COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
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Wilmington, Delaware 19801-3734

REDACTED VERSION - FILED MAY 25, 2010

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Re: *Arkema Inc. v. The Dow Chemical Company and Rohm and Haas Company*, Civil Action No. 5479-VCP

Dear Counsel:

This matter is before me on Plaintiff, Arkema, Inc.'s ("Arkema"), motion for a temporary restraining order ("TRO") against The Dow Chemical Company ("Dow") and its wholly-owned subsidiary, Rohm and Haas Company ("R&H") (collectively, "Defendants"). On May 6, 2010, Dow informed Arkema that, due to REDACTED it would be unable to supply Arkema with its full contract

quantities of methyl methacrylate ("MMA"), the key chemical raw material used to manufacture many of Arkema's products.[1]

Through the TRO, Arkema seeks to enjoin Defendants from allocating any MMA for their own use or sale to any third party unless and until they have satisfied their obligations to Arkema under an MMA supply contract originally entered into between R&H and Arkema on March 1, 2000 and referred to by the parties as the Capacity Reservation Contract (the "CRC").[2] Arkema claims that it will suffer irreparable damage to its goodwill and its reputation with its customers as a reliable, vertically-integrated supplier of MMA absent entry of the TRO.

Generally, a plaintiff seeking a TRO must show that it has a colorable claim, faces a likelihood of imminent, irreparable harm if relief is not granted, and will suffer greater hardships if the TRO is not granted than the defendants would if the relief were granted.[3] Defendants suggest, however, that where granting a plaintiff's motion for a TRO

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1 *See* Verified Compl. for Declaratory and Equitable Relief ("Compl.") Ex. 4; Affidavit of Douglas Sharp ("Sharp Aff.") ¶¶ 2-3.

2 As amended on January 1, 2002, the CRC remains in effect between Arkema and Dow, who succeeded to R&H's rights under the contract when it acquired R&H on April 1, 2009. *See* Decl. of Robert Summerhayes ("Summerhayes Decl.") ¶ 6. When it entered the CRC, Arkema was known as ATOFINA Chemicals, Inc. *Id.* ¶ 2.

3 *See, e.g., Mitsubishi Power Sys. Americas., Inc. v. Babcock & Brown Infrastructure Gp. US, LLC*, 2009 WL 1199588, at *3 (Del. Ch. Apr. 24, 2009); *CBOT Hldgs., Inc. v. Chi. Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007); *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. May 17, 1990).

effectively would grant all the relief which could be granted after a hearing, that plaintiff must be held to a higher standard, *i.e.*, one akin to that for summary judgment.[4] The Court rarely grants a TRO in such a situation. Nevertheless, in this case, I find that a significant amount of the harm to Arkema already has taken place through Dow's sizeable reduction in the allocation of its MMA supply to Arkema for the week of May 10, 2010. In addition, I have scheduled a prompt preliminary injunction hearing for May 28, 2010—two weeks before the reduced allocation period may end. Hence, granting the requested TRO would not provide all the relief Arkema might receive after trial on the merits and I do not apply the heightened standard championed by Dow.

Regarding its motion for entry of a TRO, Arkema presented a more-than-colorable claim that Dow's failure to provide it with 100% of its requirements for May and June constitutes a breach of the CRC. Additionally, Arkema provided evidence showing that it will be imminently and irreparably injured as a result of that breach. Indeed, from the evidence in this understandably sparse record, it appears that Arkema's reputation as a reliable, vertically-integrated supplier of MMA, which it has built over several years, may be diminished significantly if it is forced to weather all of Dow's planned MMA reductions. Finally, although Arkema has made a strong preliminary showing that Dow is intentionally failing to meet its contractual obligations to supply Arkema with its

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4 *See, e.g., Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972); *Chadha v. Szeto*, 1993 WL 498186, at *2 (Del. Ch. Nov. 18, 1993).

MMA requirements under the CRC, this case is in its infancy, and Defendants have not yet had much of an opportunity to present their defense. Moreover, I find that the balance of harms only weighs slightly in favor of granting the TRO. Indeed, in a case such as this one where the factual record is sparse, where a preliminary injunction hearing is set to follow two weeks from today, and where there is a real possibility of harm in both directions, the equities nearly balance.

Having carefully considered all of these factors, I grant Arkema's motion for a TRO and, from the date of this Letter Opinion until further order of the Court or June 13, 2010, whichever is earlier, I enjoin Dow and R&H from altering the quantities and quality of MMA supplied to Arkema below the REDACTED minimum pounds per month set forth in 12(b) of the CRC. As stated in the accompanying temporary restraining order, the order does not affect Dow's reduced allocation to Arkema of REDACTED of its full contract quantities of MMA for the week of May 10, 2010.

