

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AIR PRODUCTS AND CHEMICALS, INC., :  
:   
Plaintiff, :   
:   
vs. : Civil Action   
: No. 5249-CC   
AIRGAS, INC., PETER McCAUSLAND, :   
JAMES W. HOVEY, PAULA A. SNEED, :   
DAVID M. STOUT, ELLEN C. WOLF, :   
W. THACHER BROWN, RICHARD C. :   
ILL, LEE M. THOMAS and JOHN C. :   
VAN RODEN, JR., :   
:   
Defendants. :

- - -

Chancery Court Chambers  
34 The Circle  
Georgetown, Delaware  
Friday, March 5, 2010  
1:30 p.m.

- - -

BEFORE: HON. WILLIAM B. CHANDLER III, CHANCELLOR.

- - -

TELECONFERENCE  
RULING OF THE COURT

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CHANCERY COURT REPORTERS  
410 Federal Street  
Dover, Delaware 19901  
(302) 739-3934

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APPEARANCES:  
(By telephone):

JON E. ABRAMCZYK, ESQ.  
Morris, Nichols, Arsht & Tunnell LLP

-and-

FRANCIS P. BARRON, ESQ.  
DAVID R. MARRIOTT, ESQ.  
of the New York bar  
Cravath, Swaine & Moore LLP  
for Plaintiff

KEVIN R. SHANNON, ESQ.  
Potter, Anderson & Corroon LLP

-and-

MARC WOLINSKY, ESQ.  
of the New York bar  
Wachtell, Lipton, Rosen & Katz

-and-

JEFFREY G. WEIL, ESQ.  
of the Pennsylvania bar  
Cozen O'Connor  
for Defendants

- - -

1 THE COURT: Good afternoon, counsel.  
2 I understand that we have a court reporter on the line  
3 with us, is that correct?

4 MS. McCAFFERY: Yes.

5 THE COURT: Thank you, Miss McCaffery.  
6 Counsel, I appreciate your cooperation  
7 in being available for this conference call on such  
8 short notice. But given the nature of the underlying  
9 dispute, and the importance of moving the case  
10 forward, I have decided that it is more important that  
11 I provide you with a prompt ruling on the pending  
12 motion than that I provide you with a lengthy  
13 explanation of the reasons for my decision.

14 You have provided me with careful and  
15 thoughtful briefing under fairly extreme time  
16 pressures that I regrettably inflicted on you. And I  
17 in no way want to understate the importance of your  
18 efforts by this somewhat abbreviated ruling. But I do  
19 think it is my job to try to move the matter forward  
20 as efficiently and as quickly as possible, consistent,  
21 of course, with the proper administration of justice.

22 Now, the real meat of this lawsuit, as  
23 you know, is a dispute about the potential business  
24 combination of two Delaware firms, Air Products and

1 Chemicals Inc. and Airgas Inc.

2                   After tentative contacts about that  
3 business combination between these two companies in  
4 October and November, and perhaps December of 2009,  
5 all of which proved fruitless, Air Products, on  
6 February 4, 2010, announced publicly its intention to  
7 offer to purchase all outstanding Airgas stock for \$60  
8 per share in cash. That same day, Air Products filed  
9 a complaint in the Delaware Court of Chancery against  
10 Airgas and its board of directors seeking declaratory  
11 and injunctive relief based on allegations of breach  
12 of fiduciary duty by the Airgas board.

13                   At issue in this litigation,  
14 therefore, are the actions and decisions of the Airgas  
15 board beginning late October up until the present in  
16 responding to Air Products' all-shares, all-cash  
17 offer, and specifically whether the Airgas board may  
18 properly rely on certain defensive measures,  
19 effectively just saying no to the offer, while resting  
20 on its poison pill, staggered board and the strictures  
21 of Section 203 of the Delaware General Corporation  
22 Law.

23                   Now, on the very next day, February  
24 5th, 2010, Airgas filed a lawsuit in the Pennsylvania

1 Court of Common Pleas, not against Air Products, but  
2 against Cravath, Swaine & Moore, the New York law firm  
3 representing Air Products in connection with the  
4 proposed business combination, and in the lawsuit  
5 filed in this Court.

6                   After winning an initial skirmish in  
7 the Pennsylvania State Court, Cravath had Airgas'  
8 State Court action removed to the United States  
9 District Court for the Eastern District of  
10 Pennsylvania where, on February 22nd, 2010, the  
11 Honorable Eduardo Robreno issued an opinion and order  
12 that stayed Airgas' lawsuit against Cravath until this  
13 Court ruled on Air Products' motion seeking a  
14 determination here that Cravath may properly represent  
15 Air Products in this lawsuit.

