

IN THE 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

CASE NO. 2:13-md-2433

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

This document relates to: ALL ACTIONS.

PRETRIAL ORDER NO. 9

STIPULATION AND AGREED ORDER REGARDING
DISCOVERY AND USE OF ELECTRONICALLY STORED
INFORMATION

Pursuant to Rules 26, 29, and 34 of the Federal Rules of Civil Procedure and Rule 502 of the Federal Rules of Evidence, the Plaintiffs in all of the above-referenced consolidated actions (“Plaintiffs”) and Defendant E. I. du Pont de Nemours and Company (“DuPont”) (Plaintiffs and DuPont sometimes individually a “Party” and collectively, the “Parties”) hereby stipulate and agree that electronically stored information (“ESI”) will be produced and used in the following form and manner, and request that the Court enter these terms as its own Order (“Agreed Order”):

1. **Types of ESI to be Produced:** As set forth in the Agreed Protective Order dated July 12, 2013 (“Protective Order”), any and all documents or other material produced and/or disclosed by any Party or third party in *Tennant, et al. v. E. I. du Pont de Nemours & Co., Inc.*, Case No. 6:99-0488 (S.D. W.Va.); *Leach, et al. v. E. I. du Pont de Nemours & Co.*, Case No. 010-C-608 (Cir. Ct. W.Va.); *Rowe, et al., v. E. I. du Pont de Nemours and Company*, Case No. 06-1810 (D. N.J.); *Scott v. E. I. du Pont de Nemours & Company*, Case No. 06-3080 (D. N.J.)

and/or *Rhodes, et al. v. E. I. du Pont de Nemours & Co.*, Case No. 6:06-0530 (S.D. W.Va.) (collectively such cases are referred to herein as the “Prior Actions” and the documents the “Prior Action Documents”) shall be deemed to have been produced by such Party or third party (the “Prior Producers”) in this MDL Litigation. No Prior Producer shall be required to re-produce any of the Prior Action Documents; provided, however, that the Parties agree to work together to address reasonable requests for copies of Prior Action Documents, subject to mutually-agreeable arrangements addressing cost sharing and protection of subjective coding or other privilege/work product material associated with the documents (which no Party is required to share). The Parties acknowledge and agree that the Prior Action Documents will not meet all of the criteria contained in Paragraph 3 of this Stipulation and Agreed Order but that the form of their production in the Prior Actions is acceptable and sufficient, and such Prior Action Documents do not need to be re-processed. Should production of documents or ESI beyond the Prior Action Documents be necessary (a “Future ESI Production”), the Parties shall produce all ESI responsive to a request for production, subject to the limitations of this Agreed Order and the obligations, limitations, and scope of Rules 26 and 34 of the Federal Rules of Civil Procedure, and any such further productions shall be governed by the terms of this Stipulation and Agreed Order.

2. Documents to be Produced:

With respect to any Future ESI Production(s), the Parties agree as follows:

a. **Key Custodians:** With respect to any future discovery request or other required production, DuPont shall provide a list of proposed Key Custodians within 10 business days of service of the request. If DuPont’s position is that no additional custodians are warranted beyond the scope of the Prior Action Documents, it shall communicate that in writing within 10

business days of service of the request. In response to DuPont's proposed list of Key Custodians or communication that it believes no additional custodians are necessary, Plaintiffs shall respond with any proposed addition or deletion of custodians within 10 business days. The Parties will confer in good faith regarding any disagreement. Additionally, the Parties shall confer in good faith regarding any possible additional custodians as discovery proceeds.

b. Non-Custodian Specific Data: In addition to data associated with a specific custodian identified above, the Parties shall make reasonable efforts to identify other non-custodian specific data relevant to this litigation and responsive to a Rule 34 request, including but not limited to data stored on file shares or other available databases or systems.

