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January 24, 2011

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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:

As I advised you on Friday evening, I am denying defendants' motion *in limine* to exclude or limit the testimony of Air Products' expert witness, Joseph J. Morrow, at the supplemental evidentiary hearing that is scheduled to begin tomorrow ("Defs.' Morrow Motion *in Limine*"). These are my reasons for denying the motion.

BACKGROUND

A week-long trial in this matter was held in October. At that time, Air Products' offer was $65.50 per share. Air Products subsequently raised its offer to

$70, making that its "best and final" offer.[1] In light of the increased offer, counsel for defendants argued that the Court should not, and could not, decide the core issue that was tried based on the record presented at the October trial and in the post-trial briefing submitted before the increased offer, and before the Airgas board had made a determination as to that offer.[2] Accordingly, in a Letter Order dated December 23, 2010, I scheduled a supplemental evidentiary hearing regarding Air Products' position that $70 per share is its "best and final" offer and the Airgas board's decision to reject that offer as "clearly inadequate."[3] In connection with the upcoming hearing, I authorized the parties to take limited discovery relating to the $70 offer.[4] The parties sent letters to the Court regarding the scope of discovery permitted by the December 23 letter. Noting that there was an asymmetry in the phrasing of the limited discovery authorized by the December 23 letter, Air Products asked for "symmetrical" discovery.[5] Airgas then sent a letter making several points about the scope of discovery. One such point was that the "unrebutted evidence at trial was that Air Products could call a special meeting and seek to remove the Airgas Board by a 67% vote."[6] If the Court did not view the record to be closed on this issue, however, and Air Products were allowed to offer further evidence regarding the achievability of a 67% vote, Airgas argued that it, too, should be entitled to present further evidence on that point, including analyses

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[1] *See* Air Products Press Release (Dec. 9, 2010) ("This is Air Products' best and final offer for Airgas and will not be further increased.").

[2] Teleconference Tr. 10-11 (Dec. 13, 2010) ("I hope it's clear from our submission that we do not believe that the Court should be going forward [] to decide the issue that we tried on the basis of the pleadings and the record that's in front of you.") (Wolinsky); *see also* Defs.' Opp. to Air Products' Mot. to Supplement the Record 4 ("[I]f there is a dispute as to Airgas'[s] response to Air Products' $70 offer, it ought to be litigated in a deliberative and fair manner based on an actual appropriate record and opportunity to be heard.").

[3] Dec. 23 Letter Order 2-3.

[4] *See* Dec. 23 Letter Order 2 ("I will allow the parties to take limited discovery on both sides regarding the $70 offer (i.e., both Air Products' position that $70 is their 'best and final' offer and the Airgas board's position that $70 is inadequate), the financial advisors' reports on that offer, and any other issues the parties believe should be considered.").

[5] Letter from Kenneth J. Nachbar to Court (Dec. 26, 2010).

[6] Letter from Kevin R. Shannon to Court (Dec. 28, 2010), at 2. The letter continued, "We glean from the fact that the Court's Order did not address this issue that following receipt of the parties' post-trial submissions on this matter, the Court regards the record to be closed on this issue." *Id.* Air Products takes the position that the evidence at trial on this issue was not, in fact, unrebutted. Air Products' Response to Airgas's Morrow Motion *in Limine* 3. In any event, though, Air Products argues that if defendants are permitted to introduce supplemental evidence on this issue, Air Products should be permitted to respond. *Id.*

prepared by Air Products' proxy solicitor, MacKenzie Partners.[7] Air Products responded that "Airgas's request for discovery into other ancillary matters[[8]] is a side show and irrelevant to the 'core' issue before the Court."[9] On December 30, 2010, I sent another Letter Order to counsel intending to clarify the scope of discovery authorized by the December 23 Letter Order. Specifically, I informed the parties that:

