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Attorneys for Plaintiffs

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

PLAINTIFF’S RESPONSE AND OPPOSITION TO DEFENDANTS’ MOTION TO ENFORCE THE CASE MANAGEMENT ORDER AND TO PRECLUDE PLAINTIFF FROM COLLATERALLY ATTACKING EPIDEMIOLOGY STUDIES

The 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 Defendants’ motion and avers as follows:

1. Admitted.
2. Admitted.

3-5. Denied as stated. Dr. Neugebauer’s and Dr. Ginsberg’s reports are in writing and as such speak for themselves. By way of further response, Dr. Ginsberg discussed all of the studies that have examined the North American cohort and found that all of them have reported a

significant excess of brain cancers among vinyl chloride workers.

6-7. Admitted.

8. Denied as stated. Dr. Neugebauer's and Dr. Ginsberg's reports are in writing and as such speak for themselves.

9. Denied as stated. Plaintiff's March 3, 2010 subpoena is a document in writing and as such speaks for itself. By way of further response, Plaintiff's March 3, 2010 subpoena seeks factual testimony from a Dow designee regarding certain vinyl chloride workers who were not included in the industry-wide vinyl chloride studies.

10. Denied as stated. Plaintiff's September 5, 2008 subpoena is a document in writing and as such speaks for itself.

11-14. Admitted in part, denied in part. It is admitted that Dow is headquartered in Michigan. It is denied that the Michigan Court's reasoning for quashing Plaintiff's September 5, 2008 subpoena, which sought documents relating to Dow's vinyl chloride toxicological research, is at all relevant to the question of whether Plaintiff can call a Dow designee as a fact witness at trial.

15-18. Denied in part, admitted in part. Since Plaintiff's various subpoenas are documents in writing and as such speak for themselves, Defendants' averments are denied as stated. It is admitted that Plaintiff received various documents from various individuals and organizations in response to subpoenas issued under the *Gates v. Rohm and Haas Company, et al.* caption.

19-21. Denied as stated. The parties' letters and the Case Management Order of the Court are documents in writing and as such they speak for themselves.

22. Admitted.

23-24. Denied as stated. Plaintiff's response in opposition is a document in writing and as such it speaks for itself. By way of further response, the documents referenced by Defendants are public documents that will be authenticated by a designee from the Environmental Working Group, the custodian of the documents. Further, the Dow designee is being called in part to authenticate the Dow documents regarding the Dow plants included in the Mundt study. An example is attached at Exhibit A, which is a list of bullet points put together by Dow describing the benefits of updating the cohort study. One benefit listed is litigation defense. *Id.* at 143940.

25. Denied as stated. Dr. Neugebauer's and Dr. Ginsberg's supplemental reports are in writing and as such speak for themselves.

26. Denied as stated. Dr. Neugebauer has never relied on or endorsed the Mundt study. Dr. Neugebauer's reference to Mundt was only that their methodology, which was the subject of the Defendants' *Frye* challenge, was the same and was in fact standard across the field of epidemiology.

27. Admitted.

28. Admitted. By way of further response, the Plaintiff's March 3, 2010 subpoena does not seek discovery but instead seeks factual trial testimony from a Dow designee regarding certain vinyl chloride workers who were not included in the industry-wide vinyl chloride studies.

29. Denied as stated. Plaintiff's response in opposition is a document in writing and as such it speaks for itself.

30. Denied as stated. Plaintiff's February 12, 2010 letter is a document in writing and as such it speaks for itself.

31-32. Denied as stated. Plaintiff's March 3, 2010 subpoena is a document in writing and as such speaks for itself.

33. Denied. By way of further response, Plaintiff's have obtained a substantial record through the discovery process and from public achieves that shows with certainty that Dow and other members of the Chemical Manufacturers Association hid cases of brain cancer from Dr. Mundt and other investigators in an effort to downplay the strong association between vinyl chloride and brain cancer.

34. Denied.

35. 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").

36. Denied. By way of further response, "collateral attacks" on the scientific literature is essential so that a jury can determine the credibility and apply the appropriate weight to the scientific studies being put forward by the respective parties' experts. In fact, in *Blum v. Merrell Dow Pharm. Inc.* the trial court allowed the plaintiff to collaterally attack the peer reviewed studies that defendants relied on.¹ 33 Phila.Co.Rptr. 193, 1996 WL 1358523 (Phila. Cty. 1996). Defendants' argument is tantamount to suggesting that Plaintiff should not be

¹The Superior Court subsequently reversed the trial court finding that the plaintiff's expert's methodology did not meet the *Frye* standard. *Blum v. Merrell Dow Pharm., Inc.*, 705 A.2d 1314 (Pa. Super. 1997). However, the Superior Court's holding in *Blum v. Merrell Dow Pharm., Inc.*, was abrogated by *Trach v. Fellin*, 817 A.2d 1102 (Pa. Super. 2003).

entitled to cross examine witnesses and evidence at trial. It is an absurdity.