I. PROCEDURAL AND FACTUAL BACKGROUND

Toward the end of the day on Thursday, May 6, 2010, Dow notified Arkema via email that it was declaring a force majeure as to the manufacture of MMA and had decided to allocate a diminished supply of MMA on a pro rata basis to all customers, both internal and external.[5] Specifically, Dow told Arkema that it would provide of REDACTED

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[5] Compl. Ex. 4; Summerhayes Decl. ¶ 13. MMA is the major component in the production of polymethyl methacrylate ("PMMA"), which in turn is used to manufacture "automotive and lighting products, acrylic sheet and molding, clear

Arkema's requested allotment during the week of May 10, 2010 and REDACTED of its requested allotment for the REDACTED [5] Dow's decision to allocate on a pro rata basis followed the April 30, 2010 closing of the HR B-3 Unit at R&H's MMA production facility in Deer Park, Texas (the "Deer Park Facility").[7] Dow moved swiftly to restore that unit, however, and, as of May 12, 2010, was allegedly producing MMA at 100% capacity; Dow expects to be able to resume supplying 100% of its customer's requirements beginning in "early June."[8] Additionally, "Dow believes it can make up any shortfall in supply of MMA to Arkema over the next six months."[9]

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plastics, extrusion powder, acrylic surface and paper coatings, latex paints, printing inks, floor polishes, dental restorations, adhesive cements, and surgical implants." Decl. of Thomas L. Lewis ("Lewis Decl.") ¶ 2. Arkema uses MMA largely to produce two PMMA-based products: acrylic sheet (used for signs or security barrier glazing) and acrylic resins (used to mold products such as automobile tail lights). Sharp. Aff. ¶¶ 49-50. Many of Arkema's acrylic resin customers are in the automotive, medical, and optical industry segments. *Id.* ¶ 55.

6 Compl. Ex. 4; Summerhayes Decl. ¶ 13; Sharp Aff. ¶ 11.

7 Lewis Decl. ¶¶ 8-13. Lewis is the production leader at the Deer Park Facility.

8 Summerhayes Decl. ¶¶ 11, 17. Though Dow attempted to purchase MMA from alternative suppliers, the market for MMA is "currently so tight" that it is virtually impossible to procure MMA. *Id.* ¶ 12; Sharp Aff. ¶¶ 26-31.

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Summerhayes Decl. ¶ 17.

9 Summerhayes Decl. ¶ 16.

Arkema seeks to enjoin Dow from executing its pro rata allocation plan because, under the terms of the CRC, which remains in force for the life of the Deer Park Facility, Arkema has the right to purchase and receive approximately REDACTED pounds of MMA per year.[10] After R&H and Arkema executed the CRC, Arkema made prepayments to R&H for the full amount of MMA it was entitled to purchase under the CRC during the first twelve years of the agreement.[11] Arkema entered the CRC so that it could "present itself to its customers as a reliable, vertically integrated supplier of acrylic products."[12] This reputation as a reliable supplier of PMMA-based products is a significant advantage for Arkema, allowing it to compete with its other industry participants, including Evonik, Lucite, and Plaskolite.[13] The desire to build and maintain a reputation as a credible supplier of PMMA-based products led Arkema to enter the CRC with R&H and include provisions in the agreement to protect its source of supply, such as Section 12.[14] Though

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10 CRC § 3(a); 2002 CRC Am. § 3; Affidavit of James P. McAliney ("McAliney Aff.") ¶ 12. Both the CRC and the January 1, 2002 amendment to the CRC are included in Exhibit 1 to the Complaint.

11 CRC § 2. Arkema prepaid "more than REDACTED to R&H under the CRC, allegedly "to guarantee an uninterrupted supply of MMA" from R&H beginning on April 1, 2002. Sharp Aff. ¶ 6.

12 Sharp Aff. ¶ 5.

13 *Id.* ¶¶ 4, 51-52; McAliney Aff. ¶¶ 8, 10-12.

14 Sharp Aff. ¶ 7.

Section 12 of the CRC begins by defining certain force majeure events whereby the obligations of the parties may be reduced or suspended,[15] it also provides that:

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Only after production at the Deer Park Facility is adversely affected

[17]

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Even in that situation, however, Dow must

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After learning of Dow's decision to limit the allocation of MMA to Arkema, Arkema actively attempted to obtain the amount of MMA it had originally requested

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15 Such events include the following: "Act of God, war, riot, fire, explosion, accident, flood, sabotage; compliance with governmental request, laws, regulations, orders or actions; national defense requirements or any other event beyond the reasonable control of such party or in the event of labor trouble, strike, lockout or injunction . . . which event makes impracticable the manufacture, transportation, acceptance, use or consumption of the MMA." CRC § 12(a).

