RICHARD J. SILVERBERG & ASSOCIATES
A PROFESSIONAL CORPORATION
1500 WALNUT STREET
SUITE 1500
PHILADELPHIA, PA 19102
(215) 546-1110
FAX (215) 546-8779
RJS@RJSILVERBERG.COM

April 9, 2009

Via E-Mail and Fax
Patricia D. Petersen, Chief Hearing Officer
State of Washington
Office of the Insurance Commissioner
Box 40255
Olympia, WA 98504-0255

RE: Jackson v. Rohm and Haas Co., et al.
United States Court of Appeals
for the Third Circuit
No. 09-1872

Dear Judge Petersen:

The purpose of this letter is to request that the March 24, 2009 Order be reconsidered and vacated, and that this matter be stayed pending the outcome of the above-captioned appeal. Since the September 22, 2008 teleconference, the federal district court has issued decisions concerning both the Motion for Preliminary Injunction ("injunction motion") and Motions to Dismiss the underlying Consolidated Amended Complaint ("CAC"). In particular, the CAC was dismissed (in large part) as a sanction against plaintiff's counsel based upon purported pleadings violations, and not the merits of particular allegations or claims. Further, the injunction motion was denied because plaintiff had not demonstrated irreparable harm, and not because the motion did not otherwise have merit.[1]

The March 24 Order confirms that Michael J. Miller, Esquire (on behalf of Liberty Mutual) made a series of knowing and material misrepresentations to Your Honor, which you then relied upon, concerning both the CAC and injunction motion in order to defeat plaintiff's challenge to the Final Order approving Liberty Mutual's Acquisition of Safeco Insurance Company. Because the March 24 Order is premised upon fraudulent misrepresentations, plaintiff's challenge should be upheld and the Final Order cannot stand.

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[1]As discussed *infra*, plaintiff is pursuing a statutory injunction where, if plaintiff meets his burden, irreparable harm is presumed. Assuming *arguendo* that irreparable harm must be demonstrated, the fact that a particular plaintiff may not have done so does not mean that irreparable harm cannot be shown.

The Order of March 24, 2009

The Order of March 24, 2009 states, in pertinent part:

> Of note was the information presented by Mr. Miller that, while the litigation was technically still ongoing, the federal judge involved in the matter had *already determined* that the litigation lacked good cause to proceed[.]
>
> .....
>
> After careful consideration of the information and argument presented at posthearing teleconference, and the entire hearing file, the undersigned at the time of the subject posthearing teleconference concluded that while it would have been appropriate for Liberty Mutual to advise the undersigned about this litigation prior to the hearing, the failure to do so was not significant to either the hearing itself or to the Final Order entered by the undersigned on September 18, 2008.

Order of 03/24/09 at 4 (emphasis supplied). As discussed *supra* and *infra*, Mr. Miller made a series of knowing, material misrepresentations during the teleconference in an intentional effort to confuse and mislead Your Honor with respect to the status and merits of the CAC and injunction motion. Further, it is apparent that Mr. Miller's misrepresentations were a substantial factor in the March 24 Order.

This case was assigned to U.S. District Judge Louis H. Pollak. Pursuant to 28 U.S.C. §636(b)(1)(A), Fed. R. Civ. P. 72(a) and Loc. R. Civ. P. 72.1 I(e), Judge Pollak referred the case to Magistrate Judge M. Faith Angell for pretrial management purposes. Magistrate Judges are *not* Article III judges, and merely provide support for them. While Judge Angell was assigned responsibility for certain pretrial motions, the decisions were not binding on the parties. Rather, upon the filing of timely objections, all decisions were subject to final approval by Judge Pollak. However, during the Telephone Conference, Mr. Miller stated that Judge Angell had final dispositive authority. I cannot overstate the egregiousness of such a misrepresentation.

Similarly, Mr. Miller's statement to the effect that "the federal judge involved in the matter had *already determined* that the litigation lacked good cause to proceed" is a shocking and reprehensible misstatement of the facts and procedural history. Judge Pollak never made any such determination. Judge Angell (to whom Mr. Miller was referring) did not issue the Report and Recommendation ("R&R") concerning defendants' Motions to Dismiss the CAC until December 16, 2008, nearly three months *after* the Telephone Conference. Further, the R&R recommended dismissal as a sanction against plaintiff's counsel based upon purported

pleadings violations, and *not* based upon the merits. Whatever views Judge Angell may have expressed during pretrial proceedings, she never "determined" that plaintiff lacked a good faith basis to proceed, nor did she have the authority to do so.[2] In fact, the R&R actually undermines any such contention. *See Order of 12/16/08 at 17* ("[S]ome of Plaintiff's claims may have merit and/or have survived prior motions to dismiss. I find, therefore, that the sixth *Poulis* factor weighs against dismissal of the CAC with prejudice.").