37. Denied. By way of further response, a fact witness or a defendant may be asked about facts within their knowledge and about opinions they hold. *See Decker v. Pohlidal*, 22 Pa. D. & C.2d 631, 1961 WL 6209 (Northampton Cty. 1960).

WHEREFORE, Plaintiff respectfully urges that Defendants' Motion be denied.

LAYSER & FREIWALD, P.C.

By:



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DATED: 4/21/10

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO ENFORCE THE CASE MANAGEMENT ORDER AND TO PRECLUDE PLAINTIFF FROM COLLATERALLY ATTACKING EPIDEMIOLOGY STUDIES

I. Introduction

Defendants style this motion as a motion to enforce the case management order and to preclude Plaintiff from collaterally attacking epidemiology studies.

First, there is no need to enforce the case management order. The subpoena to Dow Chemical, which precipitated this motion, is a proper motion seeking a corporate designee to

give trial testimony. The subpoena does not seek discovery.²

Second, the notion that a party could be precluded from making a “collateral attack” at trial on a piece of evidence or against a witness is absurd. Collateral attack means an attack on credibility. Will Defendants next suggest that Plaintiff should not be permitted to make collateral attack on their experts?

Thus, Defendants’ Motion is devoid of any merit and should be denied.

II. Statement of Questions Presented

1. Does the calling of a fact witness for trial require the Court to reopen or revise the existing Case Management Order?

Suggested Answer: No.

2. Is the Plaintiff permitted to collaterally attack published epidemiology studies both parties rely on and agree are relevant to the question of causation?

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

²Several weeks ago, Plaintiff filed a Motion to Compel Defendants regarding two former company witnesses. Plaintiff sought trial depositions. Defendants objected, claiming Plaintiff was seeking discovery. The Court rejected Defendants’ arguments then and ordered the witnesses to be produced. Mr. Silver, who argued the motion for Rohm and Haas, conceded during oral argument that there would be no objection where the witness was within the subpoena power of this Court, i.e, if the witness was able to be served in Pennsylvania. Dow is such a witness.

but were never reported to Dr. Mundt or other epidemiologist who were studying the vinyl chloride industry wide cohort. The industry wide vinyl chloride study included three (3) Dow plants.³

Plant personnel collected the cohort information and determined who met the inclusion criteria and reported that 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 substantial number of cases of brain cancer to the epidemiologist studying the cohort. Plaintiff's subpoena, in essence, seeks testimony relating to the three Dow plants and the information provided – and not provided – to Dr. Mundt and others.

IV. Argument

A. Plaintiff is allowed to subpoena and call a fact witness for trial without requiring that the Case Management Order be revised.

Defendants' entire motion is based on the incorrect premise that Plaintiff, through her subpoena is seeking discovery from Dow. Defendants are wrong. Plaintiff is seeking fact testimony for trial. This testimony is relevant to the question of general causation. According to the Rules of Evidence and Civil Procedures, Plaintiff is clearly entitled to compel relevant trial testimony from Dow through a subpoena.

The fundamental consideration in determining the admission of evidence is whether the evidence is relevant. *See* Pa.R.E. No. 402.⁴ Evidence is considered relevant if it logically tends

³At 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.

⁴Strangely, in their motion Defendants did not cite to the Pennsylvania Rules of Evidence or the Pennsylvania Rules of Civil Procedure regarding subpoenas although both are instructive to resolving this dispute.

to establish a material fact in the case, tends to make the fact at issue more or less probable, or supports a reasonable inference or presumption regarding the existence of a material fact. *See* Pa.R.E. No. 401; *Commonwealth v. Spiewak*, 533 Pa. 1, 617 A.2d 696 (1992); *Gemstar Corp. v. Department of Env'tl. Protection*, 726 A.2d 1120 (Pa.Cmwlt. 1999).

Consequently, if the testimony of a witness is relevant to the elements to be proven (duty, standard of care, breach of duty, causation, damages), then the testimonial evidence must be permitted, unless otherwise excluded. *Carpenter v. Pleasant*, 759 A.2d 411, 414-415 (Pa. Cmwlt. 2000). If the witness is not testifying as an expert, “the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are rationally based on the perception of the witness and helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” *Id.* at 415; *citing* Pa.R.E. 701.

Any competent witness may be compelled to testify in any civil matter so long as the witness has personal knowledge of a relevant matter. *See* Pa.R.E. No. 601 and 602.

The usual mode of compelling the attendance of a witness is by means of a subpoena. *See* Pa.R.Civ.P. No. 234.1(a). Rule 234.1(a) allows a Plaintiff to request for the issuance of a subpoena, signed by the Prothonotary and under the seal of the Court, “commanding a person to attend and testify at a particular time and place.” However, the subpoena may only be used to command a person to attend either at a trial *or* at the taking of a deposition. *See* Pa.R.Civ.P. No. 234.1(b).

