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OF THE
STATE OF DELAWARE**

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Re: *Rohm and Haas Co. v. The Dow Chemical Co., et al.*
Civil Action No. 4309-CC

Dear Counsel:

Before me are three discovery issues. On February 20, 2009, Rohm and Haas Company filed a motion to compel the production of The Dow Chemical Company's current financial model that Dow is using to provide information to banks, rating agencies, and its board. On February 23, Dow filed a response to the motion to compel and a cross-motion for a protective order. Dow argues that the model Rohm and Haas seeks is protected by the attorney work product privilege and the business strategies privilege. Dow also seeks a protective order to limit access to certain discovery materials already provided to Rohm and Haas. Specifically, Dow seeks to preclude access by Goldman Sachs to Dow's financial models. On February 23, Dow also filed a motion to compel discovery on plaintiff's allegations of irreparable harm. The only remaining issue on this motion is the production of a February 3 email from Thomas MacPhee, a Rohm and Haas

Vice President, to Rohm and Haas's Chief Financial Officer, Jacques Croisetiere (the "MacPhee Email"). Rohm and Haas argues that the MacPhee Email is protected attorney work product because the email was part of an effort to gather information to assist Rohm and Haas's counsel in responding to Dow's interrogatories.

For the reasons set forth below, Rohm and Haas's motion to compel is denied. Dow's cross-motion for a protective order is denied, but only on the conditions explained below. Dow's motion to compel is granted in part, in that Rohm and Haas will produce the MacPhee Email to Dow.

I. ROHM AND HAAS'S MOTION TO COMPEL

Dow's self-dubbed Enterprise Model is a dynamic program that Dow uses for corporate decision-making and the development of near and long-term corporate strategies and financial planning. Rohm and Haas claims that this financial model is critical to its ability to understand what Dow is telling the banks and rating agencies and thereby to rebut Dow's defense that the merger will harm both Dow and Rohm and Haas and threaten the viability of the newly created entity. On February 17, Dow produced several versions of the financial model to Rohm and Haas, the most recent of which was dated approximately January 17. These models were produced in their dynamic form, meaning with the logical formulas intact and able to be manipulated.

Rohm and Haas seeks to compel production of the updated version of this financial model. Dow claims that following a January 17 meeting, Dow's head of litigation directed Dow personnel to work with the company's attorneys to create a model that could be used for litigation support and settlement analysis in anticipation of this litigation. Dow created this new model by programming new data and assumptions, including potential settlement strategies, into the then-existing Enterprise Model. Dow termed the new model the Litigation Support Model.[1]

On February 19, Dow produced to Rohm and Haas a static excerpt of the Litigation Support Model that did not contain formulas or many of the spreadsheets contained in earlier iterations of the model. Dow has also produced (1) presentation materials used in a February 16 meeting between Dow and the

[1] For the sake of convenience, I will refer to this model as the Litigation Support Model. While this name implies a result, I assure the parties that it was not the basis for my decision.

banks and rating agencies, including pro forma financial projections prepared using a limited set of output from the Litigation Support Model and (2) a consolidation of the model output that Dow's Treasury Department prepared in order to prepare the lender and rating agency presentations. According to Dow, the banks and rating agencies do not have Dow's Enterprise Model or the Litigation Support Model, and not even Dow's own litigation experts have the Litigation Support Model. Thus, Rohm and Haas is on exactly the same footing as Dow's own experts, who have received the Enterprise Model in the same form provided to Rohm and Haas, and the same outputs of the Litigation Support Model produced to Rohm and Haas.