The Order of September 19, 2008

In the March 24, 2009 Order, Your Honor quotes at length from Judge Angell's September 19, 2008 Order. However, the purpose of the September 19 hearing was *not* to determine the merits of the of the injunction motion, but only whether a status quo Order should be entered *pending a decision on the merits.* In fact, on October 30, 2008, a hearing was held before Judge Pollak which addressed, in part, the September 19 hearing before Judge Angell:

> The precise character of [the September 19, 2008] hearing, I take it, is a matter of dispute by plaintiff, that is plaintiff objects to having regarded that hearing as being addressed to his motion for a preliminary injunction as distinct from his motion for *expedited consideration* of the motion for preliminary injunction.
>
> *That distinction becomes important with respect to the hearing that was held* because when plaintiff was called upon to undertake to explain to the magistrate judge the grounds for seeking preliminary injunctive relief, plaintiff's counsel said he was not prepared to address the merits of the motion on virtually no notice and that, I would take, it led to the hearing terminating rather quickly.
>
> The request of the plaintiff for expedited consideration of the motion for a preliminary injunction to enjoin the merger between Rohm [and Haas] Company and the Dow Chemical Company and the acquisition of Safeco Insurance Company by the Liberty Mutual Group and to [require] full and proper disclosure, consideration of that for the moment at least moved from the magistrate judge's courtroom to this courtroom[.]

See N.T. (10/30/08) at 5:2-24 (emphasis supplied).

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[2]Had she done so, the case would have been stopped in its tracks *at that time*, and then immediately submitted to Judge Pollak.

During the Telephone Conference, Mr. Miller misrepresented both the purpose of the September 19 hearing and the significance of the September 19 Order. The sole purpose of the hearing was to determine whether the motion should be given expedited consideration, and not the merits of the motion.[3] Mr. Miller intentionally took advantage of Your Honor's lack of familiarity with both the procedural history, and the respective roles and authority of Judges Pollak and Angell, in an effort to gain the Final Order approving the acquisition. Futher, Richard P. Quinlan, Liberty Mutual's Deputy General Counsel, clearly was aware of what was occurring but failed to prevent Mr. Miller from knowingly misleading you.

The Orders of March 19 and 20, 2009

On March 19, 2009, Judge Pollak signed an Order dismissing most of the claims in the CAC as a sanction against plaintiff's counsel based upon purported pleadings violations, permitted certain claims to proceed, and directed plaintiff to file and Amended Complaint. On March 20, 2009, Judge Pollak signed an Order approving Judge Angell's R&R (dated November 17, 2008) denying the injunction motion based upon the failure by plaintiff to show irreparable harm.[4] On March 23, plaintiff voluntarily dismissed the remaining claims and, as discussed *infra*, filed a Notice of Appeal.

Notice of Appeal

On March 24, 2009, plaintiff filed a Notice of Appeal with the U.S. Court of Appeals for the Third Circuit with respect to all claims (except those voluntarily dismissed by plaintiff), the denial of the Motion for Preliminary Injunction, and certain other pre-trial Orders.

As the decision of March 19, 2009 reveals, certain of plaintiff's claims were dismissed as a sanction against plaintiff's counsel for purported pleadings violations pursuant to *Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863 (3rd Cir. 1984). *Poulis* dismissals are strongly disfavored in the Third Circuit. The Third Circuit requires that a plaintiff be notified directly by the Court that his claims are subject to dismissal pursuant to *Poulis*, a hearing, particularized findings, and an opportunity to re-plead before the severe sanction of a punitive dismissal will

[3]In fact, prior to the October 30 hearing before Judge Pollak, Judge Angell had put the motion down for a hearing on the merits for December 5, 2008.

[4]Plaintiff's injunction motion has been brought pursuant to RICO's "private attorneys general" standard, and specifically 18 U.S.C. §1964(a) to prevent and restrain future violations of RICO. Plaintiff is seeking a "statutory injunction" where, if plaintiff meets his burden, irreparable harm is presumed.

be permitted. Further, it must be shown that the plaintiff himself is personally responsible for the supposedly sanctionable conduct, and not just the plaintiff's attorney. As the Third Circuit has stated:

> [W]e have held that dismissals based on the apparent default of counsel require the court not just to balance the Poulis factors but also to provide the litigant notice and a hearing. *Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126, 129 (3d Cir. 1987). Even where the attorney's actions are "flagrant," a litigant's potentially meritorious claim is not to be dismissed in the absence of evidence that the litigant bears any personal responsibility. *Id*. Here, the District Court neither considered the Poulis factors nor provided DiFrancesco with the opportunity to respond to the threat of dismissal. That was an abuse of discretion.