16 *Id.* § 12(b).

17 *Id.* § 12(c).

18 *Id.*

from Dow on April 27, 2010[19] and believed it was entitled to under Sections 3(a) and 12(b) of the CRC.[20] When those attempts failed, Arkema filed its Verified Complaint for Declaratory and Equitable Relief on May 10, 2010. At that time, Arkema also moved for a TRO, seeking to enjoin Defendants from allocating MMA to a third party or for their own use without first meeting Arkema's supply requirements.[21] According to Arkema, if the Court refuses to grant the TRO, Arkema permanently will lose its goodwill, its reputation, and significant amounts of its business.[22]

Dow responded to Arkema's motion on May 13, 2010, and I heard argument later that day.[23] Additionally, a hearing for a preliminary injunction has been scheduled for May 28, 2010.

II. ANALYSIS

A. Standard for a Temporary Restraining Order

A TRO is a special remedy of short duration. To obtain such an order, a party must demonstrate three things: "(i) the existence of a colorable claim, (ii) the irreparable

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19 Compl. Ex. 2.

20 Sharp Aff. ¶¶ 32-48.

21 Docket Item ("D.I.") 2.

22 Sharp Aff. ¶¶ 16, 52, 55-65.

23 Arkema also submitted a supplemental affidavit from Douglas Sharp at 8:00 p.m. on May 13, 2010. D.I. 22. Dow objected to that submission as a violation of Court of Chancery Rule 171(a). D.I. 24. As the information in the supplemental Sharp affidavit does not affect my decision in this matter, I do not consider it in the context of the present motion.

harm that will be suffered if relief is not granted, and (iii) a balancing of hardships favoring the moving party."[24] Though similar to actions involving preliminary injunctive relief,[25] "motions for [TROs] may be subject to less exacting merits-based scrutiny"[26] because the "chief focus when reviewing an application for a [TRO is] 'the nature and imminence of the allegedly impending injury.'"[27]

The purpose of a TRO is "to protect the status quo and to prevent imminent and irreparable harm from occurring *pending* a preliminary injunction hearing or final resolution of a matter."[28] Thus, injunctive relief through a TRO is rarely appropriate

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24 *CBOT Hldgs., Inc. v. Chi. Bd. Options Exch., Inc.*, 2007 WL 2296356, at *3 (Del. Ch. Aug. 3, 2007) (citing *Stirling Inv. Hldgs., Inc. v. Glenoit Universal, Ltd.*, 1997 WL 74659, at *2 (Del. Ch. Feb. 12, 1997)); *see also Newman v. Warren*, 684 A.2d 1239, 1244 (Del. Ch. 1996).

25 *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 1223782, at *3 (Del. Ch. Mar. 24, 2010); *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 115 (Del. Ch. 2007).

26 *CBOT Hldgs.*, 2007 WL 2296356, at *3 (citing *UIS, Inc. v. Walbro*, 1987 WL 18108 (Del. Ch. Oct. 8, 1987); *Cottle v. Carr*, 1988 WL 10415 (Del. Ch. Feb. 9, 1988)). The Court's oft times less-exacting review of the merits in a TRO context arises partly because of the duration of the TRO and limited development of the factual background.

27 *Id.* at *3 n.11.

28 *Id.* at *3 (emphasis added); *Newman*, 684 A.2d at 1244-45 (Del. Ch. 1996) ("How the Court of Chancery, in the exercises of its discretionary judgment, balances the foregoing elements in a particular case will necessarily incorporate a complex judgment reflecting the unique blend of timing considerations, consideration of the nature and extent of the risk of injury to both sides should relief be granted or denied, and consideration of the merits to the extent conditions allow.").

where it grants the plaintiff all relief to which it might be entitled after a full trial on the merits.[29] In such situations, the plaintiff must meet a higher standard of proof. Specifically, where application for a TRO effectively becomes a form of mandatory relief, a plaintiff "must clearly establish the legal right he seeks to protect or the duty he seeks to enforce" and, where application for the TRO serves as a final resolution of the matter, the plaintiff must show that the material facts are not in substantial dispute.[30]

