

Case Name: Air Products and Chemicals, Inc. v. Eric P. Wiesemann, et al.
Case Conclusion: February 2017
Caption: United States District Court, District of Delaware, Civ. No. 14-1425-SLR
Keywords: Post-Closing Damages, Representations and Warranties
Industry: Industrial Gases
Professionals: David G. Clarke, ASA and William P. McInerney, ASA

In May 2013, publicly-traded industrial gases producer Air Products and Chemicals, Inc. (“Air Products”) acquired EPCO Carbon Dioxide Products, Inc. (“EPCO”) from founder and CEO Eric P. Wiesemann and other stockholders. EPCO was a privately-held company that produced and distributed liquid carbon dioxide.

After the transaction closed, Air Products brought suit against Mr. Wiesemann and the other selling stockholders for breach of contract, fraud, and negligent representation. The claims related primarily to EPCO’s compliance with U.S. Department of Transportation (“DOT”) regulations governing truck drivers’ hours of service. EPCO employed about 100 truck drivers to deliver liquid carbon dioxide from its 11 plants to customers around the United States. Air Products alleged that EPCO’s management knowingly operated the company in violation of DOT regulations by allowing drivers to continue making deliveries after their daily driving hour limits had been reached. Air Products claimed that EPCO concealed the alleged violations during due diligence, and that after the transaction closed, Air Products was forced to purchase additional trucks and hire new drivers in order to operate the business in compliance with DOT hours of service regulations.

Air Products’ expert calculated damages by comparing the purchase price Air Products paid for EPCO to a lower, alternative estimate of EPCO’s value that took into account the costs that Air Products allegedly would have incurred going forward from the transaction date in order to operate EPCO legally (buying additional trucks and hiring new drivers). The purported damages were therefore equal to the difference between the two amounts; the diminishment in EPCO’s value that would result from incurring the ongoing costs of “curing” the allegedly non-compliant driver management practices that were not disclosed in due diligence.

David G. Clarke, ASA, a Managing Principal of The Griffing Group, was retained by the EPCO defendants to analyze the valuation and damages issues in the case. Mr. Clarke submitted an expert report which demonstrated that even if the violations alleged were true, a detailed analysis of EPCO’s historical truck and driver usage revealed that the company had more than enough capacity in its existing truck fleet and driver corps to cure the violations by reconfiguring the company’s delivery schedule, rather than purchasing more trucks and hiring new drivers. As such, no damages were indicated. In addition, Mr. Clarke pointed out that a review of EPCO’s client billing practices and contracts indicated that even if the company had to incur new transportation costs, these costs could have been passed along to customers (thus nullifying damages). Finally, Mr. Clarke noted that the plaintiff’s expert failed to offer any evidence that Air Products actually incurred any of the purportedly-necessary truck and driver costs after the transaction closed.

Following the issuance of his report, Mr. Clarke testified at deposition and at trial, in June 2016. In February 2017, the Court ruled in favor of the EPCO defendants on all liability counts and awarded no damages to Air Products.

David G. Clarke, ASA was assisted by William P. McInerney, ASA. The plaintiffs were represented by Robert S. Saunders, Joseph O. Larkin, Matthew P. Majarian, Jessica R. Kunz, Kathryn S. Bartolacci, and V. William Scarpato, III of Skadden, Arps, Slate, Meagher & Flom LLP.