

BASF Corporation's Substantiation for Trade Secret Claims Made in its October 15, 2020 Revised Abridged Alternatives Analysis Report for Spray Foam

In Response to DTSC's Trade Secret Claim Substantiation Requirements

The purpose of this letter and its enclosure is to provide BASF Corporation's (BASF) substantiation of its claims for trade secret protection in the case of certain information submitted to DTSC in accordance with 22 CCR § 69509 (Assertion of a Claim of Trade Secret Protection). More specifically, the subject trade secret information is that proprietary commercial submitted by BASF to DTSC as part of the October 14, 2020 Abridged Alternatives Analysis (AA) report submitted by the American Chemistry Council's Spray Foam Coalition (SFC) on behalf of BASF (and other participating responsible entities (RE)).¹

Section 69509(a)(1)-(12) of the California regulations sets forth the supporting information required to substantiate a trade secret claim submitted, in this case, to DTSC under its Safer Consumer Products Program. The numbered answers below correspond to the questions covered in Section 69509(a)(1)-(12).

1. The identity of the person asserting the claim;

BASF Corporation (BASF) is the identity of the person asserting each of the individual claims for trade secret protection contained in this AA report, corresponding to each of the eighteen (18) entries in the "DTSC – Cal SAFER – BASF CBI Summary" (enclosed). BASF is a Delaware corporation doing business in the United States in the spray foam market.

2. Description of the nature of information for which trade secret protection is claimed:

BASF – Trade Secret protection is claimed within the AA Report for the eighteen private label products and partial customer brand names for spray foam products BASF supplies to its customers. This list of customers products and the associated BASF products, attached as "BASF DTSC-Cal SAFER CBI Summary," is referred to below as "BASF Trade Secret Information" or "BASF CBI Information." This document is incorporated into Appendix B of the AA Report; Appendix B covers "Confidential Supply Chain Information on Existing Priority Products (Confidential Business Information)."

These 18 products are grouped into five sets of private label products, each set for a different private label customer, and prefaced as [REDACTED]. For example, the [REDACTED] products are the first three of the 18 products, as follows:

1. [REDACTED] = BASF CBI - #1
2. [REDACTED] = BASF CBI - #2
3. [REDACTED] = BASF CBI - #3

Within the [REDACTED] group, the ISO or Part A side of the spray foam product is [REDACTED] ISO. This isocyanate product is the A side for all BASF Priority Products in the SPF notification. BASF supports two SPF systems

¹ See the *Abridged Alternatives Analysis Report on Two-component Low- and High-pressure Spray Polyurethane Foam Systems Containing Unreacted Methylene Diphenyl Diisocyanate* (Prepared by Gradient for the American Chemistry Council's Spray Foam Coalition (SFC), October 14, 2020); otherwise referred to herein as the "SPF Abridged AA Report (October 2020)" or the "AA Report."

for this private label customer, each composed of A side [REDACTED] ISO and B sides [REDACTED] or [REDACTED], corresponding to BASF CBI # 2 and BASF CBI #3. This is as much as the redacted BASF Trade Secret Information reveals.

As noted in the unredacted version of the BASF Trade Secret Information, [REDACTED] ISO corresponds to BASF product [REDACTED], also known as BASF CBI #1. BASF CBI # 2 and BASF CBI #3 correspond to specific BASF B side products, as shown (but unstated here), which are sold as [REDACTED] and [REDACTED].

The BASF private label party then creates its private label product name by taking, in this first case, the [REDACTED] ISO name and adding to it a customer-selected tradename, resulting in ("Private label customer tradename" "ISO [REDACTED]." BASF's performance credentials for its [REDACTED] ISO are extended to this private label party.

By using such coded names in place of BASF tradenames and restricting access to the unredacted BASF Trade Secret Information (product compositions, performance credentials) through NDAs and other means, both internally and externally, BASF protects the identity of the products it extends to private label customers while allowing product credentials necessary to any sale to benefit that same customer. If this unredacted version were to be disclosed, BASF's business would be harmed, as described below.