Here, Defendants argue that, if a TRO is entered, Arkema will receive all of its required MMA under the CRC, a result akin to full resolution of the matter. I disagree. First, based on Dow's sizeable reduction in the allocation of its MMA supply to Arkema for the week of May 10, 2010, Arkema already has been harmed significantly. Second, because the preliminary injunction hearing is scheduled for May 28 and Defendants have not presented competent evidence that they will be providing Arkema 100% of its contractual supply of MMA until "early June," it is conceivable that the TRO will not provide Arkema all the relief it could expect to obtain after a final hearing. The Court could conclude, for example, to vacate the TRO on May 28 and permit Dow to subject

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29 *See, e.g.*, *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972); *Chadha v. Szeto*, 1993 WL 498186, at *2 (Del. Ch. Nov. 18, 1993); *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. May 17, 1990). Although these cases deal with preliminary injunctions, the principle that preliminary relief should be awarded sparingly where it effectively grants a claimant all of the relief it could obtain after a final trial on the merits applies equally to TROs.

30 *Stahl v. Apple Bancorp, Inc.*, 579 A.2d 1115, 1120 (Del. Ch. May 17, 1990).

Arkema to an REDACTED allocation in the first week or two of June. Thus, I do not apply the heightened standard applicable when a TRO corresponds to a final adjudication on the merits, but instead examine each of the three factors under the traditional TRO standard to determine whether Arkema's request should be granted.

B. Colorable Claim for Relief on the Merits

When seeking to show that the alleged claims are meritorious on an application for a temporary restraining order, plaintiffs must meet the low burden of showing "that a colorable claim has been made out if the facts alleged are true."[31] The evidence submitted by Arkema easily exceeds this hurdle.[32]

The CRC grants Arkema explicit purchase rights for the life of the Deer Park Facility.[33] Under the plain language of Section 12 of the CRC, even if a force majeure event is declared, Dow must

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31 *See Topspin P'rs, L.P. v. RockSolid Sys., Inc.*, 2009 WL 154387, at *2 (Del. Ch. Jan. 21, 2009) (citing *UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *1 (Del. Ch. Oct. 6, 1987)).

32 In fact, Defendants do not contest this element of Arkema's motion.

33 CRC § 3(a).

34 *See supra* note 16.

Thus, at a minimum, Arkema has presented a colorable claim that Defendants have breached the CRC.

C. Imminent Threat of Irreparable Injury

Additionally, Arkema has shown that it is subject to an imminent threat of irreparable injury if the TRO is not granted. This element is "[t]he essential predicate for issuance of" a TRO.[35] Indeed, once a plaintiff has shown a threat of imminent, irreparable injury, "the remedy ought ordinarily to issue *unless* the Court is persuaded (1) that the claim asserted on the merits is frivolous or not truly litigable, (2) that the risk of harm in granting the remedy is greater than the risk to plaintiff of denying it, or (3) that plaintiff has not proceeded as promptly as it might, [and] has therefore contributed to the emergency nature of the application and is guilty of laches."[36]

Here, Arkema claims that its goodwill and reputation as a reliable, vertically integrated supplier of PMMA-based products will be irreparably lost if Dow is allowed to disregard Section 12(b) of the CRC, thus causing Arkema to fail to meet its customers' orders on time.[37] Less than REDACTED of Arkema's customers sign long-term supply agreements and, as a result, Arkema must compete continually to gain and retain its

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35 *Mitsubishi Power Sys. Ams., Inc. v. Babcock & Brown Infrastructure Gp. US, LLC*, 2009 WL 1199588, at *3 (Del. Ch. Apr. 24, 2009) (emphasis added) (citing *Cottle v. Carr*, 1988 WL 10415, at *3 (Del. Ch. Feb. 9, 1988)).

36 *Id.*

37 *See* Sharp Aff. ¶¶ 55-65; McAliney Aff. ¶¶ 8, 10-12, 15-19.

customers.[38] Thus, to combat the other major manufacturers of PMMA-based products in North America—Evonik, Lucite, and Plaskolite—Arkema markets itself as "a monomer-integrated domestic manufacturer"[39] that is "on par with Evonik and Lucite in terms of the vertically-integrated nature of its PMMA production" and more reliable than Plaskolite "because it enjoys a guaranteed North American supply of MMA."[40]

Arkema submitted affidavits which show that if Dow is allowed to restrict the supply of MMA available to Arkema, Arkema will be forced to notify its customers that it cannot meet their usual requirements for its products. The affidavits further aver that such a notification "will cause immediate harm to Arkema's reputation as a reliable supplier, will cause Arkema to lose customers and business for an indefinite period going forward, and will harm Arkema's good will with its customers."[41]

As an example of this harm, Arkema points to the major Original Equipment Manufacturers ("OEM") in the automotive industry. When purchasing PMMA-based products from Arkema, these OEMs specifically ask about its MMA supply because the OEMs' "quality control programs require them to evaluate the reliability of their

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38 Sharp Aff. ¶ 57.