Dow argues that the Litigation Support Model is protected by the attorney work product doctrine. I agree. The key question that the Court must ask when evaluating a claim of work product protection is whether the material at issue was "prepared in anticipation of litigation or for trial."[2] In other words, "the right question to ask when determining whether the work product doctrine applies is: '[u]nder the totality of the circumstances, why was the document prepared?'"[3] For documents that were prepared in anticipation of litigation, the party seeking the discovery must show a "substantial need" for the discovery and that it cannot otherwise obtain the material without "undue hardship."[4]

Dow has demonstrated that the Litigation Support Model sought by Rohm and Haas was prepared in anticipation of litigation. The Litigation Support Model was created at the instruction of Dow's lead litigation counsel, who directed Dow personnel to work with the company's lawyers to create a model that could be used for litigation support and settlement analysis purposes in anticipation of this litigation.[5] According to Dow, the Litigation Support Model was created by programming new data and assumptions, including *potential settlement strategies*,

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[2] Ct. Ch. R. 26(b)(3) ("[A] party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.").

[3] *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 959 A.2d 47, 52 (Del. Ch. 2008) (quoting *Pfizer v. Advanced Monobloc Corp.*, 1999 WL 743868, at *5 (Del. Super. Sept. 20, 1999)).

[4] Ct. Ch. R. 26(b)(3).

[5] Defs.' Resp. to Pl's. Mot. to Compel (hereinafter, "Resp."), Ex. B, 2/22/09 D. Stuart Aff. ¶ 6; Ex. C, 2/22/09 D. Bernick Aff. ¶¶ 4-5; Ex. A, 2/22/09 C. Wilhelm Aff. ¶ 16.

into the then-existing Enterprise Model.[6] Thus, many of the inputs, assumptions, formulas, and outputs of the Litigation Support Model represent Dow's litigation strategies and settlement evaluations.[7] This Court is hard pressed to think of any information that warrants greater protection under attorney work product doctrine than potential settlement strategies prepared at the direction of counsel.

Additionally, work product protection is not precluded merely because the Litigation Support Model may also serve a business function. In adopting the "because of" test over the "primary purpose" test, the Court in *Pfizer v. Advanced Monobloc Corp.* observed that "[e]valuating the risks of litigation that a business plan will face is often integral to the plan . . . . There is no persuasive reason to deny work product protection because the document has these marks of business purpose, if it was prepared because of the anticipated litigation."[8] I am convinced that the litigation purpose of the Litigation Support Model sufficiently permeates the business purpose of the model to warrant work product protection.

Although the information sought in the motion to compel may be relevant, Rohm and Haas has failed to establish the necessary showing to demonstrate entitlement to otherwise-protected work product: (1) a "substantial need" of the materials and (2) that it cannot obtain the "substantial equivalent" of the materials without "undue hardship." Dow has provided Rohm and Haas with a dynamic version of the Enterprise Model and the inputs and outputs of the Litigation Support Model that have been presented to the Dow board, the banks, and the credit rating agencies. According to Dow, Rohm and Haas "is on exactly the same footing as Dow's experts, who have received the Enterprise Model in the same form provided to Rohm and Haas, and the same *outputs* of the Litigation Support Model produced to Rohm and Haas."[9] Given the information to which it already has access, Rohm and Haas has not demonstrated a substantial need for the Litigation Support Model.

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[6] Resp. Ex. A, C. Wilhelm Aff. ¶ 17.
[7] *See* Resp. at 12.
[8] *See Pfizer*, 1999 WL 743868, at *4 (quoting 6 Moore's Federal Practice, § 26.70[3][a] (Matthew Bender 3d ed.)).
[9] Resp. at 8; *See* Resp. Ex. A, C. Wilhelm Aff ¶ 32.

II. DOW'S CROSS-MOTION FOR PROTECTIVE ORDER

In its cross-motion, Dow seeks a protective order to limit access to the Enterprise Model and in particular to preclude access by Goldman Sachs personnel. Goldman Sachs serves as Rohm and Hass's financial advisor in connection with the merger and has been identified as a witness for trial. Goldman Sachs is also serving as a financial advisor for other parties that may be counter-parties to Dow in other transactions. Dow claims that the Enterprise Model may enable Goldman Sachs (and its clients) to determine the price at which Dow might sell certain assets and the price other potential bidders have offered for such assets. Dow claims that it could be significantly harmed if Goldman Sachs clients gained access to the Enterprise Model, which Dow claims is a powerful decision model used for Dow's run-the-business analysis.

