

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: E. I. DU PONT DE  
NEMOURS AND COMPANY C-8  
PERSONAL INJURY LITIGATION,

Civil Action 2:13-MD-2433  
JUDGE EDMUND A. SARGUS, JR.  
Magistrate Judge Elizabeth P. Deavers

This document relates to: ALL CASES.

**DISCOVERY ORDER NO. 3**

**Request of Oral Argument and Leave to  
File Sur-Reply on Plaintiffs' First Motion to Compel**

For the reasons that follow, DuPont's Motion for Oral Argument and Leave to File Sur-Reply on Plaintiffs' First Motion to Compel is **DENIED**.

Southern District of Ohio Local Civil Rule 7.2(a)(2) permits the filing of a motion and memorandum in support, a memorandum in opposition, and a reply memorandum. The Rule further states that "[n]o additional memoranda beyond those enumerated will be permitted except upon leave of court for good cause shown." S.D. Ohio Civ. R. 7.2(a)(2).

The entirety of DuPont's Motion provides as follows:

DuPont respectfully moves: (1) for oral argument on Plaintiffs' First Motion to Compel (Doc. No. 211); and (2) for leave to file a sur reply brief by April 17, 2014. PSC's reply brief (Doc. No. 224) and exhibits concerning the PSC's request for a 30(b)(6) deposition contains substantial new materials and argument which, for fairness and due process, DuPont should have an opportunity to address before the Court rules.

Accordingly, DuPont requests leave to file a sur reply by one week from today, April 17, and requests oral argument on the motion.

(DuPont's Mot. 1, ECF No. 233.) Plaintiffs' oppose Defendant's Motion, asserting that DuPont has "failed to actually identify any such 'new' materials." (Pls.' Opp. 1, ECF No. 235.)

The Court agrees with Plaintiffs that DuPont has failed to establish good cause. This Court has routinely found good cause exists to permit a party to file a sur-reply to address an issue raised for the first time in a reply brief. *See, e.g., Thompson v. Transam Trucking, Inc.*, 750 F. Supp.2d 871, 884, No. 2:08-CV-927, 2010 WL 4384234, at \*10 (S.D. Ohio Oct. 21, 2010); *Levy v. Cain, Watters & Assoc., P.L.L.C.*, No. 2:09-cv-723, 2010 WL 271300, at \*2 (S.D. Ohio Jan. 15, 2010). Beyond its conclusory assertions, however, DuPont fails to identify any new arguments Plaintiffs raised in their Reply. Moreover, upon review of the parties' briefing, the Court concludes that Plaintiffs' Reply does not raise new arguments but instead appropriately responds to the arguments DuPont raises in opposition to Plaintiffs' First Motion to Compel.

The Court likewise denies DuPont's request for oral argument as unnecessary. Based upon DuPont's representations, however, the Court concludes that supplementation of the record will assist the Court in resolving the subject Motion to Compel. DuPont contends that the first two topics set forth in Plaintiffs' Notice of Deposition to Dupont pursuant to Federal Rule of Civil Procedure 30(b)(6) are improper because these topics "have been covered in numerous prior depositions." (DuPont's Opp. 8, ECF No. 218.) In support of this assertion, DuPont proceeds to identify a number of depositions of fact witnesses and two depositions of DuPont pursuant to Rule 30(b)(6). DuPont's Defense counsel, in correspondence, also suggests that no material difference exists between fact witnesses and witnesses deposed within the context of Rule 30(b)(6). (Mace Corres. 2, ECF No. 225-2 ("I have never been clear on why [Plaintiffs'

counsel] think there is a material difference between 30 B6 testimony and the testimony by DuPont's toxicologist, like Gerald Kennedy.”.)

In *Smith v. General Mills, Inc.*, No. C2 04-705, 2006 WL 7276959 (S.D. Ohio Apr. 13, 2006), this Court analyzed this very issue and concluded “the fact that individually named witnesses have testified concerning a subject is generally no obstacle to a 30(b)(6) deposition on the same subject.” 2006 WL 7276959 at \*5–6. In reaching this conclusion, the *Smith* Court relied upon other courts’ rejection of this argument, the language of Rule 30(b)(6) and pointed out that fact witnesses (as contrasted with Rule 30(b)(6) deponents) “are or were under no duty to educate themselves about all information available to the corporation of a particular topic.” Moreover, as the Court recognized, fact witnesses’ testimony “does not bind [the corporation] in the same way as Rule 30(b)(6) testimony would.” *Id.*

For the reasons articulated in *Smith*, the Court rejects DuPont’s reliance upon prior fact witness testimony to conclude that the topics noticed in the subject Notice of Deposition are improper on duplicity grounds. Unless the parties agree to stipulate to the use of an individual, fact witness testimony as the corporate testimony of DuPont, this leaves the Court with DuPont’s assertion that the topics are duplicative of subject matter covered in two prior Rule 30(b)(6) depositions. Plaintiffs’ dispute DuPont’s representation that the subject matter has been previously covered. To resolve this dispute, the Court must review those portions of the prior two Rule 30(b)(6) depositions that DuPont maintains cover the same topic areas set forth in the subject Notice of Deposition.

Accordingly, DuPont is **DIRECTED** to file those portions of the prior two Rule 30(b)(6) depositions that it maintains cover the topic areas set forth in the subject Notice of Deposition

**ON OR BEFORE TUESDAY, APRIL 15, 2013.** In addition, in the event the parties have agreed to stipulate to the use of a particular individual, fact witness's testimony as the corporate testimony of DuPont, DuPont must also attach excerpts of any such testimony covering the same topic areas set forth in the subject Notice of Deposition. To be clear, the Court seeks only the excerpts described above. The Court will not consider further briefing on any of the issues raised in the course of the parties' briefing Plaintiff's First Motion to Compel.

**IT IS SO ORDERED.**

4/11/2014  
DATE

  
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EDMUND A. SARGUS, JR.  
UNITED STATES DISTRICT JUDGE

  
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ELIZABETH A. PRESTON DEAVERS  
UNITED STATES MAGISTRATE JUDGE