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	:	OF PHILADELPHIA COUNTY
On behalf of himself and all others	:	
similarly situated,	:	CLASS ACTION COMPLAINT
	:	
Plaintiffs	:	
	:	
v.	:	
	:	AUGUST TERM, 2005
	:	
ROHM AND HAAS CO.	:	NO. 1918
	:	
Defendants	:	JURY TRIAL DEMANDED

**REPLY TO RESPONSE TO EMERGENCY MOTION TO RESTRAIN DEFENDANT'S
EX PARTE COMMUNICATIONS WITH CLASS MEMBERS**

I. INTRODUCTION

On September 8, 2005, Plaintiff William Brendley filed his Emergency Motion to Restrain Defendant’s *Ex Parte* Contacts With Plaintiff Class Members (the “Motion”). On September 14, 2005, Defendant Rohm and Haas filed its brief in response (“Response”). A hearing is scheduled for September 28, 2005. Plaintiff files this Reply Memorandum to address issues raised in Defendant’s Response.

Defendant concedes that the law protects putative class members from misleading or coercive communications from a defendant employer. See Response at ¶ 20 (“Rohm and Haas

recognizes that its Spring House employees are putative class members and that care is necessary in communicating with them to avoid influencing their individual decisions about whether to participate in the class action lawsuit.”) Defendant suggests, however, that a simple disclaimer appended to future communications will suffice to address Plaintiff’s concerns. Plaintiff disagrees.

Defendant requests that it be allowed to continue communicating with its employees in two ways. First, the company seeks unrestricted communications with certain, unidentified management level employees regarding its investigation of this and other lawsuits involving the incidence of brain cancers at the Spring House facility. Second, Defendant seeks leave to provide updates to its employees about the status of an ongoing epidemiological study regarding the incidence of brain cancers among employees, past and current, at its Spring House research facility. Defendant goes so far as to attach a curious, proposed Memorandum that the Company claims was about to be circulated to employees when plaintiff’s filed this Motion.

Contrary to Defendant’s dire warnings, plaintiff’s Motion is reasonable and the relief sought is reasonable. In light of this action and the claims that are central to plaintiff’s claims, Defendant’s interest in communicating with its employees must be balanced with other interests, such as plaintiff’s interest in not having the Company coerce class members. Accordingly, plaintiff responds to the arguments raised by Defendant in its Response, as follows:

**1. Defendant Should Identify Those Employees/Class Members
With Whom It Plans to Communicate Regarding Litigation Strategy**

Defendant Rohm and Haas claims that it must be permitted to communicate with certain employees to prepare its defense in this and other cases.¹ With some qualification, Defendant’s

¹In addition to this case, undersigned counsel represents two families who have filed individual actions against Rohm and Haas claiming fraudulent concealment of the high incidence

request is reasonable. Defendant should be required to identify by name and/or job title the employees with whom it desires unfettered communications. Plaintiff cannot prepare a response to Defendant's suggestion that it have unrestrained communications with broad categories of employees unless those person are sufficiently identified. Without this, legal basis for permitting or excluding communications can not be determined. Identifying specific individuals now will also likely limit future motion practice on this issue.

2. Defendant Should Not Be Permitted to Have Unfettered Communication With Class Members Regarding the Status of its Ongoing Study

In its Response, Defendant portrays itself as proactive in the interests of employee's health and welfare and as a candid communicator with its employees on important developments with regard to this particular controversy. Although no formal discovery has been exchanged yet, there is record evidence to suggest the contrary.

The company acknowledges that it suspected an increased risk of brain cancer at the Spring House facility as far back as 1996 but took no action, notwithstanding its suspicions, until 2001. See Declaration of Dr. Arvind V. Carpenter ("Carpenter Declaration"), a copy of which is attached to this Reply Memorandum as Exhibit A.² In his Declaration, Dr. Carpenter states that he reviewed

of brain cancer at Spring House. These cases are Linda Lange, Individually and as Executrix of the Estate of Barry Lange, deceased v. Rohm and Haas, Court of Common Pleas, Philadelphia County, April Term 2005, No. 2860 and Jemin Charles Hsu and Kuo Hom Hsu v. Rohm and Haas, Court of Common Pleas, Philadelphia County, April Term 2005, No. 2861. Dr. Lange and Dr. Hsu both contracted malignant brain cancer while working as research chemists at Spring House.

²The Carpenter Declaration was attached to Defendant's Opposition to Motions for Pre-Complaint Discovery in the Lange and Hsu cases. On September 16, 2005, Judge Allen granted plaintiffs' Motions in part, allowing document discovery to proceed in aide of plaintiffs' preparing their Complaints.

data on brain cancer cases at Spring House in 1996 but found only five cases out of 100,000 person years at risk. (Carpenter Declaration at ¶ 19.) Dr. Carpenter, however, fails to explain anywhere in his Declaration the reason or reasons why he reviewed the data in 1996, what his methodology was, how cases of brain cancer were identified, how the information was processed, etc. Apparently, in 1996 there was no public or intra-company disclosure of the brain cancers or the fact that Dr. Carpenter had undertaken a review of some data relating to known incidences of brain cancer.

