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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

COURT OF CHANCERY COURTHOUSE
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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 is defendants' motion to disqualify Wachtell, Lipton, Rosen & Katz ("Wachtell") from conducting discovery against The Dow Chemical Company and examining Dow witnesses. I have considered the parties' briefs, and oral argument was presented to the Court on February 11, 2009. For the reasons set forth briefly below, the motion to disqualify is denied.

Dow argues that Wachtell should be disqualified because the firm's representation of Rohm and Haas Company in this matter presents a conflict of interest as a result of Wachtell's representation of Dow. Dow alleges that Wachtell is in violation of the Delaware Rules of Professional Conduct because Dow is both a current client of Wachtell and a client whom Wachtell has previously represented in matters substantially related to the instant proceedings. Dow alleges that it is prejudiced in this action because Wachtell was privy to sensitive information in its capacity as Dow's counsel.

Dow argues that it is a current client of Wachtell because the firm never took steps to inform Dow that it was no longer a client following Wachtell's representation of Dow in 2007 and 2008 in connection with the termination of two Dow executives and potential defensive measures in response to rumors of a takeover bid. Dow further argues that Wachtell represented Dow in matters substantially related to this proceeding and in the course of that representation obtained confidential information that will materially advance Rohm and Haas's position in the instant litigation.

Plaintiff Rohm and Haas counters that there is not a concurrent conflict of interest because Dow is no longer a Wachtell client. According to Rohm and Haas, it should have been clear to Dow that Dow was no longer a Wachtell client when the firm appeared opposite Dow in its representation of Rohm and Haas in the negotiations of the initial confidentiality agreement and the merger agreement in mid-2008. Rohm and Haas further argues that the nature and scope of the prior representation and the current litigation are distinct and that Wachtell received no confidences from Dow that could be used to advantage Rohm and Haas in this proceeding.

While the Court's evaluation of these issues is guided by the Delaware Rules of Professional Conduct, the moving party is not entitled to disqualification merely by showing a violation of the ethical rules. The Supreme Court of this State made this clear when it stated that:

> While we recognize and confirm a trial court's power to ensure the orderly and fair administration of justice in matters before it, including the conduct of counsel, the Rules may not be applied in extra-disciplinary proceedings solely to vindicate the legal profession's concerns in such affairs. Unless the challenged conduct prejudices the fairness of the proceedings, such that it adversely affects the fair and efficient administration of justice, only this Court has the power and responsibility to govern the Bar, and in pursuance of that authority to enforce the Rules for disciplinary purposes.[1]

Thus, a mere showing that a law firm violated the Rules of Professional Conduct is not sufficient to warrant disqualification. Instead, I must determine whether allowing Wachtell to continue its representation of Rohm and Haas will affect the fair and efficient administration of justice. When making this

[1] *Appeal of Infotechnology, Inc.*, 582 A.2d 215, 216-17 (Del. 1990).

determination, the Court must weigh the interest of the former client in protecting confidences against the prejudice that will be caused to the current client if the firm were disqualified.[2] I am also mindful of the skepticism with which courts view motions for disqualification. Because of the risk that the ethical rules may be "invoked by opposing parties as procedural weapons," courts impose a significant burden on the party seeking disqualification.[3]

After careful consideration of the parties' arguments, I am not convinced that allowing Wachtell to continue representing Rohm and Haas in this matter will prejudice the fairness of the proceedings or affect the fair and efficient administration of justice. First, I am not convinced by the argument that Dow reasonably believes it is a current client of Wachtell or that Dow relied on such a belief. Dow knew that Wachtell was representing Rohm and Hass during the negotiations of the merger agreement and did not object. Rather, Dow obtained its own separate counsel to represent Dow in the merger negotiations. Wachtell sent its final bill to Dow in June 2008, and there is no convincing evidence that Wachtell continued to perform services for Dow that would justify a reasonable belief by Dow that it is a current Wachtell client. I am also not convinced by Dow's argument that there was an implicit promise by Wachtell that they would represent Rohm and Haas in the negotiations but would discontinue the representation if litigation arose. In short, if Dow truly felt that they were a current client of Wachtell and that they should not be "across the table" from their own lawyers, then Dow should have objected at the outset of the negotiations of the merger agreement that eventually lead to this litigation rather than waiting until this expedited litigation was commenced to attempt to make Rohm and Haas obtain new counsel.

Second, I am not convinced that Wachtell possesses confidential information that it obtained during its representation of Dow that will materially enhance the position of Rohm and Haas in this litigation. Wachtell represented Dow in 2007 and early 2008 regarding matters related to a possible takeover attempt and the termination of two Dow executives. Dow alleges that this is a complex and difficult case that will involve many issues regarding Dow's motivations for entering into the merger agreement, its current condition, and the feasibility of the merger. According to Dow, Wachtell has confidential Dow information that is

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[2] *Express Scripts, Inc. v. Crawford*, C.A. No. 2663-N, 2007 WL 417193, at *1 (Del. Ch. Jan. 25, 2007).
[3] *Infotechnology*, 582 A.2d at 220.

relevant to these issues, including Dow's internal strategies in connection with the takeover attempt and Dow's general business strategies and inner workings. Specifically, Dow alleges that Wachtell has information relevant to Rohm and Haas's claim that Dow should sell assets to consummate the merger because Wachtell had access to information regarding the synergies that could be gained through performance acquisitions and the strategic value of various Dow assets.

Again, I am not persuaded that Wachtell's access to this information will materially advance Rohm and Haas's position or undermine the fair and efficient administration of justice. Dow's defense to specific performance is that conditions in the market and within Dow have changed significantly since December 2008 and that it is no longer feasible for the merger to close. Dow has failed to convince me that the information Wachtell had access to regarding Dow's strategies and asset values in 2006 and 2007 will substantially advance the interest of Rohm and Haas in this litigation. Additionally, Wachtell has assured the Court that its attorneys who obtained confidential Dow information have not and will not share Dow's client confidences with the Wachtell attorneys working on this matter. While Dow is correct that the ethical rules impute knowledge of one attorney to other attorneys in the firm, the issue before the Court is not whether there was a violation of the ethical rules. To justify disqualification, the Court must find that allowing the representation to continue would threaten the fair and efficient administration of justice, a threat that is greatly reduced by a credible representation to the Court that the firm will ensure that the attorneys working on this matter do not have access to Dow's client confidences. Dow has failed to point to information or confidences obtained by Wachtell in its 2006-2007 work for Dow that will have a material influence on the proceedings before me today.

For the foregoing reasons, the motion to disqualify is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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WBCIII:jmb