

JOANNE BRANHAM, Individually and
as the Administratrix of the Estate of
FRANKLIN DELANO BRANHAM

Plaintiffs

v.

ROHM AND HAAS COMPANY, ET AL.
Defendants

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

MAY TERM, 2006

NO. 3590

ORDER

AND NOW, this day of , 2010, upon consideration of the Motion by
The Dow Chemical Company to Quash Plaintiff's Subpoena and Plaintiff's response in
opposition it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

J.

LAYSER & FREIWALD, P.C.

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JOANNE BRANHAM, Individually and
as the Administratrix of the Estate of
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**PLAINTIFF'S RESPONSE AND OPPOSITION TO THE DOW CHEMICAL
COMPANY'S MOTION TO QUASH PLAINTIFF'S SUBPOENA OF MARCH 3, 2010**

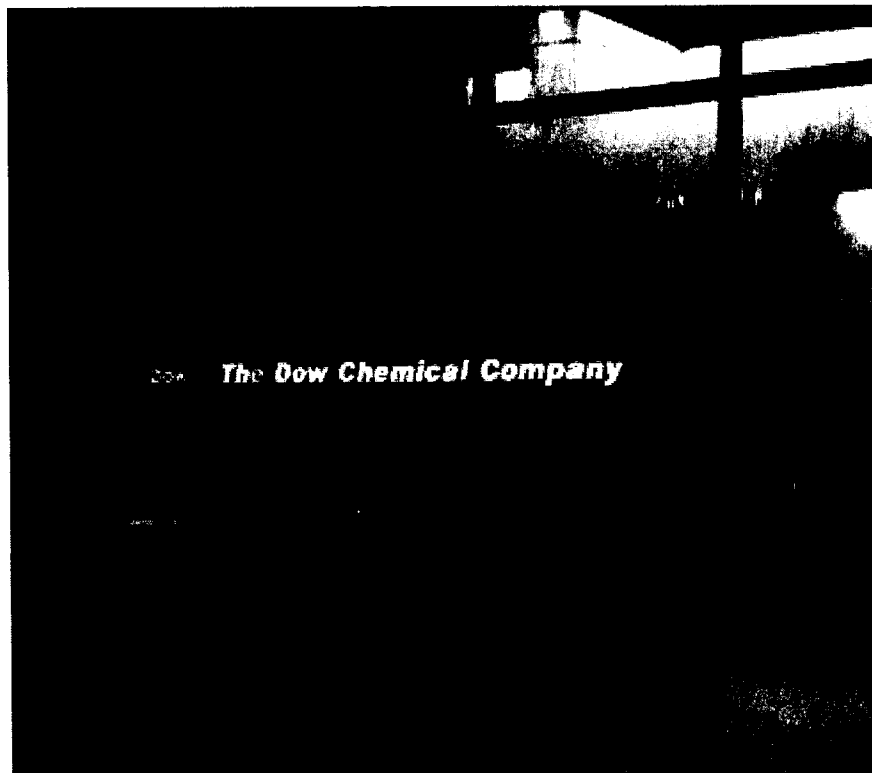
Plaintiff Joanne Branham, individually and as the administratrix of the Estate of Franklin Delano Branham, through her attorneys at Layser and Freiwald, P.C. hereby opposes The Dow Chemical Company's ("Dow") motion to Quash Plaintiff's March 3, 2010 subpoena and avers as follows:

1. Denied as stated. Plaintiff's March 3, 2010 subpoena is a document in writing and as such speaks for itself.
2. Denied. By way of further response, the Plaintiff's subpoena seeks trial testimony from a Dow designee regarding certain Dow and Union Carbide vinyl chloride workers who died

of brain cancer but were not reported to or included in the Mundt study, a copy of which is attached as Exhibit A.

3. Denied.

4. Denied. By way of further response, Dow is not a non-resident corporation. Dow has corporate offices, officers, employees and plants in Pennsylvania. Accordingly, Dow is subject to the Court's subpoena power. Attached as Exhibit B is the profile of Jerome Peribere who is a Senior Vice President for The Dow Chemical Company (corporate officer) and a member of Dow's 14-member Executive Leadership Committee. Mr. Peribere's office is located at 100 Independence Mall West, Philadelphia Pa, the entrance to which is shown below and attached as Exhibit C. The building, at 6th and Market Streets, was the corporate headquarters of the Rohm and Haas Company.



