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.

DISCOVERY ORDER NO. 9

Defendant's Motion to Compel Discovery Responses From Trial Plaintiffs Carla Bartlett and John Wolf

This matter is before the Court on the Motion to Compel of Defendant E.I. du Pont de Nemours and Company's ("DuPont"), which is directed at Carla Bartlett and John Wolf ("Trial Plaintiffs"), the plaintiffs whose cases have been selected for the first two trials. (ECF No. 1895.) The Trial Plaintiffs have filed their Memorandum in Opposition (ECF No. 2036) and DuPont has filed its Reply in Support of its Motion (ECF No. 2181). For the reasons that follow, the Court **DENIES** DuPont's Motion.

I.

This dispute revolves around interrogatories and requests for admissions ("RFAs") served on the Trial Plaintiffs by DuPont. While the Trial Plaintiffs responded to those discovery requests, DuPont believed that the responses were deficient and ultimately submitted the dispute to the Court-appointed Mediator. The Mediator issued a Report and, in accordance with it, the Trial Plaintiffs supplemented their answers to the interrogatories. DuPont maintains that the Trial Plaintiffs' supplementation does not remedy the deficiencies in their responses to the

interrogatories. DuPont also contends that the Trial Plaintiffs' original answers to the RFAs are deficient. In DuPont's briefing on its Motion to Compel, it asserts that the Trial Plaintiffs have failed to provide "a single substantive interrogatory response, specifically identif[y] a single document, or explain[] the basis for denying any of DuPont's straightforward requests for admission." (DuPont's Reply at 1.) DuPont additionally claims that, in the event the Court grants its Motion to Compel, it is entitled to collect its reasonable costs and fees incurred in bringing the Motion.

II.

DuPont propounded 104 RFAs to Trial Plaintiff Bartlett and 91 RFAs to Trial Plaintiff Wolf. DuPont takes issue with the Trail Plaintiffs' responses to 18 of these RFAs.

A. Rule 36

Rule 36 of the Federal Rule of Civil Procedure provides that "[a] party may serve on any other party a written request to admit . . . the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either[.]" Fed. R. Civ. P. 36(a)(1). In turn, Rule 26(b)(1) authorizes liberal discovery within reasonable bounds determined by judicial discretion.

The functional purpose of utilizing requests to admit in litigation is to facilitate proof and narrow the issues to be presented at trial. Fed. R. Civ. P. 36 advisory comm. note (West 1970). "The propounding party bears the burden of setting forth simple and direct RFAs that 'can be answered with a simple admit or deny without an explanation,' though qualifications or explanations for the purpose of clarifying a response are permitted." *Piskura v. Taser Int'l*, No. 1:10-cv-248, 2011 U.S. Dist. LEXIS 141443, at *5 (S.D. Ohio Nov. 7, 2011) (citing *Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 77 (N.D. N.Y. 2003)).

Rule 36 also addresses responses:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

Fed. R. Civ. P. 36(a)(4).

Upon motion to determine the sufficiency of an answer or objection, "[u]nless the court finds an objection justified, it must order that an answer be served." Fed. R. Civ. P. 36(a)(6). If the court determines that "an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served." *Id.* "A matter admitted under this rule is conclusively established [only for that proceeding] unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b).

B. Analysis

In DuPont's Motion to Compel,[1] it contends that, "[i]n keeping with the purpose behind Rule 36," which is to "narrow[] the issues and factual disputes for trial," it propounded "clear, concise, and carefully worded" RFAs to the Trial Plaintiffs. (DuPont's Mot. to Compel at 4.) DuPont also served the Trial Plaintiffs with an interrogatory ("Interrogatory No. 15") that asked for "[t]he basis for each denial of the requests for admission served on Plaintiffs, including identification of the specific facts, witnesses and specific documents that each Trial Plaintiff contends supports their response and their failure to fully admit." (DuPont's Mot. to Compel,

[1] "As a motion to compel is not the proper procedural device for challenging responses to requests to admit, the Court will treat [DuPont's Motion to Compel] as a motion[] regarding the sufficiency of an answer or objection under Federal Rule of Civil Procedure 36(a)(6)." *Piskura*, 2011 U.S. Dist. LEXIS 141443, at *3, n.1.