3. **Extent to which the information is known internally by employees or others involved within the facility or business of the person, and whether or not those individuals are bound by nondisclosure agreements:**

All authorized BASF employees involved in the Performance Materials – Construction Business Unit are or could be aware of BASF's trade secret/CBI information protection (including Sales, Technical, Marketing and Production employees). Each employee is obligated under BASF's Code of Conduct to maintain such CBI information as confidential to BASF. Moreover, it is BASF Corporation HR policy for employees to enter into a non-disclosure agreement (NDAs) as a condition of employment; thus, is it expected that internal employees with knowledge of this trade secret/CBI information would also be contractually bound by nondisclosure agreements. BASF does not share its employment-related NDAs with governmental entities, as a matter of policy.

4. **The extent to which the information is known externally outside of the facility or business of the person, and whether or not individuals with such knowledge are bound by non-disclosure agreements:**

The information BASF claims as CBI is known in certain cases to external 3rd party testing and credentialing bodies, and possibly its consultants, under an appropriate NDA. This information has been provided to the 3rd party testing and credentialing agencies under non-disclosure agreements. The CBI information must be provided to external 3rd party companies because they must extend BASF's product specifications to the BASF customer requesting the private label and all documents must accurately use the BASF customer brand name. UL and other credentialing bodies maintain all such information as trade secret. A third-party reviewing the credentials of the private label product would not be able to identify the linkage to the corresponding BASF product through the UL website.

5. **The measures taken to restrict access to and safeguard the information, and whether or not the person plans to continue utilizing such measures:**

Per a contractual agreement with the private label customer, BASF sets up these private label products in its SAP system under the customer's product name as a mirror copy of a specific BASF sales product. (SAP® is the German software supplier providing the Enterprise Resource Planning (ERP) system used by BASF.) The customer's private label name is attached to the product in all SAP modules; *e.g.*, from Customer Service through Production and Supply Chain. Access to SAP is strictly controlled within BASF through use authorizations, and cyber-security measures are applied to protect the information. All commercial sales and collateral paperwork reflects the contracted private label branding and product name, without mention of the corresponding BASF product name. Both BASF and the private label customer have a commercial incentive to continue maintaining this linkage as confidential, as the loss of that confidentiality would adversely sales, harming both BASF and the private label customer.

BASF does plan to continue using these measures.

6. The estimated value of the information to the person and the person's competitors:

The estimated value of the BASF trade secret information to BASF depends on each private label customer's total business value to BASF. In addition to aggregate annual sales totals across all 18 products, which is typically well in excess of \$1 Million. BASF benefits by leveraging the private label customer's marketing muscle to pull more of that BASF product through its channels of trade, sometimes reaching applications and end-uses not yet met by BASF's own distribution and sales activities.

The estimated value of the BASF trade secret information to BASF's competitors is of the same magnitude. If this trade secret information became public, BASF's competitors would learn valuable insight into how they could better compete with BASF in gaining that private label customer's business and penetrate BASF's market share. A competitor would immediately be able to determine which of its own products might match up in similarity with the private label product and move to substitute its offering for that of BASF. Such competitors would gain real incentive to "data mine" DTSC trade secret substantiations and other Safer Consumer Product documentation for competitive business information.

7. The estimated amount of effort and/or money expended by the person in developing the information:

BASF – The level of effort and/or money expended by BASF in developing the information depends on the number and type of products requested for private label treatment by each customer, plus the level of product specification detail requested for each product. Creation of each private label takes from 3 months to 12 months depending on the complexity of the product specifications included. Costs vary as well depending on the complexity of and claims included on the private label. BASF typically spends \$10,000 to \$20,000 to extend each private label. BASF also incurs an annual maintenance cost of \$5,000 to \$10,000 per label to keep the private label active at the various 3rd party testing and certification agencies.

In addition, BASF spends significant time and resources in the case of each private label product/customer request to evaluate the initial customer request, understand the customer's motivations, then prepare and consider the business case for moving forward for management approval and system set-up. The entire value of this per-product investment in time and resources would be erased should this BASF trade secret information be disclosed.

8. The estimated ease or difficulty with which the information can be properly acquired or duplicated by others, including for any chemical claimed as trade secret, an explanation of why the chemical identity is not readily discoverable through reverse engineering:

While an astute competitor or other party in this market could probably make some reasonable guesses as to which OEM manufacturer's products (such as BASF's) may be rebranded/distributed and sold by another distributor, it would only be guessing whether BASF and that distributor had entered into and were actively engaged in administering a private label agreement. It could not be certain, for example, whether BASF had extended a UL certification, and specifically for which BASF product, in the case of a third-party's product.