Here, Plaintiff has issued a subpoena for the testimony at trial of a Dow Corporate Designee, to provide factual testimony on whether certain brain cancer cases identified in Dow’s

internal studies or their plants were in fact included in the industry wide studies, including Mundt's update. *See* Exhibit B.

As noted by Defendants' former lead trial counsel, David Bernick, and Defendants' toxicologist Dr. Valberg, the Mundt study is the cornerstone of Defendants' claim that vinyl chloride has not been scientifically linked to brain cancer, i.e. general causation. Contrary to Mr. Bernick's argument, all of the other industry studies showed a statistically significant excess of brain cancers among workers. Therefore, the Mundt study, since it is the only one that does not show an association, will play a major role in the upcoming trial.

While Defendants may wish that the jury never hear anything more than the conclusion of the study, which is the only thing Mr. Bernick shared with the Court during oral arguments, Plaintiff intends on educating the jury as to how Dow and other chemical companies manipulated the data and lied to Dr. Mundt in order to undercut his conclusions and cover up the fact that vinyl chloride was causing brain cancer in the workers at their vinyl chloride plants.

Contrary to Defendants' arguments, Plaintiff is not seeking discovery of documents that show Dow's manipulation and scientific fraud. The Plaintiff already has the documents, which were acquired through the discovery process (via federal subpoenas) and from public archives. These documents include a draft of Dr. Mundt's study and a copy is attached as Exhibit C. The Dow witness being called by Plaintiff will be questioned about those Dow documents, which reference Dow plants, that identify a significant number of brain cancer cases that were improperly withheld from Dr. Mundt and various other investigators that have looked at the cohort. Attached as Exhibits D and E are documents identifying just two of the individuals who

were long term vinyl chloride workers and who died of brain cancer but were not counted by Mundt.

In light of the central focus that will be the Mundt study and the other industry studies, which have looked at the same cohort of workers, it is beyond dispute that Dow through its corporate designee has relevant testimony that will help the jury understand, assign the credibility of and weigh the relevant epidemiologic studies to answer the question of general causation.

Further, Plaintiff's experts do not have to recalculate the SMR for the Mundt study as Defendants suggest. According to Defendants' expert, Dr. Valberg, if a factual record is established that there was even one more case that Mundt was not aware of, Mundt's conclusions would be altered. *See* Valberg Dep pp. 209-247 attached as Exhibit F. In essence, the weak association found by Mundt would be strengthened, thus removing chance as a possible cause for the workers' brain cancers.

In specific, on questioning from Plaintiff's counsel, Dr. Valberg conceded that an SMR of 1 in this case, being right on the line, so to speak, "provides weak evidence in the sense that it could be considered suggestive evidence for an association [between vinyl chloride and] brain cancer." *Id.* What would be the impact of one or more additional brain cancers?

Q: If I told you that the correct number for Mundt was not 36, but was more than 36; if we add two, if we add three to 36 and we do not change the cohort, am I correct, sir, that you would expect the association between vinyl chloride and brain cancer, at least in terms of Mundt's work, to yield a strong and more statistically significant association?

A: Just let me be clear.

Q: Sure.

A: You're posing the hypothetical that he made a mistake. He missed brain cancers that were actually there?

Q: Correct.

A: And if he missed brain cancers that were actually there, I mean, they would play into the statistics in such a way as to increase the SMR. And that's, again, just the way that epidemiology works.

Id.

It should also be noted that as a courtesy and as common practice in Philadelphia County the testimony was scheduled as a video trial deposition. This was done for the benefit of Dow, so that Dow would have the greatest degree of flexibility in producing their witness. Plaintiff's counsel could have simply required that the witness show up at trial and wait to be called, which presumably would have caused more inconvenience to both the witness and Dow, though it would have been entirely proper and permissible.

Regardless, it is clear that Plaintiff is entitled to issue a subpoena for relevant factual testimony from Dow at trial that will help the jury reach a decision on general causation.⁵

B. A plaintiff is permitted to collaterally attack published epidemiology studies both parties rely on and agree are relevant to the question of causation.

Defendants in their motion argue that "Pennsylvania law does not permit a jury to hear the type of collateral attack on a published epidemiological study that plaintiff seeks to mount here." Def. Memo p. 14. Defendants' motion provides two bases for granting this motion:

- 1) The exclusion or inclusion of a worker in a study is a question that turns on expert testimony and none of Plaintiff's experts provide opinions on that topic; and

⁵Dow has filed a motion to quash said subpoena pursuant to Rule 234.4. Plaintiff will be filing a response in opposition to Dow's motion to quash.

