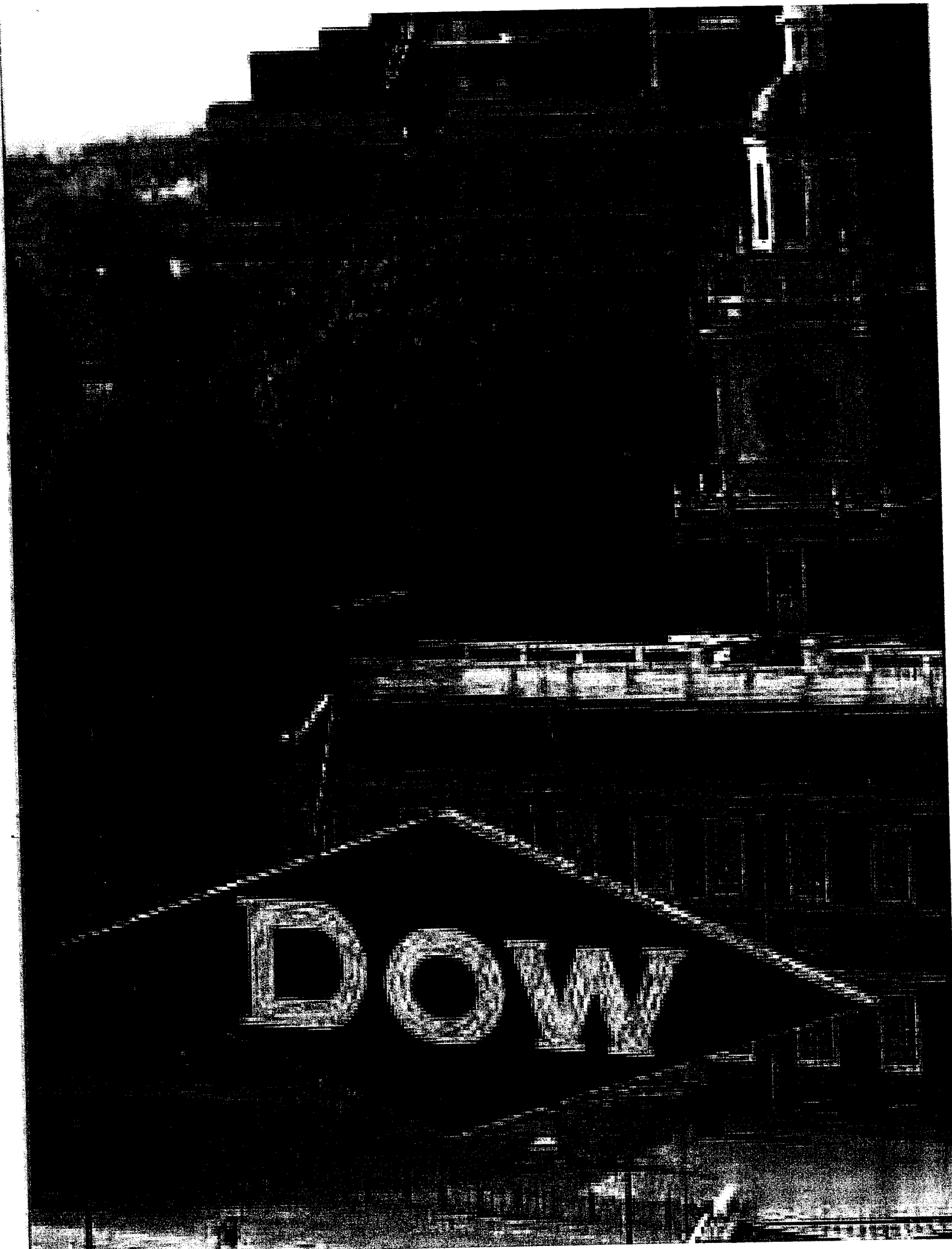




that it does business in Pennsylvania, while arguing that it is not the alter ego of its subsidiary (Rohm and Haas) and not incorporated in Pennsylvania.

The apparent reason Dow focuses on corporate formalities rather than physical presence is because Dow undoubtedly is physically present within the Commonwealth – a fact not disputed by Dow and demonstrated in compelling fashion (and with ironic timing) by the photograph reproduced on the following page, which accompanied the story, “Dow’s Philadelphia boss plots growth”, published this past Sunday in the Philadelphia Inquirer. A copy of the article is attached as Exhibit A to this Answer.