> I am authorizing limited discovery regarding the documents presented to and considered by the boards of Airgas and Air Products regarding Air Products' increased $70 per share offer and Airgas's response that that increased offer. Depositions may be taken of those individuals (at Air Products) directly involved in or responsible for making the increased $70 offer and those individuals (at Airgas) directly involved in or responsible for rejecting the increased $70 offer.[10]

The December 30 Letter Order continued:

> I am interested in the facts regarding why the Airgas board has rejected the increased $70 per share offer and why the Airgas board deems the $70 offer to be inadequate at the present time. I also am interested in the factual basis for concluding (or not concluding) that the tender offer process has reached its end or terminal stage.[11]

Finally, the December 30 Letter Order explained that this limited discovery was intended to be symmetrical in nature and scope, and that the more expansive discovery mentioned in the parties' letters (including discovery into the analyses prepared by MacKenzie Partners on the 67% vote issue) was not authorized under my December 23, 2010 Letter Order.[12]

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[7] *Id.*

[8] Other than the limited discovery contemplated by the December 23, 2010 letter regarding Air Products' decision to make its "best and final" $70 offer and the Airgas board's decision to reject it—which, Air Products suggests, should be limited to the documents presented to and considered by each board in connection with their respective decisions to make the $70 offer (Air Products) and to reject it (Airgas), and depositions of the particular individuals involved in making those decisions.

[9] Letter from Kenneth J. Nachbar to Court (Dec. 29, 2010), at 2.

[10] Dec. 30 Letter Order 1.

[11] *Id.* at 2.

[12] *Id.*

On January 5, 2011, the parties exchanged witness lists for the supplemental evidentiary hearing. Shareholder Plaintiffs identified five potential witnesses. Air Products identified three potential witnesses. Airgas identified fifteen potential witnesses. One of the witnesses identified on Airgas's list was Peter C. Harkins, Airgas's "proxy expert" who had testified in the October trial as to the realistic attainability of a 67% vote at a special meeting to remove and replace Airgas's sitting directors.[13] Also on January 5, 2011, defendants served Harkins' Second Supplemental Expert Report on Air Products. The Second Supplemental Report addressed several issues, but did not offer an opinion regarding the "realistic attainability" of a 67% vote of the outstanding stock at a special meeting to remove Airgas directors, which Harkins had previously opined on.

Air Products objected to Airgas's attempt to broaden the scope of the limited discovery authorized by the December 23 and December 30 Letter Orders, and on January 6, 2011, filed a motion for a protective order and other pre-hearing relief. Air Products argued that five of the individuals identified on Airgas's witness list are not "at Airgas" or "at Air Products," in accordance with the Court's December 30 clarifying Letter Order.[14] Moreover, Air Products objected that having "another round of expert testimony" was outside the scope of the anticipated discovery and hearing.[15]

On a telephone conference with the parties that afternoon, I denied Air Products' motion. Although I agreed with Air Products that some of the individuals identified on Airgas's witness list were beyond the scope of what I originally intended in my December 23 and 30 Letter Orders, as I told counsel, Airgas and its directors are on trial. Defendants are bearing the burden of proof.[16] In light of that, I denied all parts of Air Products' omnibus motion, which included allowing Airgas to submit Harkins' supplemental expert testimony. Accordingly, Air Products advised the Court and defendants' counsel that it might need to call a

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[13] *See, e.g.*, Trial Tr. 1067, 1071 (Harkins). Harkins had opined on other issues as well, including the significance of the vote at the September 15, 2010 Airgas Annual Meeting, what shareholders may have been thinking when they cast their votes, the role of institutional investors and arbitrageurs in the tender offer process, and more.

[14] Two of the witnesses identified were Airgas's outside financial advisors (DeNunzio and Rensky). Two were Air Products' outside financial advisors (Miller and Bednar). And one is a representative of a purported stockholder of Airgas who was not directly involved with any decision made by the Airgas board (Hanson). *See* Air Products Omnibus Mot. for Protective Order and Other Pre-Evidentiary Hearing Relief 6-7.