Ex. A; ECF No. 1895-2.) DuPont concludes that, regardless of its proper utilization of the RFAs and Interrogatory No. 15, the Trial Plaintiffs "improperly stonewalled and posed improper objections and asserted denials to these [18 RFAs that are the topic of the Motion to Compel] and many other Requests without providing any valid basis or explanation for such denials." (DuPont's Mot. to Compel at 9.)

DuPont requests that the Court review the Trial Plaintiffs' responses to the following 18 RFA's:

- Admit that at all relevant times, DuPont operated its Washington Works Plant in substantial compliance with its permits to operate and with all applicable laws, statutes and regulations. (RFA No. 1.)

- Admit that you do not have any evidence that DuPont at any relevant time failed to operate its Washington Works Plant in substantial compliance with its permits to operate and with all applicable laws, statutes and regulations. (RFA No. 2.)

- Admit that from 1950 through the present, DuPont has complied with all laws and regulations governing the use and disposal of C8. (RFA No. 21.)

- Admit that, throughout all relevant times, DuPont fully complied with all usage and handling instructions given by 3M, DuPont's supplier of C8. (RFA No. 23.)

- Admit that there are no animal studies showing kidney cancer being caused at the C8 exposure levels you are claiming. (RFA No. 25.)

- Admit that there are no animal studies showing kidney cancer being caused at the C8 exposure levels you are claiming. (RFA No. 27.)

- Admit that there are no occupational studies showing kidney cancer being caused at the C8 exposure levels you are claiming. (RFA No. 29.)

- Admit that employees of 3M repeatedly told DuPont that 3M was not seeing adverse health effects in 3M employees who worked with C8. (Bartlett RFA No. 35, Wolf RFA No. 37.)

- Admit that, at no time before December 2011, did DuPont know that the amount of C8 that was reaching the community would cause any clinically significant adverse human health effect. (Wolf RFA No. 39.)

- Admit that, at no time before May 1997, did DuPont know that the amount of C8 that was reaching the community would cause any clinically significant adverse human health effect. (Bartlett RFA No. 40.)

- Admit that, at no time before May 1997, did DuPont know that the amount of C8 that was present in Tuppers Plains-Chester Water District water supply would cause any clinically significant adverse human health effect. (Bartlett RFA No. 41.)

- Admit that C8 had not been scientifically shown to cause ulcerative colitis at any time before 2012. (Wolf RFA No. 50.)

- Admit that no scientific studies had been published prior to July 2012 that linked C8 to ulcerative colitis. (Wolf RFA No. 53.)

- Admit that the amount of C8 that was reaching the community around the Washington Works plant had not been scientifically shown to cause ulcerative colitis at any time before July 2012. (Wolf RFA No. 66)

- Admit that the amount of C8 that was reaching the community around the Washington Works plant had not been scientifically shown to cause kidney cancer at any time before May 1997. (Bartlett RFA No. 81.)

- Admit that you have not sought any psychological or emotional counseling or treatment related to your alleged exposure to C-8 and/or your kidney cancer diagnosis. (Bartlett RFA No. 96, Wolf RFA No. 83.)

- Admit that you have no evidence that DuPont intentionally tried to hurt you. (Bartlett RFA No. 98, Wolf RFA No. 85.)

- Admit that you have no evidence that DuPont thought that C8 was causing clinically significant human health effects to anyone in the community surrounding the Washington Works. (Bartlett RFA No. 99, Wolf RFA No. 86)

(DuPont's Mot. to Compel, Ex. A; ECF No. 1895-2.)

The Trial Plaintiffs contend that their "responses provide exactly what is required under Fed. R. Civ. 36, namely, admitting, denying and/or objecting and identifying the grounds for any objection." (Pls' Mem. in Opp. at 5.) This Court agrees.