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## **II. FACTUAL BACKGROUND**

### **A. Statement Of The Case**

This case has its origin in the discovery by three next door neighbors that each of them had been diagnosed with rare brain cancers within the same short time span. The neighbors lived in McCullom Lake Village, Illinois, a community of approximately 400 homes situated downhill from Defendants' chemical plant. They investigated whether chemicals produced by the plant could have caused their illness and discovered there was an ongoing remediation effort to remove vinyl chloride contamination from the groundwater under the plant. They also discovered that vinyl chloride exposure was associated with increased risk of brain and liver cancer. After they filed suit, others in the small community were diagnosed, and some who had previously been diagnosed came forward.

Today, there are 30 individuals with brain cancer or tumors who have brought suit against Defendants for personal injuries caused by exposure to Defendants' chemicals. Their cases, and the case of one woman with liver disease, have been consolidated before the Honorable Allan L. Tereshko of the Philadelphia Court of Common Pleas. Plaintiff Joanne Branham's husband, now deceased, was one of the three next door neighbors mentioned above, and she was the first to file suit. Trial of her case begins on June 3, 2010.

### **B. Factual Dispute Requiring Dow Testimony**

The parties offer competing expert testimony on the specific cause of Mr. Branham's brain cancer. Plaintiff's experts, weighing the evidence, conclude that vinyl chloride from the Defendants' plant caused Mr. Branham's brain cancer. One of the factors considered by Plaintiff's experts is the relative weight to be given to various epidemiological studies.

There are a handful of published epidemiological studies that have examined the relationship between vinyl chloride and brain cancer. Some of these studies involve workers at vinyl chloride plants, including workers at certain plants owned by Dow.<sup>1</sup> Most of these studies find that there is a statistically significant association between exposure to vinyl chloride and brain cancer; a few have been inconclusive. Defendants argue that Plaintiff's expert is wrong to give weight to earlier studies because some later studies do not show the same level of association between vinyl chloride and brain cancer. Defendants' experts in turn discount the earlier studies as less probative.

In response, Plaintiff seeks to present evidence that one of the more influential studies, the "Mundt Study", showed a weaker association between vinyl chloride exposure and brain cancer because the Mundt Study failed to properly account for all exposed workers with brain cancers.

The determination of which workers to include in the study was made according to criteria set forth by Dr. Mundt, but the selection of workers meeting the criteria was left to the companies supplying the worker information. Plaintiff has substantial evidence that Dow's predecessor-in-interest, Union Carbide, and Dow itself failed to report workers meeting the inclusion criteria. Had they been included, the study would have shown the statistically significant association between vinyl chloride exposure and brain cancer shown by the earlier studies.

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<sup>1</sup>Two vinyl chloride plants were owned and operated by Union carbide until Dow acquired Union Carbide.

Plaintiff properly served a subpoena to compel Dow to appear at trial and testify regarding the selection and reporting of worker information to the Mundt Study.

**C. Dow's Interest In Withholding Information**

Dow has at least two significant interests in withholding the requested information. First, as the corporate parent of Defendant Rohm and Haas, Dow has every interest in hindering and delaying Plaintiff's presentation of evidence against Defendants. Second, as a long-time owner and operator of vinyl chloride plants, Dow has every interest in hindering and delaying any investigation seeking to further demonstrate the link between vinyl chloride exposure and brain cancer.

**III. ARGUMENT**

**A. The Court Lacks Jurisdiction To Hear The Appeal**

An order denying a motion to quash a subpoena is neither a final order nor a collateral order subject to immediate appeal. *See, e.g., In re Twenty-Fourth Statewide Investigating Grand Jury*, 589 Pa. 89, 97, 907 A.2d 505, 509-10 (Pa. 2006); *accord In re Air Crash At Belle Harbor, New York On November 12, 2001*, 490 F.3d 99, 104 (2d Cir. 2007). The reason that an order denying a motion to quash is not a final order is that the final step on a proceeding to enforce a subpoena, and thus the final order, is an order finding the witness in contempt for failing to obey the subpoena. *Id.*; *see also Takorsky v. Henning*, 906 A.2d 1255, 1258 (Pa. Super. 2006). Similarly, the reason that such an order is not a collateral order is that the witness' right to refuse compliance with the subpoena is not effectively unreviewable upon the order denying the motion to quash because it remains reviewable upon appeal after an order finding the witness in contempt. *See Air Crash*, 490 F.3d at 110. Thus, the proper avenue for seeking appellate review

of an order directing appearance at a deposition is to refuse to appear and accept a finding of contempt, and then to appeal the contempt order. *Twenty-Fourth Statewide Invest. Grand Jury*, 589 Pa. at 97; 907 A.2d at 510; *Air Crash*, 490 F.3d at 104.

