary evidence in support of its assertion that $70 per share is its "best and final" offer. Because Air Products has refused to produce internal analyses or valuations that the Air Products board relied upon in reaching the decision to make the $70 offer, Airgas contends that Delaware law precludes Air Products from offering any evidence supporting its determination to make this its "best and final" offer.

The decisions that Airgas relies upon for this argument, however, are inapposite to this case.[11] Airgas is the target company; it is relying upon a rights plan to resist the potential hostile acquirer. Thus, it is the Airgas board's burden to defend the decision to maintain the rights plan—a defense that will require the board to demonstrate the existence of a threat to corporate policy or effectiveness and the reasonableness of the board's response to that threat. Delaware decisions involving the "sword and shield" concept have precluded a party from shielding evidence from an opposing party and then relying on the evidence at trial to meet

[11] For example, defendants cite *Chesapeake Corp. v. Shore* for the proposition that Air Products is the "master of the evidence" it will present and "must accept the consequences of [its] tactical choice" to bar discovery into the financial analyses supporting its $70 offer. Airgas's Motion *in Limine* 5 (quoting *Chesapeake*, 771 A.2d 293, 301 n.8 (Del. Ch. 2000); *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, Del. Ch., C.A. No. 16588, Jacobs, V.C. (Oct. 23, 1998) (Transcript)). In both *Chesapeake* and *Mentor Graphics*, however, the party barring discovery on privilege grounds and thus precluded from presenting such evidence in their defense at trial was defendants. In *Mentor Graphics*, then-Vice Chancellor Jacobs said the following: "By blocking discovery into these subjects, the defendants have . . . thereby precluded themselves from arguing or placing into evidence the content of [those subjects]. It must be emphasized that under *Unocal* and *Unitrin* the defendants have the burden of showing the reasonableness of their investigation, the reasonableness of their process and also of the result that they reached. One would think that a board having that burden would want to expose their deliberative process to full view, but they are not legally required to do so." Del. Ch., C.A. No. 16588, Jacobs, V.C. (Oct. 23, 1998) (Transcript); *see also Chesapeake*, 971 A.2d at 300-01 & n.8 (same). The reverse is not necessarily true for plaintiffs.

its burden of proof on an issue central to the resolution of the parties' dispute.[12] But Air Products' decision to characterize its $70 offer as its "best and final" offer does not involve an issue central to the resolution of this dispute. Indeed, Air Products' internal views and assumptions about (or analyses of) the value of Airgas, whether on a standalone basis or in combination with Air Products, are not central to any question that I must resolve in the context of this litigation. Whether the Airgas board honestly and in good faith believed the $70 offer presented a "threat" depends upon what the Airgas board knew at the time it made that determination; it cannot be based upon what the Air Products board knew about Air Products' own internal valuations of Airgas, either alone or in combination with Air Products. Nonetheless, I can imagine circumstances (not present here) where a buyer's views or analyses of an asset's value might be relevant to a determination of the fairness of a transaction, or to whether the buyer's conduct was reasonable and equitable in particular circumstances—but (again) those are not circumstances implicated in this case.

Air Products is not required to demonstrate the fairness of its offer; nor is it required to demonstrate that its offer is less than, equal to, or greater than what it has independently and internally determined is the value of Airgas. Having publicly announced that its $70 offer is its "final" offer, however, Air Products has now effectively and irrevocably represented to this Court that there will be no further requests for judicial relief with respect to any other offer (should there ever be one). Accordingly, contrary to Airgas's argument, this is not a "sword and shield" problem, and Airgas is not entitled to an order prohibiting Air Products from introducing testimony or documents supporting its assertion that $70 is its "best and final" offer. Airgas's motion *in limine* is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:slu

[12] *See, e.g., Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999).