Under Court of Chancery Rule 26(c), this Court has broad discretion, upon motion and for good cause shown, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Given the potential prejudice to Rohm and Haas of denying them a financial advisor and trial witness at this late stage of the litigation, I am denying the motion for a protective order, albeit on certain mandatory conditions.

Access to the Enterprise Model will be limited to only Goldman Sachs personnel that are essential to advising Rohm and Haas regarding this litigation. In addition to any confidentiality agreements already undertaken, and in addition to the confidentiality undertakings contemplated on page four of Rohm and Haas's motion to compel and on page seven of Rohm and Haas's reply in further support of its motion to compel, any Goldman Sachs personnel who have access to the Enterprise Model (or any "dynamic" Dow financial model) will enter into, under oath, a certification that will be filed with this Court that states that such person: (1) consents to the jurisdiction of this Court for purposes of enforcement[10] of the certification and other confidentiality undertakings regarding confidential Dow material; (2) will use information obtained in discovery from Dow only for purposes of this litigation and will not provide Dow information to any other person within Goldman Sachs or otherwise; (3) will not, absent Dow's written

[10] *See generally DiSabatino v. Salicete*, 671 A.2d 1344, 1348 (Del. 1996) (explaining the inherent authority in all courts to punish for contempts).

consent, appear opposed to Dow in any transaction that involves Dow's business; and (4) will return or destroy all Dow materials at the conclusion of this litigation and will then certify to this Court that the materials were returned or destroyed. The parties will confer and submit to the Court signed certifications reflecting what I have set out above. Any Goldman Sachs employee will so certify *before* accessing Dow discovery materials. To the extent that any Goldman Sachs personnel already have Dow materials, they will so certify within five days of the entry of this letter opinion. Additionally, Rohm and Haas's local and out-of-state counsel will certify that access to confidential Dow material will only be given to Goldman Sachs personnel who have entered into a certification reflecting what I have set out above.

III. DOW'S MOTION TO COMPEL

Dow argues that Rohm and Haas has not met its burden of showing that the MacPhee Email is protected work product. I agree. Rohm and Haas argues that the MacPhee Email was created as part of an effort to gather information to respond to Dow's discovery requests. Dow points out in its reply in support of its motion to compel that the only support Rohm and Haas provides for this assertion is Rohm and Haas's citation to two deposition excerpts: (1) Rohm and Haas's General Counsel, Robert Lonergan's testimony that he asked business heads "or people under their supervision [to] gather the data and assemble it", and (2) Jacques Croisetiere's testimony that he asked MacPhee to send him the information in the email.[11] Dow also points out that the email was not written by Rohm and Haas's counsel, was not sent to Rohm and Haas's counsel, does not in any way reference Rohm and Haas's counsel, and does not contain anything to suggest that its author was soliciting or reacting to legal advice. I agree with Dow that the scant evidence Rohm and Haas has provided leaves the Court with only a faint inference that the MacPhee Email was prepared in anticipation of litigation or for trial. Under Delaware law, the burden is on the party asserting the claim of privilege. Rohm and Haas has not sufficiently shown that the MacPhee Email meets the requirements of protected work product. Accordingly, Dow is entitled to discovery of this otherwise relevant evidence.

[11] Even the portion of Croisetiere's deposition testimony to which Rohm and Haas cites is ambiguous: "Q. At one point did you ask [Mr. Macphee] to try to collect information to support a story that Rohm and Haas was suffering harm as a result of the delay in the Merger? A. No, I never asked him specifically. Suffering harms, not financial harms, yes. I asked not only him, but all of my direct reports." Pl's. Resp. to Dow's Mot. to Compel at 4 n.2.

For the foregoing reasons, Rohm and Haas's motion to compel production of the Litigation Support Model is denied. Dow's cross-motion for a protective order to prevent access by Goldman Sachs to its financial models is denied, but only on the conditions set forth above. Dow's motion to compel production of the MacPhee Email is granted to the limited extent that Rohm and Haas must produce the MacPhee Email to Dow.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:jmb