Difrancesco v. Aramark Corp., 2006 U.S. App. LEXIS 5312, at *7-8 (3rd Cir. 2006). Here, there was no notice, hearing, particularized findings, or opportunity to re-plead, and no showing that plaintiff himself was personally responsible for the challenged conduct.[5]

The ERISA claims were not dismissed pursuant to *Poulis*. Plaintiff had obtained information that Liberty Mutual and Rohm and Haas were knowingly misrepresenting the disability plan as an ERISA-governed plan even though the plan was being funded from the "general assets" of Rohm and Haas Company, and therefore, was a payroll practice excluded from ERISA. Accordingly, plaintiff pled ERISA in the alternative. Even though alternative pleading is specifically permitted under the Federal Rules, plaintiff's ERISA claims still were dismissed, including those that previously had been permitted in *Jackson II* and *Jackson III*, the predecessor cases.[6]

Importantly, Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b) require *de novo* review of a Magistrate Judge's decision, meaning the district court itself must evaluate each of the party's Objections to the Magistrate Judge's decision. This means that Judge Pollak was required to perform an independent analysis of the *Poulis* factors, plaintiff's compliance with Rule 8, the purported violation of prior Orders, and each of plaintiff's other

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[5]In its Motion to Dismiss the CAC, Liberty Mutual made *no argument* that it was entitled to dismissal under *Poulis*, suggesting that it did not believe the *Poulis* elements were met and/or that it was entitled to a punitive dismissal against plaintiff.

[6]*See Jackson v. Rohm and Haas Co.*, 2007 U.S. Dist. LEXIS 67666 (E.D. Pa. Sept. 13, 2007)("Jackson II"); *Jackson v. Rohm and Haas Co.*, 2007 U.S. Dist. LEXIS 65900 (E.D. Pa. Sept. 5, 2007)("Jackson III").

Objections to Judge Angell's decision, none of which occurred. Similarly, there was no analysis of plaintiff's Objections concerning the Motion for Preliminary Injunction - just an Order denying the motion. Consequently, RICO, ERISA, fraud, and other claims that previously had been permitted were now out based upon purported pleadings violation(s), most of which were not identified or explained. While *de novo* review requires the district court to consider the relevant evidence of record, there was no evidence (in support of a *Poulis* dismissal) to consider because the required *Poulis* hearing never took place. Judge Pollak could have held the hearing himself, which he has done in other cases but failed to do here. In essence, without proper *de novo* review of a party's Objections, there has been no (proper) decision by the district court.

The failure by Judge Pollak to apply the correct standard of review cannot be harmless, nor was there otherwise harmless error. Even if the CAC was somehow improper, the cases are plain that *Poulis* requires notice, an evidentiary hearing, particularized findings (so that errors may be corrected) and an opportunity to re-plead. *Poulis* is an extreme sanction - it is not a club to use against unsuspecting plaintiffs, and certainly not innocent ones.

This letter is not intended to argue our appeal (nor to be exhaustive), but to show there are substantial, meritorious appellate issues. Whatever defendants may argue, there can be no dispute that Judge Pollak did not independently analyze plaintiff's Objections, and pursuant to that analysis, determine whether the CAC and Motion for Preliminary Injunction should be permitted. To the extent the district court has determined that plaintiff's counsel supposedly engaged in a sanctionable offense, plaintiff's claims cannot be dismissed absent evidence that the plaintiff himself is personally responsible for the sanctionable conduct. There is no such evidence here - there never was an evidentiary hearing. We fully expect the Third Circuit to determine there was reversible error, that the extreme sanction of a punitive dismissal was not warranted, and for the case to be returned to the district court, including the pending Motion for Preliminary Injunction.

All relevant documents may be obtained from PACER (via the website for the U.S. District Court for the Eastern District of Pennsylvania, www.paed.uscourts.gov), and all exhibits (not appearing on the docket) may be obtained from Liberty Mutual. Copies of the documents cited in this letter are included with the faxed version of this letter for your convenience.

Thank you.

Very truly yours,

/s Richard J. Silverberg

Enclosures

cc: Michael J. Miller, Esquire (via fax)
Melvin N. Sorensen, Esquire (via reg. mail)
James F. Williams, Esquire (via reg. mail)
DeAnn F. Work, Esquire (via reg. mail)
Linda Dalton, Esquire (via reg. mail)
Christina Beusch, Esquire (via reg. mail)
Mike Kreidler (via reg. mail)
Vernon Stoner (via reg. mail)
James T. Odiorne (via reg. mail)
Ronald Pastuch (via reg. mail)
Carol Sureau (via reg. mail)
Charles D. Brown (via reg. mail)
Colleen Healy Simpson, Esquire (via fax)
David M. Bernick, Esquire (via e-mail and fax)
Charles J. Kalil (via e-mail)

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