The requirement that a witness choose either to comply with an order enforcing a subpoena or to accept a contempt order before bringing an appeal serves the purpose of further developing the factual record and avoiding piecemeal litigation. As the United States Court of Appeals for the Second Circuit explained:

“Both sides benefit from having a second look.” The subpoenaed person “may decide ... that the importance of the issue and the risk of adverse appellate determination do not warrant being branded as a contemnor,” while “the person seeking information ... may decide that the quest is not important enough to seek a contempt citation, thereby entailing the delay of an appeal ....”

*Air Crash*, 490 F.3d at 105 (quoting *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 180 (2d Cir. 1979) (internal citations omitted)).

In this case, the rationale for the rule supports what the rule requires. Dow’s appeal must await its determination of whether or not to comply with the subpoena, and must further await the parties’ responses to Dow’s actions, and finally the trial court’s final order. Earlier this week, Plaintiff filed an emergency motion to quash the appeal, which remains pending at this time. The Court should grant Plaintiff’s Motion and should vacate the stay that was imposed pending the outcome of this Motion.

**B. Dow Is Present Within The Commonwealth And Thus Is Within The Subpoena Power Of Pennsylvania Courts**

Rule 234.2 of the Pennsylvania Rules of Civil Procedure states that a subpoena “may be served upon any person within the Commonwealth ....” The parties to this appeal agree that

Pennsylvania courts have authority to subpoena witnesses “within the Commonwealth.” Dow, however, claims that it is not “within the Commonwealth” because it is incorporated outside the Commonwealth.

Dow’s corporate presence within Pennsylvania is a physical, tangible presence, not simply a legal construct. It goes beyond maintaining an agent for service of process. Serving Dow with a subpoena in Pennsylvania is akin to personal service by hand delivery on an individual living in Pennsylvania. Dow may have a corporate domicile in its state of incorporation, just as an individual may have a domicile in the state where he or she votes, but when either of them are found in Pennsylvania – for example, at the corner of Sixth and Market Streets in Philadelphia, Pennsylvania – they each may be served with a subpoena and compelled to attend and testify at trial in Pennsylvania.

While Dow carefully and deliberately fails to describe the extent of its presence within the Commonwealth, Dow never disputes that it has a physical presence in Pennsylvania in the form of offices, production facilities and personnel. For example, while Dow argues at length that the presence of its wholly-owned subsidiary cannot be imputed to Dow as parent corporation, it fails to deny that it has a corporate presence of its own in Pennsylvania apart from that of its subsidiary. While Dow argues at length that its corporate residence is its state of incorporation, it again fails to deny that it has a corporate presence – whether residence or some other physical presence – of its own in Pennsylvania. Dow moved to quash the subpoena; if it had some basis to say that it was not physically present in Pennsylvania then it should have done so. The trial court correctly held that Dow was “within the Commonwealth” and that Dow was subject to service.

Dow argues that Plaintiff and the trial court conflate the concepts of personal jurisdiction and subpoena power, but it is Dow that incorrectly conflates those concepts. Dow compares specific personal jurisdiction to the subpoena power and then states that the reach of the Commonwealth's jurisdiction is greater than its subpoena power because specific personal jurisdiction extends to non-residents with no presence in the Commonwealth; however, Plaintiff never argued that her subpoena reached beyond the borders of the Commonwealth. The correct comparison of jurisdiction to subpoena power is the comparison of general personal jurisdiction and subpoena power. A corporation that is subject to the Commonwealth's general jurisdiction is found within the Commonwealth and, to that extent, the jurisdiction and subpoena power are co-extensive. In other words, if the corporation is within the Commonwealth in that it has a continuous and systematic presence giving rise to general jurisdiction, then it is within the Commonwealth for purposes of the trial court's subpoena power.

**C. The Presence Of Dow Is Not Dependent On A Finding Of Alter Ego Liability Or On Dow's State Of Incorporation**

Perhaps because the trial court's authority to subpoena Dow is self-evident – there being various buildings within the Commonwealth bearing the name of Dow Chemical Company and containing Dow Chemical Company offices and personnel – the entirety of the trial court's statement on the issue was as follows:

“Dow's argument that it is not subject to the Subpoena power of the Court is misplaced as it clearly is a corporate resident of this County as it succeeded to the prominent corporate presence of Rohm and Haas which had been acquired by Dow.”

Findings and Order at 1.