c. Dates: All requests for production shall specify a time period for the documents and ESI sought in the request. The Parties shall confer in good faith regarding any disagreements at to requested time periods and whether it is appropriate for some issues to limit the preservation, search, collection, review, and production of potentially relevant documents and ESI to the period on or before the filing of the first complaint specifically naming such Party as a party in the above-captioned litigation.

d. Reasonably Accessible Data: The Parties acknowledge and agree that each Party is not required to preserve, search, collect, process, or produce ESI that is not reasonably accessible or available in a usable form in the ordinary course of business of the following types: (i) back-up tapes or systems created solely for the purpose of disaster recovery; (ii) residual, slack, deleted, fragmented, damaged, or corrupted data, or other data that is only accessible through forensic recovery; (iii) random access memory (RAM), temporary system files, or other data that is difficult to preserve without disabling an operating system; (iv) server, system, or network logs; (v) temporary internet files, history, cache, cookies, and other such

online access files; (vi) encrypted data/password protected files, where the key or password cannot be ascertained through good faith, diligent, and reasonable efforts; and (vii) historic or legacy data and systems that are no longer used by a Party and which the Party has no good faith and reasonable basis to believe contain information relevant to these cases after reasonably diligent inquiry. The foregoing list does not prevent the Parties from identifying, in accordance with Rule 26(B)(2)(B), other sources and information that the Parties consider not reasonably accessible because of undue burden or cost. The Parties will confer in good faith regarding the preservation and collection efforts previously implemented by DuPont and any supplemental efforts that Plaintiffs may request. The Parties reserve their right to seek a production from sources identified as not reasonably accessible (either pursuant to Paragraph 2.d(i)-(vii) above or in response to requests for production) for “good cause” as set forth in Rule 26(b)(2)(B), including if a source identified as not reasonably accessible is the only source in which information otherwise directly responsive and relevant to a discovery request currently exists. If a producing Party believes a requesting Party is making an unreasonably burdensome request, nothing in this Order prevents the producing Party from requesting the Court to require the requesting Party to bear all or some of the costs of production (and nothing in this Order prevents the other Party from opposing a request for cost-shifting).

e. De-duplication of Data: In cases where a custodian or multiple custodians possess identical copies of a document, only one copy of the document need be produced, provided that the metadata shall reflect the multiple custodians as provided in Paragraph 3.b.1 below. Each Party may de-duplicate its data globally; however, a requesting party may, for specific documents, make reasonable requests that the producing party produce supplemental information regarding the file(s) and/or location(s) where the document originated.

3. **Form of Production:**

a. **General:**

i. **Image Format:** Except as provided in Paragraphs 6-9, all production document images (both ESI and hard-copy) will be provided as single-page TIFF format utilizing Group 4 compression with at least 300 dots per inch (“dpi”) resolution. Images may be reduced by up to 10% to allow for a dedicated space for Bates numbering and stamping of documents as detailed in Paragraph 4.

ii. **Image Load File:** In addition to the metadata load files discussed below, a cross-reference load file in an Opticon (.opt or .log) file or IPRO (.lfp) file format shall accompany the images, showing the document boundaries and the correlation between the unique page identifier (“Bates Number”) of the document and the location of the file on the delivery media. In addition to this image load file, productions shall also contain the metadata load file(s) described in Paragraph 3.b below.

iii. **Unitization:** Each page of a document shall be electronically saved into an image file. If a document is more than one page, the unitization of the document and any attachments shall be maintained as it existed in the original form and reflected in the load file outlined above. The relationship of documents in a document collection (*e.g.* cover letter and enclosures, email and attachments, binder containing multiple documents, or other documents where a parent-child relationship exists between the documents) shall be maintained. If more than one level of parent-child relationship exists, documents will be kept in order, but all will be treated as children of the initial parent document.

iv. Imaging Errors: Documents that present special issues or imaging or formatting problems not discussed in Paragraphs 6-9 below, shall be identified and the Parties shall meet and confer to attempt to resolve such problems.