[15] *Id.* at 1, 7-9.

[16] *See* Teleconference Tr. 14-16 (Jan. 6, 2010).

rebuttal expert.[17] This ruling substantially broadened the scope of discovery and the supplemental hearing as I had originally envisioned them.

After the telephone conference, defendants' counsel, by letter dated January 11, 2011, asked Air Products' counsel to advise defendants if it intended to call a rebuttal witness to Harkins by the close of business on the following day, January 12.[18] At the time, Air Products advised defendants that it "currently [did] not intend to call a rebuttal witness to address the testimony of Peter C. Harkins," but reserved the right to call such a witness in the event that Harkins testified at deposition or trial on matters outside the scope of his Second Supplemental Expert Report.[19]

Harkins was deposed on January 14, 2011. Although not addressed in his supplemental expert report, counsel for Air Products questioned him on his views about the realistic attainability of the 67% vote. Airgas did not object.[20] Harkins also testified as to the "prisoner's dilemma" that Airgas's stockholders find themselves in as a result of Air Products' offer.[21] Late in the afternoon on January 18, 2011, Air Products' counsel advised defendants that after reviewing Harkins' deposition transcript, they now intended to call Joseph J. Morrow as an "expert rebuttal witness."[22] Air Products' counsel said that it would "promptly produce" Morrow's expert report and would make him available for deposition.[23] Airgas responded the following day, January 19, 2011, requesting to receive Morrow's expert report by the close of business that day in order to have "a meaningful opportunity to review Mr. Morrow's expert report in advance of his deposition."[24] The following evening, on January 20, 2011, Air Products served Morrow's expert report on defendants. Morrow's report addresses matters beyond those addressed in Harkins's second supplemental report, including his opinion on the "realistic attainability" of a 67% vote to remove directors at a special meeting.

CONTENTIONS OF THE PARTIES

A. Defendants' Position

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[17] *Id.* at 17.
[18] Defs.' Morrow Motion *in Limine* 5 and Ex. H.
[19] *Id.* at 5 and Ex. I.
[20] *Id.* at 5 ("Rather than involve the Court, counsel for Airgas did not block this questioning.").
[21] *See* Air Products' Response to Defs.' Morrow Motion *in Limine* 1-2.
[22] *Id.* at 6 and Ex. J.
[23] *Id.*
[24] *Id.* at 6 and Ex. K.

Defendants argue that Air Products has known since December 23, 2010 that the deadline for completing discovery was this past Friday, January 21, 2011. Furthermore, Air Products has known since January 5 that Airgas intended to call Harkins as an expert, yet Air Products did not serve Morrow's rebuttal report until January 20, 2011. As the cut-off period for the supplemental discovery was fast-approaching (defendants filed their Morrow Motion *in Limine* on Friday, January 21, 2011—the day discovery was to be completed by—and Air Products responded to the motion late in the afternoon that same day), Airgas argued that it did not have adequate time to fully prepare for Morrow's deposition. Thus, it argued, Morrow's testimony and report should be excluded in their entirety because Air Products failed to produce his expert report on a timely basis.

In the alternative, Airgas requests that the Court preclude Morrow from testifying with respect to the "realistic attainability" of a 67% vote. Defendants argue that Harkins did not opine on this issue in his Second Supplemental Report, and therefore, it is not a proper subject for a "rebuttal." In the event, however, that the Morrow Motion *in Limine* is denied, defendants request that Harkins be permitted to testify in response to Morrow's testimony on the "realistic attainability" issue.

B. Air Products' Position

On the "prisoner's dilemma" issue, Air Products argues that it is simply responding to arguments that defendants have made, continue to make, and seek to introduce supplemental expert testimony to support. With respect to the 67% "realistic attainability" issue, Air Products argues that (1) the topic was addressed at Harkins's deposition, (2) defendants have questioned Air Products' three witnesses on this subject, and (3) Airgas has failed to demonstrate how it would be prejudiced by the admission of Morrow's testimony.