With only Dr. Carpenter's own, self-serving statements, it is clear that the number of cases of malignant brain cancer doubled in only the next five years. This suggests that the risk to Rohm and Haas employees may have been significantly increasing during this time period – *i.e.*, as of 1996, there were 5 cases in the first 100,000 person years of risk, but between 1996 and 2002 there were 5 cases in only the next 20,000 person years of risk. As discussed below, there have been additional cases of malignant brain cancer since 2002.

On information and belief, the first disclosure to Spring House employees that there was a higher-than-normal incidence of brain cancer among Spring House employees came in May 2002. In a communication to Spring House employees at that time, Rohm and Haas announced that the Company would undertake an in-house epidemiological study to determine what was causing a rate of brain cancer acknowledged to be double the rate in the general population of the United States. A copy of this communication is attached as Exhibit B. Importantly, Rohm and Haas chose to describe the incidence of brain cancers as 10 cases over 40 years, rather than 5 cases in the previous 5 years. The May 2002 Memorandum, written by Eileen M. Bonner, M.D., director of corporate medical services for Rohm and Haas declared, even before the epidemiological study had begun,

“We believe the Spring House site is a safe workplace.” The Memorandum did not refer in any way to company employees seeking medical testing of any kind.

In January 2004, Rohm and Haas notified its Spring House employees of the summary results of its epidemiological study. (Carpenter Declaration, Exhibit 4.) By this time, Rohm and Haas had identified two more cases of malignant brain cancer (bringing the total to 12) and three cases of so-called benign brain tumors. Rohm and Haas stated that the study found no single risk factor that was statistically significant as an association with the occurrence of brain cancer or benign tumors. The study did not, however, contradict the Company’s initial determination that the incidence of brain cancers among its Spring House employees far exceeded the incidence in the general population. Yet again Rohm and Haas stated that it believed, based on the study findings and review of the current health and safety practices, that “Spring House is a safe place to work.”

In January 2004, the Company also announced that it would undertake a second, in-house study, this time to further explore the statistical incidence of brain cancer at Spring House. The Company has reported that this second study should be completed by late 2006. On information and belief, there have been no status updates or communications or memoranda regarding this second study until the Memorandum that is the predicate for this Motion.

On August 19, 2005, shortly after Plaintiff filed this class action lawsuit and following widespread news coverage of the filing of the action, Defendant circulated a Memorandum to current employees at Spring House that, by its own designation, was not an update on the epidemiological study but rather was a discussion about the litigation and the media response. (See Exhibit A to Defendant’s Response to Plaintiff’s Emergency Motion To Restrain Defendant’s *Ex Parte* Contacts With Class Members.) Apart from the timing and title of the Memorandum, the fact

that the Memorandum was only directed to current Spring House employees – in sharp contrast to any prior communications about the Company’s brain cancer epidemiological studies – suggests that the Defendant’s August 2005 communication was not a sincere effort to provide updated information to its employees, but rather was an attempt to undermine the relationship between counsel and the class. Defendant’s concedes that its attack on the class action lawsuit as being “without merit” was injudicious. Defendant’s conduct was worse than that.

The Memorandum next states that “[w]e continue to believe that Spring House is a safe place to work.” The Memorandum also instructs Spring House employees that a “prudent medical response” is to “have regular medical check-ups by your doctor.” The suggestion that an increased risk of brain cancer may be appropriately addressed by a routine medical check-up is the first time Rohm and Haas has suggested to its employees that they address any health concerns caused by the increased incidence of brain cancers suspected at least as far back as 1996.

Defendant provides no basis for a rule permitting it unfettered communications on such issues so long as there is some disclaimer attached to the communication. To the contrary, the biased and potentially misleading communications to date on such issues demonstrate that Plaintiff’s concerns are more appropriately addressed by a rule that Defendant receive leave of court or Plaintiff’s consent before communicating to employees regarding the company’s study of the incidence of brain cancers at the Spring House facility. The ongoing study is one of the subjects of this lawsuit and communications regarding the study are not communications made in the ordinary course of business to employees. Given the very infrequent communications Defendant makes on such issues, about once a year so far, requiring pre-approval before sending out the communication seems a modest inconvenience at most.

3. Plaintiff Objects to the Distribution of the Proposed Follow Up Memo As Drafted

Rohm and Haas proposes to send another communication to its employees. There are at least three serious problems with this proposed communication.