b. **ESI**: In addition to the above criteria, ESI shall be produced with the following metadata and extracted text fields in a format suitable for importing into commercially available document management or litigation support software.

i. General Metadata Load File Format: All produced ESI documents shall be accompanied by a properly delimited ASCII metadata load file that shall be delimited with the following data fields:

- Beginning Document Number;
- Ending Document Number;
- BegAttach (the Beginning Document Number of the parent document);
- EndAttach (the Ending Document Number of the last attachment);
- Custodian;
- Duplicate Custodian(s);
- Page Count;
- MD5;
- Redacted (Indication of whether the document at issue is redacted as well as the reason for the redaction if the reason is other than for attorney-client privilege or work product);
- Confidential (Indication of whether the document at issue was designated as confidential as of the date of production);
- Foreign Language (Indication of whether the document at issue would need translation into English); and

- Extracted Text (which shall not be included in the load file but shall be a separate text file indexed to the load file and named to correspond to the Beginning Document Number field in the load file).

ii. Non-email Metadata Load File: In addition to the general metadata fields contained in Paragraph 3(b)(i), the metadata load file for all non-email ESI (including attachments to emails and loose files) shall, where reasonably available, also contain the following data fields:

- FileExt (the extension of the filename, e.g., "DOC" for an MS Word document);
- Filename (the original filename);
- Filepath;
- Date Created (MM/DD/YYYY);
- Date Last Modified (MM/DD/YYYY);
- Author and;
- Native Path (relative path to the native version of the ESI when a native version is delivered (e.g. Excel/PowerPoint files)).

iii. Email Metadata Load File: In addition to the general metadata fields contained in Paragraph 3(b)(i), the metadata load file for all email ESI shall, where reasonably available, also contain the following data fields:

- PST or NSF File Name;
- To;
- From;
- Cc;
- Bcc;

- Date Sent (MM/DD/YYYY);
- Importance (for emails with a designation);
- Sensitivity (for emails with a designation);
- Date Received;
- Subject Line;
- Attachments.

iv. Redactions to ESI: For ESI that is redacted, the Producing Party shall perform Optical Character Recognition (“OCR”) on the redacted version of the document and produce the corresponding OCR text files for all redacted documents. The OCR text shall be provided in ASCII text format and shall be labeled with the Bates number of the first page of the corresponding document followed by the extension “.txt.” The OCR files shall be provided as properly delimited document level files suitable for importing into commercially available document management or litigation support software. When ESI is redacted and the corresponding OCR text file is produced, the OCR text file will reflect those redactions.

v. Production of Native Versions: Subject to the provisions of Paragraphs 6-9, ESI will not be produced in native format.

c. **Hard-copy Documents**: Except as provided in Paragraph 10, documents that exist only in hard-copy form will be scanned and produced as electronic images in accordance with this Paragraph 3.

i. Organization: Paper documents shall be scanned and the images organized in the manner in which the documents were maintained in the ordinary course of business.

ii. OCR: Each Party shall produce corresponding OCR text files for all produced documents that originally existed in hard-copy form. The OCR text shall be provided in ASCII text format and shall be labeled with the Bates Number of the first page of the corresponding document followed by the extension “.txt.” The OCR files shall be provided as properly delimited document level files suitable for importing into commercially available document management or litigation support software.

iii. Hard-copy Metadata Load File: In addition to the scanned image and OCR text file, all hard-copy documents shall be produced with an accompanying metadata load file, in a format suitable for importing into commercially available document management or litigation support software, containing the following data fields, to the extent reasonably available:

- Beginning Document Number;
- Ending Document Number;
- BegAttach (the Beginning Document Number of the parent document);
- EndAttach (the Ending Document Number of the last attachment);
- Page Count; and
- Custodian or source (where reasonably available).

In addition to the foregoing fields, if a producing Party performs objective coding to create additional fields (such as Title of Document, Date, or Author), then the producing Party shall also share such additional objective coding in the form of additional fields in the hard-copy metadata load file at the time of production). This does not obligate any Party to perform coding

to create additional fields or to share any coding fields that are not purely objective or that contain work product or privileged information.

