

**CONRAD O'BRIEN PC**

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JOANNE BRANHAM, Individually and as	:	COURT OF COMMON PLEAS
the Administratrix of the Estate of FRANKLIN	:	PHILADELPHIA COUNTY
DELANO BRANHAM,	:	
	:	MAY TERM, 2006
Plaintiffs,	:	
v.	:	NO. 3590
	:	
ROHM AND HAAS COMPANY, et al.,	:	
	:	
Defendants.	:	

**AFFIDAVIT IN SUPPORT OF MOTION TO QUASH**

STATE OF MICHIGAN            )  
  )     ss.  
COUNTY OF MIDLAND        )

Matthew H. Metcalf, Esq., being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the states of Illinois and Michigan and am employed by The Dow Chemical Company (hereafter "TDCC") as a member of its Legal Department. Among other things, I am currently responsible for managing litigation relating to vinyl chloride in which TDCC is involved. In that capacity, it is my responsibility to identify employees with knowledge or information relevant to such litigation involving TDCC.

2. On March 3, 2010, TDCC's statutory agent for service of process in Pennsylvania received a subpoena which purports to compel a TDCC "corporate designee" to appear on May

13, 2010 in Philadelphia in this case to give testimony on seven stated subjects. A copy of the subpoena is attached hereto as Exhibit 1.

3. TDCC is incorporated in the state of Delaware, and its principal place of business is in Midland, Michigan. TDCC is not now nor has it ever been a party to this case, and it has no documents in Pennsylvania relating to the subjects in the subpoena nor any employees in Pennsylvania who have personal knowledge of the subjects in the subpoena.

4. Union Carbide Corporation ("UCC") is a New York corporation with its principal place of business in Houston, Texas. UCC was acquired by and became a wholly-owned subsidiary of TDCC in 2001 through a series of publicly-reported corporate transactions.

5. The subpoena requests TDCC to designate one or more persons to give testimony pertaining to TDCC and UCC scientific epidemiological studies, cancer research, and communications regarding those studies that took place many years ago during the 1970s, 1980s and 1990s, as specifically set forth in Exhibit 1.

6. After reasonable inquiry, I have been unable to identify any present employee of TDCC who can testify based on personal knowledge on all of the subjects listed in the subpoena, which relate to studies, activities, and communications that occurred within both TDCC and UCC over the past 40 years. Therefore, any persons designated by TDCC to testify would necessarily have to review and become conversant with the contents and history of numerous complex scientific studies, some of which are decades old, and other documents and information within TDCC's possession relating to those studies. Based on my experience with other litigation involving vinyl chloride, in my assessment any representative designee would need to review thousands of pages of documents spanning many decades of TDCC research efforts to provide testimony responsive to the requests identified in the subpoena.

7. Dr. Theodore Torkelson, the TDCC scientist referred to in paragraph 7 of the subpoena, died in 1999. In light of his death, TDCC's knowledge and information concerning the topics identified in paragraph 7 of the subpoena would necessarily be limited to information that could be gleaned from extant documents on those topics.

8. Because the stated subjects all pertain to scientific research conducted in the past, any persons designated to testify would have to be diverted from their normal business duties and responsibilities to prepare to give testimony in response to the subpoena, and they would need to have sufficient education, training and background in epidemiology, toxicology, or a related scientific field to understand the studies and to sufficiently comprehend the matters discussed in the documents to enable them to testify on behalf of TDCC.

9. In addition to the effort required to prepare a designee to provide testimony on the history of TDCC's research activities, a distinct and parallel level of effort would also be required to address the history of UCC's historical research pertaining to its Texas City, Texas plant. No employee of TDCC has ever been prepared or produced in a vinyl chloride lawsuit to give testimony about those subjects. At the time the referenced studies were conducted, UCC was a separate corporate entity with no affiliation to TDCC. After reasonable inquiry, I have been unable to identify any present employee of TDCC who has personal knowledge of the subjects in the subpoena related to UCC.

10. Given the extended time period involved, the complexity of the subject matter, and the necessity for any designated representative to review TDCC's voluminous records and documentation relating to these studies, I believe it will take several hundred hours, over the course of weeks and more likely months, for TDCC to adequately prepare one or more persons to give testimony about the wide array of studies and communications referenced in the subpoena. A similar investment of time and effort would be required to prepare a person or

persons to testify about the studies and communications pertaining to UCC, which represents an entirely separate and distinct body of information on these subjects.

11. In the event that TDCC cannot locate a current employee with the appropriate scientific knowledge, background, and ability to devote the time required to review all of TDCC's and UCC's historical information on these subjects, TDCC may be required to retain an outside consultant with the appropriate qualifications to serve in this role for the company. In my experience, such outside experts typically charge several hundred dollars an hour for their services. In light of the large volume of historical data at issue here, and the substantial amount of time that would be required simply to read and review all potentially responsive information within TDCC's possession on these subjects, I would expect that securing such services on the subjects addressed by this subpoena would cost TDCC tens of thousands of dollars.

12. On or about August 4, 2008, Plaintiff petitioned the Court in this case for a commission for the issuance of a subpoena by a Michigan court, seeking the production of records in TDCC's possession regarding vinyl chloride cancer research, including documents relating to the subjects stated in the present subpoena. Plaintiff's Petition for Issuance of Commission is attached hereto as Exhibit 2.

13. On or about August 13, 2008, this Court issued an Order directing the Prothonotary to issue a Commission to the appropriate judicial authority in Michigan for issuance of the requested subpoena. A copy of the 8/13/08 Order is attached hereto as Exhibit 3.

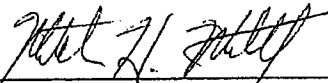
14. On or about September 5, 2008, the Michigan Circuit Court for Midland County issued and Plaintiff served the requested deposition and records subpoena on TDCC. A copy of the 9/5/08 Michigan subpoena is attached hereto as Exhibit 4.

15. Thereafter, TDCC moved in the Circuit Court of Michigan, Midland County, to quash the subpoena. The Circuit Court heard oral argument on the motion on September 26, 2008. A copy of the transcript of the hearing is attached hereto as Exhibit 5.

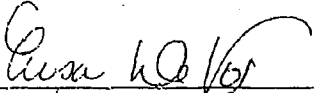
16. After hearing the arguments of counsel, the Michigan court, ruling from the bench, granted TDCC's Motion to Quash, except as to one paragraph which is not at issue here. On October 7, 2008, the Michigan court issued an order memorializing its ruling. A copy of the court's 10/7/08 order is attached hereto as Exhibit 6.

17. Plaintiff filed an appeal from that order. On March 16, 2010, the Michigan Court of Appeals issued an Opinion affirming the Michigan Circuit Court's ruling quashing the subpoena. A copy of the Michigan Court of Appeals' Opinion is attached hereto as Exhibit 7.

18. Based on the foregoing, I respectfully aver that the subpoena seeks to impose on TDCC an unreasonable investigatory burden on a non-party foreign corporation.

  
Matthew H. Metcalf

Subscribed and sworn to before  
me this 25<sup>th</sup> day of March, 2010.

  
Notary Public

Lisa De Vos  
Notary Public, Saginaw County, Michigan  
Acting in Midland County  
My Commission Expires February 16, 2013