16                   With that truncated background, I now  
17 turn to Air Products' motion for a declaration that  
18 Cravath, Swaine & Moore may continue to serve as Air  
19 Products' counsel in this case. Airgas, of course,  
20 opposes the motion, even going so far as to ask me to  
21 revoke pro hac vice orders I have entered allowing two  
22 Cravath attorneys to appear before me.

23                   Airgas also objects to Cravath's  
24 continuing role as an advisor to Air Products with

1 respect to the proposed business combination with  
2 Airgas.

3                   After considering counsel's  
4 correspondence, briefs and affidavits, including  
5 affidavits submitted by four different experts on  
6 legal ethics, I make the following findings and reach  
7 the following conclusions.

8                   First, I hold that Delaware law, in  
9 particular, the Delaware Lawyers Rules of Professional  
10 Conduct, and Delaware's common law rules regarding  
11 lawyer disqualifications applies to this dispute.

12                   Airgas seeks to disqualify the law  
13 firm of Cravath, Swaine & Moore from representing a  
14 litigant in a matter now pending before the Court of  
15 Chancery. Judge Robreno of the United States District  
16 Court in Philadelphia similarly concluded that  
17 Delaware law should apply to the issue of Cravath's  
18 disqualification in Delaware.

19                   Rule 8.5, the choice of law rule under  
20 the Rules of Professional Conduct, directs that the  
21 rules of the tribunal govern an effort to disqualify  
22 counsel appearing before that tribunal, even as to  
23 conduct of a lawyer whose predominant effect is in a  
24 different jurisdiction.

1           Where the relief sought, as here, is  
2 disqualification before a particular tribunal, Rule  
3 8.5 authorizes that tribunal to apply its local law to  
4 the disqualification question.

5           Airgas' position that Pennsylvania's  
6 rules govern the dispute, in my opinion, fails to  
7 recognize the import of Rule 8.5 as well as Delaware's  
8 direct interest in applying its law to a situation  
9 where both litigants, Airgas and Air Products, are  
10 incorporated in Delaware and both are represented  
11 principally by law firms based in New York.

12           If disqualification issues in this  
13 court involving Delaware companies, who are often  
14 represented principally by counsel from other  
15 jurisdictions, were instead to be decided by this  
16 Court based on professional conduct rules from other  
17 jurisdictions where the firms happened to be  
18 headquartered, or where their lawyers happen to be  
19 based, then fundamental concerns involving a lawyer's  
20 right to practice law before the tribunal adjudicating  
21 the underlying dispute could be decided in accordance  
22 with rules from any number of jurisdictions.

23           That outcome would potentially result  
24 in inconsistent or conflicting rulings in similar

1 circumstances based on differences in rules of conduct  
2 from foreign jurisdictions, and for no sound public  
3 policy reason that I can discern.

4           The State of Delaware has a  
5 supervening interest in having Delaware's Lawyers  
6 Rules of Professional Conduct apply to proceedings in  
7 the State's own courts.

8           In sum, where a case is filed in the  
9 Court of Chancery involving Delaware entities  
10 represented by out-of-state lawyers, and a request is  
11 made to disqualify a lawyer in that case, that would  
12 obviously have an immediate effect on the litigation.  
13 I hold that the Court of Chancery has an obligation  
14 and the right to apply its own local rules in order to  
15 ultimately determine whether a particular lawyer or  
16 particular law firm may represent a client appearing  
17 before the Court of Chancery.

18           Second, and turning now to the  
19 substantive question before me, I find and determine  
20 that no basis exists for me to disqualify Cravath,  
21 Swaine & Moore from representing Air Products in the  
22 litigation pending in this court.

23           Although the parties strenuously  
24 disagree regarding the propriety of Cravath's role in

1 connection with its previous work for Airgas while it  
2 was simultaneously engaged as counsel for Air  
3 Products, and although the ethics experts diverge over  
4 whether Cravath has complied with the strict  
5 requirements of Rules 1.7 or 1.9 of the Professional  
6 Conduct rules, I need not formally decide that  
7 question in order to dispose of the motion and  
8 objections before me.

9                   Before this Court may enter the  
10 Draconian order of disqualification, a moving party  
11 seeking that drastic relief must come forward with  
12 clear and convincing evidence establishing a violation  
13 of the Delaware Rules of Professional Conduct so  
14 extreme that it calls into question the fairness or  
15 the efficiency of the administration of justice. That  
16 is the holding of our Supreme Court in a case styled  
17 In Re: Dunlap.

18                   Motions seeking disqualification, of  
19 course, are often viewed with suspicion as they are  
20 known to be filed for tactical reasons rather than  
21 genuine concerns about client loyalty. In addition,  
22 courts recognize that a litigant should be able to use  
23 the counsel of his or her choice.

24                   For those reasons, the Delaware

1 Supreme Court has instructed the trial courts to  
2 exercise the utmost care in addressing motions to  
3 disqualify, noting that the purpose of the Rules of  
4 Professional Conduct can be subverted when they are  
5 invoked by opposing parties as procedural weapons.