4. **Bates Numbering**: Each page of a produced document shall be sequentially marked with a legible "Bates" number stamped or electronically "burned" onto the Image. In addition to the Bates number, "confidential" designations, where applicable (and consistent with the terms of the Agreed Protective Order in this case) and "redaction" designations may also be placed on the document image. Bates numbers and confidential designations are to be placed in a location that does not cover, obliterate, or obscure any other information on the document, generally on the bottom of the document. Redaction designations shall be placed to clearly indicate the location of the redacted information.

5. **File Name Conventions**: Each TIFF file shall be named with the Bates number of the page of the document, followed by the extension ".TIF."

6. **Structured Data**: DuPont shall notify Plaintiffs regarding any responsive information that DuPont contends exists only within an electronic database. The Parties will meet and confer in good faith regarding discovery of such information. Plaintiffs reserve the right to request a native production of a database and DuPont reserves the right to oppose such a production, but the Parties agree first to confer in good faith and cooperate with respect to reasonable alternative form(s) of production.

7. **Microsoft Excel**: The Parties agree that productions of Microsoft Excel files are not amenable to production in TIFF format. Therefore, the Parties agree to produce Microsoft Excel files in native format. A placeholder image will be included with the TIFF files indicating the Bates number of the document and that the document was produced in native format. Per the

metadata requirements contained in Paragraph 3, the metadata will identify the Bates number, file name, and relative path to the native version of the document.

8. **Non-Convertible Files:** Certain types of files, such as system, program, video, database, and sound files are not amenable to conversion into TIFF format. In general, these types of files will not be collected or processed. When present in a collection, however, such documents will be represented in the form of a placeholder TIFF image and will be produced in a reasonably usable form upon an adequate showing of need. The Parties agree that the foregoing exclusion is intended to exclude “system” type files and does not relieve the Parties from producing ESI that is relevant and responsive to a request merely because it exists in a particular file type. If the Parties determine, in the discharge of their duties to respond to a request in good faith and in accordance with Rule 26(g), that information responsive to a requests exists in one of the file types identified above, such information shall be included in the Parties’ production in a reasonably useable form in accordance with the provisions of this Order and applicable Rules.

9. **Oversized Documents:** Documents that cannot for technical or other reasons be legibly produced in the manner described in Paragraph 3 (*e.g.*, documents having a size larger than 11 x 17 inches) shall be produced by scanning a representative identifying portion of the document as a place holder (*e.g.*, a map or drawing legend) and Bates numbering it as described in Paragraph 4 above. Upon request, a paper copy (in color, if applicable) of the entire document shall be made and numbered with the Bates Number corresponding to the place holder and stamped with any applicable “Confidential” or “Redacted” notations.

10. **Color:** With the potential exception of any documents described in Paragraphs 6-9, all documents are to be produced in black and white. With respect to any documents that contain color, however, each Party shall honor reasonable and specific requests for the

production of color image(s) of such documents. The cost of producing color images shall be borne by the Requesting Party. If, however, a Party knows or has a good faith belief that any document contains color text that would be rendered illegible as a result of being converted to black and white, that Party will take reasonable steps to produce the documents in a legible and usable form as part of its production, and at the producing party's cost.

11. **Original Documents:** The Parties shall, upon reasonable request, make originals of any produced electronic document available for inspection by the Requesting Party, subject to any redactions. The Parties reserve their right to contend that the Requesting Party should bear all costs associated with complying with such requests and shall meet and confer on that subject before any filing with the Court.

12. **Production Media:** Documents are to be produced on either CD, single density DVD, or portable hard drive. The disc or drive label shall contain the case name, the name of the Party making the production, the Bates range contained on the media, and the date of the production.