39 McAliney Aff. ¶ 12.

40 Sharp. Aff. ¶¶ 51-52.

41 *Id.* ¶ 54.

suppliers' supply chain."[42] Because the OEMs operate in a "just in time" delivery mode, reliability is essential when determining whether or not to choose a supplier, and Arkema has been able to maintain its good reputation in that industry by making on-time deliveries of several shipments each month.[43] Any failure by Arkema to deliver an OEM's requirements could cause that OEM to shutdown, resulting in an immediate diminution of Arkema's reputation and goodwill with that individual customer and the entire OEM industry.[44]

Arkema claims that a similar loss of reputation and goodwill in its medical, construction, and acrylic sheet business would follow immediately if it was forced to notify customers that it would not be able to supply their orders.[45] According to Arkema, the harm to its reputation would be magnified due to the timing of Dow's decision to

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42 *Id.* ¶ 53.

43 *Id.* ¶ 59.

44 *Id.* ¶ 60.

45 *Id.* ¶¶ 63-64 ("To be considered a viable supplier to the [acrylic sheet] industry, it is critical that Arkema maintains a reputation for reliable product quality and order fulfillment."); McAliney Aff. ¶ 15 ("If I am forced to [notify customers that Arkema will not be able to supply their orders], the reputation and goodwill that Arkema has gained over the years for being a domestic and reliable monomer-integrated supplier will be irreparably lost.").

restrict the supply of MMA to Arkema, which takes place "at the peak of the manufacture" of many of its products, including vinyl products used in construction.[46]

Having carefully considered the submissions and arguments of the parties, my preliminary view is that Arkema's goodwill and reputation will indeed be harmed if the TRO is not granted, though the actual extent of that harm is difficult to determine. The seemingly strong protection against a supply interruption of this nature reflected in Section 12 of the CRC strengthens Arkema's argument. Arkema's failure to reliably provide its customers orders will strike a blow to its reputation in the marketplace—a reputation it has sought to build over the past decade.[47] Moreover, it would be very difficult, if not impossible, to quantify the extent of the likely harm to Arkema's goodwill and reputation. Thus, in light of these considerations, I find that Arkema has made a sufficient showing of an imminent threat of irreparable harm to warrant at least partial relief in the form of a TRO.

D. Balance of the Hardships

Finally, I note that the record also shows that Defendants may suffer significant harm as a result of the entry of a TRO. For example, Dow asserts that

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46 McAliney Aff. ¶¶ 7 ("Because customers use our [building material] products primarily to manufacture construction and building materials, demand peaks between March/April and July/August."), 15.

47 *See Horizons Res., Inc. v. Troy*, 1995 WL 761214, at *4 (Del. Ch. Dec. 21, 1995).

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that possibility in mind, I have not attempted at this preliminary stage in the proceeding to rectify the REDACTED shortfall in supply of MMA to Arkema in the week of May 10. Some form of injunctive relief regarding that situation may be shown to be appropriate at the May 28 preliminary injunction hearing. At this stage, however, the balance of the hardships is either in equipoise or tips somewhat in favor of Arkema. Moreover, a preliminary reading of the plain language of CRC § 12(b) suggests that this is exactly the kind of risk R&H agreed to shoulder when it entered that agreement.

The nature of the current proceeding is such that the factual record is sparse; it is quite difficult to determine which side will likely suffer the most harm if its respective position is rejected. But, because of Arkema's potential loss to its reputation and goodwill—in addition to its lost sales—that would follow if I wrongfully denied the TRO and because both parties will have a better opportunity to develop their case at the preliminary injunction hearing two weeks from today, the balance of harm weighs slightly in favor of granting the TRO under the terms set out in the accompanying order.

III. CONCLUSION

For all of these reasons, I grant Arkema's motion for a TRO against Dow and R&H as set forth in the order being entered concurrently with this Letter Opinion. Among other things, the order prohibits Defendants from allocating less than 100% of Arkema's MMA requirements to it for the weeks of May 17, 2010 forward until further order of this Court or June 13, 2010, whichever is earlier. Because the record indicates

that the harm to Dow if this TRO is entered improvidently could be substantial, I am requiring Arkema to post a bond in the amount of $500,000 based on the credit of Arkema.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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