First, the draft Memorandum pretends to have nothing to do with this litigation. For some 20 months, Defendant supposedly has been conducting the second epidemiological study into the incidence of brain cancer at Spring House without a single written communication to its employees updating them on the progress of the study. If the Company now feels it is important to provide an update to its employees, the Memorandum should contain information about the lawsuit as well, including the fact that members of the class are represented by counsel, that there are claims about the incidence of cancer at this facility and that the case is seeking funds to pay for medical testing and monitoring.

Second, the proposed Memorandum again states the Company's belief that "Spring House is a safe place to work," but adds a disclaimer that such a "belief" reflects only the opinions of the company and company management. A statement that it believes the workplace is safe, like the statement that it believes the lawsuit lacks merit, has the effect of dissuading class members from participating in the class action. Also, the statement that it believes the workplace is safe has the effect of dissuading class members from actually being screened for brain cancer. Regardless of the way in which Rohm and Haas would have its employees parse the language of its memoranda, this much is true – the rate of brain cancer cases among current and former Spring House employees is higher than the rate of brain cancer cases nationally. (See, e.g., Carpenter Declaration at ¶ 18, "The number of brain cancer cases at Spring House as of 2002 therefore appeared to be nearly double what one would expect when compared to the rate in the general United States population.")

It is irresponsible for Rohm and Haas to continue to assert its “belief” that Spring House is a safe place to work unless it can demonstrate that there is no increased risk of brain cancers among its Spring House employees. Now that its belief is the subject of litigation, there should be no more communications containing that statement of belief.

The third problem with Defendant’s proposed Memorandum is that the communication would offer “as a reminder” the statement that the Company will pay for MRIs not covered by health insurance “if prescribed by your doctor.” This statement is not a reminder at all, because in none of the Company’s prior communications with its employees has it made this offer. Indeed, this offer has not been made except as prompted by the filing of this class action. Accordingly, this statement constitutes, in effect, a settlement offer.

For the first time since it acknowledged the increased incidence of brain cancers among its Spring House employees, Rohm and Haas now offers to pay the cost of MRIs not covered by insurance if prescribed by the employees’ doctors. As an initial matter, Plaintiff believes that the offer, if genuine, should be immediately conveyed to the employees. This communication, however, must include a reference to the fact that the offer is prompted by the filing of this action and represents only part of the relief sought in this case.

Further, it must be acknowledged that this new offer is tantamount to a partial settlement offer that should be conveyed through class counsel. The relief offered falls far short of the creation of the medical monitoring fund sought by this litigation. For example, the Defendant proposes to convey its willingness to pay for MRIs in the same letter that also states that it believes Spring House is a safe place – Defendant should not be permitted to dissuade employees from seeking the relief it purportedly offers.

Although a step in the right direction, the relief offered by Rohm and Haas is an insufficient resolution of this lawsuit for a variety of other reasons, including but not limited to the following: (1) it requires employees to get their doctors to prescribe MRIs – doctors who may not be aware of the increased incidence of brain cancers among Spring House employees or who may face criticism from HMOs unwilling to pay for such “elective” procedures, (2) it fails to obligate the Defendant to fund the screening process – a program that permits Rohm and Haas to change its mind and stop paying for MRIs at any time is not equivalent to a binding settlement with a defined future benefit; and (3) it fails to create a formal medical monitoring program that would be subject to review for the benefit of the class. If Defendant wishes to take the opportunity early in this case to craft an acceptable medical monitoring program and thereby avoid the costs of litigation and speed the benefits of such a program to its employees, Plaintiff welcomes the opportunity to jointly craft such a program with Defendant. Until then, however, Defendant should not be permitted to make partial settlement offers directly to class members outside the presence of their counsel.

IV. CONCLUSION

For the reasons stated above, and those stated in his initial memorandum, Plaintiff revises its request relief in the Motion.

Accordingly, Plaintiff seeks an order (1) requiring Defendants to receive leave of court before communicating with any class member regarding the ongoing studies of the incidence of brain cancers at the Spring House facility; (2) requiring Defendant to identify with specificity the individual employees with whom it seeks to have unfettered communications and, after meeting and conferring with Plaintiff, to bring any dispute over such proposed communications before the Court in order to determine the scope of Defendant’s ability to communicate with such individuals; and

(3) permitting Plaintiff to prepare for the Court's review and approval a curative notice to be sent to those employees who received the August 19, 2005 Memorandum that prompted this motion.

LAYSER & FREIWALD, P.C.

By: _____
AARON J. FREIWALD, ESQUIRE
PATRICIA M. GIORDANO, ESQUIRE
Counsel for Plaintiffs

DATED: _____

CERTIFICATE OF SERVICE

I, AARON J. FREIWALD, ESQUIRE, hereby certify that service of a true and correct copy of the foregoing Reply to Defendant's Response to Plaintiff's Emergency Motion to Restrain Defendants and their Agents and Attorneys From Having Any Further *Ex Parte* Communications with Plaintiff Class Members was served on opposing counsel on this date, via Hand Delivery and United States First Class Mail, Postage Prepaid, as follows:

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