13. **Federal Rule of Evidence 502:** Nothing in this Order prevents any Party from requesting that the Court enter an order pursuant to Rule 502 of the Federal Rules of Evidence. Likewise, nothing in this Order prevents a Party from opposing such a request.

14. **Replacement Images:** If a document produced by a producing Party has an error or the images must be replaced due to an inadvertent or mistaken production, a change in confidentiality, or other reason, the replacement production must be marked as a replacement, and the producing party must provide a reason for the replacement. The load file of the replacement document(s) must be separately produced in a replacement file complying with the

terms of this Stipulation and Agreed Order. All re-produced images should properly overlay original named images.

15. **Production Index Information:** The Parties shall, with each production (including supplemental productions and any replacement productions pursuant to Paragraph 14), provide a chart or other reasonably useable form of information identifying the date of the production, the custodians included, a general description of the source for any non-custodian based production, the start and end Bates range for each such custodian or source, and whether the Party believes that production from such custodian or source is complete (i.e., as opposed to an initial production from such custodian or source as part of a rolling production).

16. **Privilege Logs:** Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the Parties will produce for Future ESI Productions logs of documents or ESI withheld from production as privileged or subject to protection as required by Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure.

a. **Form of Privilege Logs:** No Party or Prior Producer is required to provide a privilege log with respect to the Prior Action Documents. For Future ESI Productions, the descriptive information for any supplemental privilege logs will include, at a minimum and to the extent reasonably available, the author of the document, any recipients (i.e. To, CC, or BCC) of the document, the date the document was created or sent, the subject line or file name of the document, the basis for the privilege, and a brief description of the document, where necessary. The Parties agree that a Party may leverage the output from database technology used to facilitate the document review to aid in the creation of such supplemental privilege logs. When database technology is used, the descriptive information shall be provided in the output form received from the database technology. Thus, for example, the recipient of an email may

be listed as jsmith@abccorp.com without the need to change the descriptive information to Smith, John. With respect to descriptive information received from database technology, each Party will honor reasonable and specific requests to provide additional information to clarify the basis of the privilege (e.g. jsmith@abccorp.com is attorney John Smith).

b. Privileged Document Families: If the descriptive information for any portion of a document family (i.e. a document with attachments or exhibits) makes clear that the entire document family is privileged, the Parties will not be required to separately log each document in the family. Rather, the Party may do a single entry for the entire document family and include the Bates range, if any, for all documents within the entire document family in one description in the privilege logs. With respect to any such attachments or exhibits, each Party shall honor reasonable and specific requests for additional information about the privileged nature of the family or the individual documents within that family.

c. Limitation on Privilege Logs: The Parties agree that documents between the Party and its respective litigation counsel (the counsel actually appearing for the Party in this MDL Litigation or other outside counsel specifically retained for purposes of this MDL Litigation, who shall be identified generally to the other Parties) dated after the filing of any complaint involving such Party that is now within the scope of this MDL Litigation are presumed privileged and do not need to be included on the privilege logs. Additionally, the Parties agree that documents between the Party and its litigation counsel in a Prior Action (the counsel actually appearing for the Party in such Prior Action(s) or other outside counsel specifically retained for purposes of the Prior Action(s), who shall be identified generally to the other Parties) dated after commencement of that Prior Action are presumed privileged and do not need to be included on the privilege logs, except to the extent found to be waived pursuant to an

Order entered in such Prior Action. The Parties reserve all of their rights with respect to the effect of any such Order entered in a Prior Action on the assertion of privilege in this action.

STIPULATED AND AGREED:

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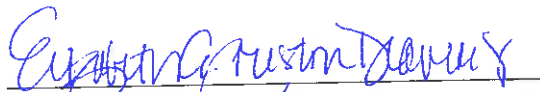
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Co-Leads of Plaintiffs' Steering Committee

IT IS SO ORDERED

Date October 22, 2013


ELIZABETH A. PRESTON DEAVERS
UNITED STATES MAGISTRATE JUDGE