6 In fact, I have held in similar  
7 circumstances that even when a violation of the  
8 ethical rules has, in fact, occurred, it need not  
9 automatically result in disqualification. And, more  
10 recently, in the Dow Chemical case, I refused to  
11 disqualify counsel when there was no showing that  
12 counsel's participation as an advocate unfairly  
13 benefited its present client, in that instance Rohm &  
14 Haas, or unfairly prejudiced its former client, the  
15 Dow Chemical Company, even though the representation  
16 of the two clients may have overlapped.

17 Like Dow Chemical and the Rohm & Haas  
18 case, Airgas here has not demonstrated even simply  
19 persuasively, let alone clearly and convincingly, that  
20 it would be disadvantaged by the presence of its  
21 former counsel as advocate for its opponent, Air  
22 Products.

23 Nothing before me shows that Cravath  
24 had access to or learned internal and non-public

1 confidential information, corporate strategies or  
2 defensive tactics during the course of its narrowly  
3 focused work for Airgas from 2001 until late October  
4 of 2009, or that such information, even if available  
5 to Cravath, would prejudice the fairness or the  
6 integrity of this proceeding.

7           The evidence presented to me indicates  
8 that Cravath's work for Airgas between 2001 and 2009  
9 was limited in scope and nature, confined to advising  
10 Airgas regarding the completion of debt financings,  
11 and involved neither contact nor advice regarding  
12 corporate governance, litigation matters, charter or  
13 by-law issues, merger and acquisition advice,  
14 defensive tactics or corporate counseling.

15           Cravath did not counsel or meet with  
16 the most senior Airgas executives or the Airgas board  
17 of directors, and Airgas, in fact, had other long-  
18 standing counsel advising it on litigation, corporate  
19 governance and mergers and acquisitions issues.

20           What's more, even if Cravath had  
21 access from its earlier representation to information  
22 that might be relevant in this proceeding, it has  
23 represented to this Court that it has no intention of  
24 using such information, and as is customary, Cravath

1 has erected an ethical wall to seal off those members  
2 of the firm who worked on the Airgas debt financings  
3 from those members of the firm working on the Air  
4 Products proposed business combination with Airgas.

5 A similar ethical wall was erected in  
6 the Rohm & Haas matter as a means to further assure  
7 this Court that no prejudice or unfairness in the  
8 proceedings would result to Dow Chemical, the former  
9 client in that case. The same is true here.

10 Next, Airgas is represented by  
11 extremely capable and highly skilled counsel in this  
12 takeover battle. Disqualification of Cravath, which  
13 has been the long-time counsel to Air Products on a  
14 wide range of matters, including mergers and  
15 acquisitions, would be a serious blow, forcing Air  
16 Products to search out and retain new counsel in the  
17 heat of an already launched hostile acquisition  
18 contest.

19 Given the absence of any credible  
20 threat of prejudice to Airgas from Cravath's continued  
21 participation in this lawsuit, I think the threat of  
22 harm to Air Products from disqualification far  
23 outweighs the threat of harm to Airgas from a failure  
24 to disqualify.

1           I am even more confident in reaching  
2 this calculus because of the nature and timing of  
3 Airgas' objection to Cravath's participation.

4           For all of these reasons, I find and  
5 conclude that disqualification of Cravath is not  
6 necessary to protect the integrity or the fairness of  
7 the proceedings before me or to maintain public  
8 confidence in the judicial system.

9           I am not persuaded that Cravath  
10 possesses confidential Airgas information that is not  
11 already publicly disclosed, but, of course, if it  
12 does, it recognizes that it is under a continuing duty  
13 not to reveal it or to use it to the disadvantage of  
14 its former client, Airgas.

15           Accordingly, I grant Air Products'  
16 motion, declare that Cravath may continue to represent  
17 it in this litigation, and deny Airgas' objection to  
18 the Cravath lawyers who have been previously admitted  
19 pro hac vice in this matter.

20           Now, to the extent that an order is  
21 necessary to implement this decision and ruling, it is  
22 so ordered.

23           Counsel, I realize you will want to  
24 review the transcript of this ruling, but are there

1 any applications at the moment?

2 MR. SHANNON: No, Your Honor.

3 THE COURT: Thank you then. Hearing  
4 none, I want to wish all of you pleasant weekend.  
5 Court is adjourned.

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7 (The teleconference concluded at  
8 1:50 p.m.)

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## CERTIFICATE

I, MAUREEN M. McCAFFERY, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 14 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Dover, this 5th day of March, 2010.

/s/Maureen M. McCaffery

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Maureen M. McCaffery  
Official Court Reporter  
of the Chancery Court  
State of Delaware

Certification Number: 201-RPR  
Expiration: 1/31/11