5-6. Denied as stated. The Pennsylvania Rules of Civil Procedure are in writing and as such speak for themselves.

7. Admitted in part, denied in part. It is admitted that Dow is subject to this Court's subpoena power. It is denied that Dow is simply "qualified" to do business in Pennsylvania. Dow has a vast corporate presence in the Philadelphia area and in the rest of Pennsylvania. See response to averment No. 4.

8. Denied as a conclusion of law. By way of further response, the out of state cases cited by Dow are inapposite to the question presently before the Court.

First, all the cases cited concerned a request for documents that were outside of the state. That is not the case here. Plaintiff has subpoenaed Dow to appear to give trial testimony through a corporate designee. Second, all of the cases cited involved corporate entities that had no presence in the state where the litigation was being prosecuted other than having a registered agent.¹ That is again not the case here. As noted above, Dow has a vast corporate presence in

¹*Syngenta Crop Protection, Inc. v. Monsanto Co.*, 908 So.2d 121, 124 (Miss. 2005) (The "issue certified . . . is '[W]hether, under Mississippi law, a non-resident, non-party corporation located outside the State of Mississippi, whose only significant contact with Mississippi is its formal business registration and a registered agent for service of process, is subject to the subpoena power of the Mississippi courts."); *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186 (La., 1994) ("CKB is a Texas corporation with its principal office in Dallas, Texas. Although CKB does not maintain an office in Louisiana, CKB is qualified to do business in Louisiana and has a Louisiana agent for service of process. Regarding the conduct of business, apparently the only activity of this company in Louisiana is maintaining a pipeline."); *In re National Contract Poultry Growers' Ass'n*, 771 So.2d 466 (Ala 2000) ("NCPGA is a corporation organized under the laws of Arkansas, with its principal place of business in Rushton, Louisiana. NCPGA has no office in Alabama, and it is not qualified to do business in Alabama."); *AARP v. American Family Prepaid Legal Corp., Inc.*, 2007 WL 2570841 (N.C.Super. 2007) ("Non-party National Western is a life insurance company chartered in Colorado, with its principal place of business in Austin, Texas. (Richardson Aff. ¶ 3.) National Western has no offices in this state, but it is licensed by the North Carolina Department of Insurance and sells its products here via a network of independent agents.").

the Philadelphia area and in the rest of Pennsylvania. *See* response to averment No. 4.

9. Denied as a conclusion of law. By way of further response, in *Simon v. Simon*, 6 Pa. D. & C.3d 196, 206 (Phila. Cty., 1977), the subpoena sought to compel a non-party to travel from Florida to Philadelphia for a deposition. In quashing the subpoena, the court found that 12 P.S. §297 was inapplicable and that to require the witness to comply would be an unreasonable burden. *Id.* at 206.

10-13. Denied. By way of further response, Plaintiff's document subpoena is irrelevant to the question of whether the Plaintiff may issue a subpoena to Dow to compel trial testimony. Further, the document subpoena referenced was issued prior to Dow becoming a resident corporation by merging with the Rohm and Haas Company and establishing a corporate presence in Pennsylvania.

14. Denied. By way of further response, the Pennsylvania Rules of Civil Procedure allow Plaintiff to subpoena and to call anyone who has relevant knowledge to testify at trial. *See Carpenter v. Pleasant*, 759 A.2d 411, 415 (Pa. Cmwlth 2000) ("if the testimony of the witness is relevant to the elements to be proven (duty, standard of care, breach of duty [negligence], causation, damages), then the testimonial evidence must be permitted").

15-18. Denied. By way of further response, Plaintiff's document subpoena is irrelevant to the question of whether the Plaintiff may issue a subpoena to Dow to compel trial testimony.

19. Denied. The Plaintiff is not requesting documents from Dow. Plaintiff is requesting a corporate designee to testify regarding certain Dow vinyl chloride workers who died of brain cancer and who have been identified previously in published studies, internal documents and archived historical documents but were not reported to Dr. Mundt. The testimony sought

concerns a study published in 2000 regarding three of Dow's plants. This is trial testimony.

Dow's suggestion that it would require months and thousands of dollars to look 10 years back and learn why some of their workers were not reported is on its face absurd. After all, Dow has an attorney that apparently specifically handles vinyl chloride litigation. *See* Def. Exhibit 1 the Aff. of Metcalf ¶1. Can Dow really identify no one with knowledge of a study that was published just ten years ago and concerned three of its plants? Of course Dow can, perhaps Dow just doesn't have an answer.