Alternatively, Air Products "would consent to a limitation on the Supplemental Hearing preventing either party from offering testimony or any other evidence on [the attainability of a 67% vote]."[25]

ANALYSIS

Although it is true that defendants only received Morrow's rebuttal expert report the day before discovery was to be completed, they did, in fact, receive his report before the close of discovery. Harkins's deposition had occurred the week

[25] Air Products' Response to Defs.' Morrow Motion *in Limine* 3.

before. Air Products had advised defendants on January 18 that it would promptly produce Morrow's expert report and make him available for deposition. Two days later, Air Products produced his expert report. Such is the nature of highly expedited proceedings.

Thus, I find that Morrow's expert report was timely produced and is not excluded in its entirety. Neither is Morrow precluded from testifying as to the 67% vote issue.

I decline Air Products' suggestion to limit all testimony on this issue for essentially the same reasons I denied Air Products' January 6, 2011 motion. Although the realistic attainability of a 67% vote was not addressed in Harkins's second supplemental report, it was not "unrebutted" at the October trial, Harkins has opined on this issue before (and indeed, was questioned about it in his deposition by Air Products' counsel), Airgas has questioned Air Products' witnesses on the issue, and if the parties want to submit supplemental evidence relating to the "realistic attainability" now that Air Products' offer is $70 per share, they may do so. I believe I have made my views known on what I believe to be the core issue to be decided.

To the extent that Airgas was unable to depose Morrow before the discovery window closed, Airgas may depose Morrow this week, before he is called to testify.[26] As far as Airgas having time to fully prepare for his deposition and trial testimony, Morrow's expert report is 11 pages long, and defendants' counsel is familiar with the subject matter. Therefore I conclude that defendants would not be prejudiced by the admission of Morrow's report and testimony, and Air Products is entitled to rebut the testimony given by Airgas's proxy expert witness in his deposition.[27] Finally, I grant Airgas's request that Harkins be permitted to testify in response to Morrow's testimony on the 67% "realistic attainability" issue.

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[26] As a rebuttal expert, Morrow will likely not testify until the end of the hearing. *Id.* at 4.

[27] One of the cases cited by Airgas is a New York federal court case explaining that "[a] rebuttal expert report is not the proper 'place for presenting new arguments, unless presenting those arguments is substantially justified and causes no prejudice.'" Defs.' Morrow Motion *in Limine* 7 (quoting *Ebbert v. Nassau County*, CV 05-5445, 2008 U.S. Dist. LEXIS 74213, at *13 (E.D.N.Y. Sept. 26, 2008)). The facts and circumstances there were quite different from what we have here. Although that case is not binding precedent on this Court, though, the New York Court explained that, in maintaining its full discretion to determine whether expert testimony will be admitted, the following factors provide guidance: "(1) the prejudice to the opposing party; (2) the ability of the party to cure the prejudice; (3) the likelihood of disruption to the trial; and (4) the bad faith involved." *Ebbert v. Nassau*, 2008 U.S. Dist. LEXIS 74213, at *14 (citing

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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cases). In *Ebbert*, in finding that plaintiff had no opportunity to respond to the new material presented, the prejudice could "not be cured by further discovery at this juncture." *Id.* Here, there will be no disruption to the supplementary evidentiary hearing, and any potential prejudice is easily cured by allowing defendants to depose Morrow before he is called to testify. Further, Airgas's expert witness will have the opportunity to respond to Morrow's testimony. I recognize that counsel is acting under extreme time pressures imposed by the situation we find ourselves in, and at times, imposed by the Court. I do not, however, find any evidence that Air Products delayed in producing Morrow's report in bad faith, or that allowing Morrow's report and testimony now would unfairly prejudice defendants. On the contrary, I do find that Air Products is justified in submitting Morrow's testimony for the reasons stated above.