This BASF trade secret information could not be properly acquired by another without the mutual agreement of both BASF and the private label customer. Any agreement to provide such information by BASF alone, or by the private label customer alone, to a third-party would breach the private label agreement and associated NDA, potentially resulting in contractual claims for breach of contract and tortious business interference. Moreover, any agreement by one or more parties to share such specific product connections with another market participant may give rise to anti-competitive concerns and potential liability, particularly should such discussions include pricing or other sensitive information.

Given that BASF is not specifically claiming any chemical name as trade secret, but rather only product names, it is not obligated to address the reverse engineering scenario. Generally speaking, however, reverse-engineering a cured polyurethane product to completely and accurately understand the composition of its system inputs (Part A and Part B, plus the specific blowing agent) is difficult if not impossible. While reverse-engineering compositions of the system inputs themselves, the Part A and Part B, may not be quite as difficult, some amount of guessing would almost always be needed to precisely identify the manufacturer and product identifier were involved, even if the compositions of potentially matching products were largely identifiable from the BASF product's Safety Data Sheet (SDS). For one, it would require guesswork to determine which BASF products to consider as potential matches. Many of the resin side chemical components are similar and may overlap, or hide one another, and therefore may be indistinguishable from each other when analyzed chemically.

9. Copies of, or references to, any pertinent determinations previously made by DTSC or other public agencies:

To date, BASF has provided many Spray Foam related industry documents to DTSC through the CPI / SFC – Spray Foam Coalition. In the August 2019 Abridged Alternatives Analysis, BASF provided documents regarding private label products that were claimed as CBI.

10. A description of the nature and extent of harm that could be caused if the information were made public, including an explanation of the causal relationship between disclosure and the harmful effects claimed:

BASF would almost immediately lose the benefit of the business value described in response to Question 6, above. The nature and extent of harm would depend on the number of such disclosures.

One potential impact would affect warranty coverage. If a private label customer rebrands and sells a BASF product, the private label customer typically warrants the performance of the product, not BASF. If a customer of the private label retailer filed a warranty claim against the private label customer, and then

learned it had received a rebranded BASF product, the customer would likely expand its claim to include BASF, potentially resulting in increased liability.

Of even greater concern is the fact that many chemical manufacturing businesses – in fact, just about every commercial market that exists -- make some use of such private label arrangements. Any loss of trade secret protection over the details of such sensitive business relationships – who one is doing business with and involving which specific products -- would have a ripple effect, causing the chemical manufacturing community to question the value of private label arrangements. The potential impact on the chemical distribution community could be enormous, as it would devalue much of what drives the private label business model. Such a public disclosure would almost immediately result in litigation that would draw management attention and resources away from this and other critical DTSC programs.

Such disclosures would harm non-chemical businesses as well, with similar adverse impacts.

11. The signature of the person's general counsel or other executive with knowledge of the preparation of the substantiating information, certifying as required by section 69501.3 and based upon the knowledge and belief of the signatory that:

(A) The substantiating information is true, accurate, and complete;

(B) The information for which trade secret protection is claimed is not otherwise publicly available; and

(C) There is a reasonable basis to assert trade secret protection for the information so claimed:

"I certify that this document and all attachments were prepared or compiled under my direction or supervision to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person(s) directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that submitting false information or statements is a violation of law." (22 CCR § 69501.3)



October 15, 2020

Name: John R. Erickson

Title: Associate General Counsel
Product & Trade Regulation
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12. Contact information for the individual to be contacted if any of the claimed information is requested to be disclosed under the California Public Records Act (commencing with Government Code section 6250).

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Please contact Dr. Szyndler with any questions about these substantiations.

As required by 22 CCR § 69509(c), BASF encloses a copy of its redacted and unredacted BASF Trade Secret Information. As noted herein, this document is to be incorporated into Appendix B to the AA Report.

Attachments:

- Unredacted copy of BASF Trade Secret Information – “BASF DTSC-Cal SAFER CBI Summary”
- Redacted copy of BASF Trade Secret Information – “BASF DTSC-Cal SAFER CBI Summary”