20-22. Denied. By way of further response, the determination of which workers were included in the Mundt study was based on an objective inclusion criteria that was defined by Dr. Mundt. However, the determination of which actual workers were included, which is the subject of the subpoena, was made by the plant personnel who are lay individuals, not experts. *See* Exhibit D. In other words, for its plants, Dow personnel decided who was and was not counted.

Contrary to Dow's argument, requiring Dow to testify about the above factual determinations of who was and was not reported and why to Dr. Mundt for inclusion in his study does not constitute the compelling of expert opinion.

23. Denied. By way of further response, the Mundt study was completed in 2000, which was 10 years ago. Further, the identification of brain cancer cases by Dow and the reporting of that information to Dr. Mundt took place no more than 12 years ago. Thus, there is no need for anyone to go back over the entire 30 years of vinyl chloride research to answer the simple questions of who was reported to Dr. Mundt and who was not and why.

24. Denied. *See* response to paragraphs 20-23.

25-28. Denied. *See* response to paragraphs 20-23.

29-31. Denied. Aside from the fact that Defendants' claim of privacy is without citation, the individuals identified by Plaintiff who will be the subject of the designee's testimony have been identified through what are called "personal identifiers" (date of birth, date of hire etc.) without reference to name. *See* Exhibit E, the list of brain cancer cases from the Mundt study. To determine whether a case was included, the personal identifiers were gathered from company and public documents and cross referenced with Mundt's study and public death records and newspapers.


Thus, the testimony will not require the release of any medical information that isn't already public knowledge.

32. Denied. As shown in Exhibit D, Dow advocated the Mundt update for PR reasons and for litigation defense. To now shield Dow from answering questions about a study they had a hand in crafting would be to allow corporate interests to trump the court's interest in reaching the truth.

WHEREFORE, Plaintiff respectfully urges that Dow's Motion to Quash be denied.

LAYSER & FREIWALD, P.C.

By:



AARON C. FREIWALD, ESQUIRE
GLENN A. ELLIS, ESQUIRE
KATHERINE ROBINSON, ESQUIRE
Counsel for Plaintiffs

DATED: 4/15/10

It is laughable for Dow to suggest that Dow is not available to the subpoena power of courts in this Commonwealth when its Philadelphia corporate offices now stand so prominently within walking distance of City Hall and directly across the street from the federal courthouse.

This Motion to Quash should be denied.

II. Statement of Questions Presented

1. Is Dow a resident corporation subject to the Court's subpoena powers?

Suggested Answer: Yes.

2. Can Plaintiff call a Dow witness to give factual testimony regarding the company's reasons for reporting some but not all of the known brain cancers at three of its plants to Dr. Mundt, who was studying the incidence of brain cancer among vinyl chloride workers?

Suggested Answer: Yes.

III. Factual Background

The Court is aware of the factual background of this case.

On March 3, 2010, in preparation for trial, Plaintiff issued and properly served a subpoena on The Dow Chemical Company ("Dow"). The subpoena compelled the appearance of a corporate designee to testify about certain Dow vinyl chloride workers who died of brain cancer but were never reported to Dr. Mundt or other epidemiologists who studied the vinyl chloride industry-wide cohort. The industry-wide vinyl chloride study included three (3) Dow plants.²

According to the documents collected by the Plaintiff, plant personnel collected the cohort information and determined who met the inclusion criteria for the study and reported that

²At the time of some of the studies, some of the Dow plants were Union Carbide plants. Union Carbide was purchased and incorporated into Dow so that all three plants became Dow plants.

information back to the study investigators. Through discovery and a review of publicly available documents, Plaintiff has amassed a substantial record showing that the Dow plants failed to report a number of cases of brain cancer to Dr. Mundt, which resulted in underestimating the association between vinyl chloride exposure and brain cancer.

Plaintiff's subpoena, in essence, seeks trial testimony relating to the three Dow plants and the information provided – and not provided – to Dr. Mundt and others.

IV. Argument

A. Dow is a resident corporation of Pennsylvania and as such is subject to the Court's subpoena power.

Dow argues that it is axiomatic that the subpoena power of a Pennsylvania state court does not extend beyond the territorial limits of the Commonwealth.³ *See* Def. Mem. at 4. In other words, according to Dow, “this Court lacks the power to enforce a subpoena upon a nonresident, nonparty corporation.” *Id.* at 5. However, Dow admits that the Court does have the power to enforce a subpoena “upon any person [or corporation] within the Commonwealth.” *Id.*

The real question is not whether the Court's subpoena power extends beyond the Commonwealth but whether Dow is a resident within the Commonwealth subject to the Court's jurisdiction. Dow's counsel does not address this question in their motion and simply wants the Court to accept without foundation that Dow is a non-resident. *See* Metcalf Aff. at ¶¶1-3. Dow's representation simply is not true. Dow is a resident within the Commonwealth.

