

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
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth Preston Deavers

This document relates to: ALL CASES.

PRETRIAL ORDER NO. 44

March 23, 2016 Conference Order

This matter came before the Court for an in-person status conference on March 23, 2016.

This Order memorializes the results of that conference as follows:

Plaintiffs' counsel first reported that they had already acquired over 90% of the necessary *Lexecon* waivers for the cases to be tried before this Court. Counsel will report again on this issue at the next in-person status conference.

The Court then discussed with the parties the plan set forth in Pretrial Order No. ("PTO") 42, for scheduling the forty cases that will be tried beginning in April 2017 ("2017 Trials").

After discussion of the relevant issues, the Court directed the parties to submit by April 6, 2016, the following:

1. A joint proposal setting forth the procedure for selection of the cases for the 2017 Trials.

2. The parties' decision on whether they will consent to trials in the Western Division seat of court (Dayton and Cincinnati), or whether all of the cases will be tried in the Eastern Division in Columbus and St. Clairesville.

3. Whether the parties will consent to the jurisdiction of any Magistrate Judge on any of the 2017 Trials.

The Court next addressed DuPont's Motion to Stay, which is directed at the remaining three bellwether trials. (ECF No. 4353.) The Court denied DuPont's Motion. The Court will memorialize its decision in a Case Management Order that will be issued forthwith.

The fourth issue discussed at the conference was Plaintiffs' Third Motion to Compel. (ECF No. 4106.) That motion has been supplemented, narrowed, and discussed at status conferences on several occasions. (ECF Nos. 4127, 4137, 4195, 4204, 4289, 4294.) The Court has issued two decisions related to the issue involved, which is the status of DuPont's continuing liabilities and obligations to the *Leach* Class Members under the 2005 Class Action Settlement Agreement in light of DuPont's "spin-off" company, Chemours. In Discovery Order No. ("DO") 4, the Court outlined the discovery that DuPont was required to produce regarding Chemours:

DuPont must produce existing documents reflecting (1) the timing of the change; (2) which entity will retain the obligations and liabilities under the 2005 Class Action Settlement Agreement in the *Leach* Case; and (3) the financial information for the entity retaining the obligations and liabilities, including documents reflecting the entity's estimated net worth, assets, liabilities, revenue, *etc.* To the extent some of the information is publically available, such as in a United States Securities and Exchange Commission Form 10-K, DuPont may designate where that information has been published.

(DO 4, ECF No. 247.)

Since DO 4 was issued, DuPont has served two Declarations from an Associate General Counsel of DuPont, Justin M. Miller, who affirmatively averred and represented to both Plaintiffs and the Court in May of 2014 and July of 2015 that:

The defendant in all of the cases involved in the current PFOA MDL is DuPont, and DuPont has no current intention to file a motion under Federal Civil Rule of Procedure 25(c) to substitute the party defendant. If any such motion were filed in the future, plaintiffs' counsel would have notice and an opportunity to respond, there would be a hearing, and the Court would make a determination after hearing all the parties.

As between the parties to the *Leach* settlement agreement, DuPont remains liable for its obligations. The obligations of DuPont to the other parties under the *Leach* settlement agreement remains obligations of DuPont, regardless of the agreement by Chemours to indemnify DuPont for any payments that DuPont may be required to make related to the MDL proceedings or under the *Leach* settlement agreement.

(Aff. of Robert A. Bilott in Supp. of Pls.' Third Mot. to Compel Ex. O, ECF No. 4106-16.¹)

In the latest supplementation of Plaintiffs' Motion to Compel, Plaintiffs explain that DuPont is in the process of a business merger with Dow Chemical Company. Plaintiffs have extended their requests directed at DuPont/Chemours to information related to the Dow merger. Plaintiffs contend that the SEC filings from DuPont and from Chemours show that the merger is currently on schedule to be closed in the summer of 2016. Therefore, Plaintiffs maintain, there must be agreements in place that indicate where the obligations and liabilities for the *Leach* Settlement Agreement lie. DuPont's counsel responded that, to the extent Plaintiffs are entitled to the discovery, their request is premature because he is unsure if the *Leach* Settlement Agreement obligations have been allocated at this time.

The Court recognized Plaintiffs' concern, stating:

Well, this is going to be a continuing problem because on the plaintiff's side, they think this could be a death star, and it may turn out to be nothing, but -- and you can respond to that, couldn't you? With some corporate representative saying what you just said, that it can't be determined?

¹ Even with this affidavit, Plaintiffs believe that DuPont has failed to provide all that was required under DO 4. Specifically, Plaintiffs maintain that they are entitled to the schedules and attachments to the Separation Agreement with Chemours. The Court will address this issue at the next status conference.