³It should be noted that the word axiomatic means something that is true or evident without proof or argument. Yet, Dow can only point to two conflicting Pennsylvania cases. The one Dow suggests is the controlling case is over 30 years old. Plaintiff would hardly call Dow's argument a self evident truth.

The residence of a corporation is defined by Black's Law Dictionary as "the place where a corporation or other enterprise does business or is registered to do business." See Black's Law Dictionary 703 (8th ed. 2004). Thus, although "a corporation is usually thought to be domiciled in its place of incorporation, depending on the context, it may be considered a resident of several states." *American Employers' Ins. Co. v. Elf Atochem North America, Inc.*, 157 N.J. 580, 725 A.2d 1093 (1999);⁴ *In re Lesker*, 377 Pa. 411, 416, 105 A.2d 376, 379 (1954) (a person may have many residencies but he may only have one domicile.)

A corporation or person may be a resident of many states because "a domicile and a residence are not interchangeable terms." See *Springfield Tp. v. Kim*, 792 A.2d 717 (Pa.Cmwlth. 2002) citing *In re Du Puy's Estate*, 373 Pa. 423, 427, 96 A.2d 318, 319 (1953). In Pennsylvania, the distinction between domicile and residence is that residence is a question of physical fact, while domicile is a matter of intention. *Id.* citing *Greenwood v. Hildebrand*, 357 Pa.Super. 253, 515 A.2d 963, 965 (1986); see also *Robinson v. Robinson*, 362 Pa. 554, 559, 67 A.2d 273, 275 (1949) ("Domicile is a matter of intention; residence is a physical fact.").

In other words, in order to determine whether a corporation is a resident the Court must look at the corporation's activities within the Commonwealth. According to 42 Pa.C.S.A. § 5301(a)(2)(iii), the carrying on of a continuous and systematic part of its general business within

⁴See also *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337 (Tex.App.-Houston 2004) (It is a well-established general principle that a corporation is an inhabitant only of the state where it is incorporated, although it may be authorized to conduct its business in other states and may in fact reside in more than one place.); *Suttle v. Reich Bros. Constr.*, 333 U.S. 163, 166, 68 S.Ct. 587, 92 L.Ed. 614 (1948) (noting that a corporation's habitat "can only be in the state by which it was created, although it may do business in other states whose laws permit it"); *Pittsburg Water Heater Co. of Tex. v. Sullivan*, 115 Tex. 417, 423, 282 S.W. 576, 579 (1926) ("It is very generally held that a corporation is an inhabitant of the state under whose law it is incorporated, and that it has a residence wherever it conducts its ordinary business.")

this Commonwealth provides the courts with sufficient jurisdiction to exercise general personal jurisdiction over a person to “enable a tribunal to render personal orders against such person.”

Thus, if the Court finds that the corporation’s presence within the Commonwealth demonstrates “a continuous and systematic part of its general business” the Court has jurisdiction over Dow as a resident. *See* 42 Pa.C.S.A. § 5301.

Dow argues, without citation, that the Court needs something more than general personal jurisdiction over Dow in order to enforce a subpoena. What that more is, Dow never bothers to explain. What is clear, however, is that if the Court were to adopt Dow’s reasoning then a state court would never have the power to subpoena a non-party foreign corporation regardless of the corporation’s activities in the Commonwealth or its knowledge regarding the litigation before the Court.

Thankfully, the Legislature has not rendered our Courts so impotent. Section 5301(a) makes clear that the Court has the power to issue orders against persons and corporations provided their activities in Pennsylvania represent a continuous and systematic part of their business. The Legislature in drafting §5301 could have used the word “parties” instead of “persons” to limit the Court’s powers to only the litigants and thereby exclude non-parties, but it did not do so.

The Legislature could have used the words “complaint or writ or original process” instead of “order”, to limit the Court’s power to the filing of a complaint, but they did not do so. Since §5301 has to be read in accordance with its plain meaning, it is clear that this Court has the power to render an order, which includes a subpoena, against Dow.