The Court finds the most efficient way to explain why the Trial Plaintiffs' responses are sufficient and their objections are justified is to begin with an example. In RFA No. 2, DuPont asks the Trial Plaintiffs to admit that they "do not have any evidence that DuPont at any relevant time failed to operate its Washington Works Plant in substantial compliance with its permits to operate and with all applicable laws, statutes and regulations." The Trial Plaintiffs objected to this RFA, contending that it is overly broad, unduly burdensome, unreasonable in its scope, contains terms subject to several possible meanings, is premature and incapable of being responded to at this time, and seeks to impose undue obligations upon the plaintiffs that are not justified under the Federal Rules. The Trial Plaintiffs then clarified that DuPont did not define the phrases "any relevant time," "substantial compliance," "permits to operate," or "all applicable laws, statutes and regulations." Further, the Trial Plaintiffs objected because the RFA "calls for expert opinion(s) and will be the basis of expert reports and/or disclosures, which will be provided in accordance with Rule 26(a)(2) of the Federal Rules of Civil Procedure and/or by the Order of the Court." The Trial Plaintiffs then, subject to the objections, denied the RFA.

The Court finds that the Trial Plaintiffs response is sufficient and their objections justified for several reasons. First, the nature of the RFA is improper. "Strictly speaking Rule 36 is not a discovery procedure at all, since it presupposes that the party proceeding under it knows the facts or has the document and merely wishes its opponent to concede their genuineness." 8B Fed. Prac. & Proc. Civ. § 2253 (3d ed.) ("Admissions, in some ways, are like sworn testimony. Once one is made, there is no need to revisit the point."). This RFA, as well as Bartlett RFA Nos. 9 and 99, and Wolf RFA Nos. 85 and 86, is directed at the evidence the Trial Plaintiffs possess and their assessment of that evidence, *i.e.*, work product. It does not seek concessions regarding the genuineness of known facts or documents.

Additionally, RFAs are meant to narrow issues for trial by removing issues on which the *parties agree* are no longer in dispute through simple admit or deny responses. RFA Nos. 2, 25, 27, 29, 50 and 53, Bartlett RFA Nos. 35, 40, 41 and 81, and Wolf RFA Nos. 37, 39, 50, 53 and 66, are directed at the substance, outcome, and interpretation of scientific studies regarding the effect of C-8 on human and animal populations. The parties have retained numerous experts that have offered competing conclusions on these issues. The parties certainly do not agree that these issues are no longer in dispute. Asking the Trial Plaintiffs to repeat the substance of expert reports does nothing to narrow the issues for trial. Consequently, the Trial Plaintiffs' responses and objections to these RFAs, similar to those made to RFA No. 2, are appropriate.

Moreover, an RFA "concludes the matter and avoids any need for proof at trial." 8B Fed. Prac. & Proc. Civ. § 2253 (3d ed.). RFA Nos. 21 and 23, Bartlett RFA Nos. 40, 41, 98 and 99, and Wolf RFA Nos. 39, 85 and 86, are directed at DuPont's actions, its knowledge or lack of knowledge about particular studies and/or the effects of C-8 at particular times, DuPont's intentions, what employees of business associates of DuPont "repeatedly told DuPont," and/or what DuPont "thought" about the effects of releasing C-8 in the community. Most of this information is exclusively within DuPont's possession, or at least originated exclusively from DuPont. The Trial Plaintiffs' answers to these requests certainly could not conclude the matter or avoid any further need for proof on the issue. Similar to the RFAs just addressed, these nine RFAs are not directed at issues the parties agree are no longer in dispute. Indeed, they go right to the heart of the parties' dispute. Thus, the Trial Plaintiffs' responses and objections to them are proper.

Finally, the Court does not find that Interrogatory No. 15 changes its analysis. While it is, at times, appropriate to propound an interrogatory directed at an RFA, here that request is

overbroad and unduly burdensome. (Interrogatory 15) (requesting the "basis for each denial of the requests for admission served on Plaintiffs, including identification of the specific facts, witnesses and specific documents that each Trial Plaintiff contends supports their response and their failure to fully admit"). The Court explains this conclusion in more detail below.

Accordingly, the Court **DENIES** DuPont's Motion to Compel as it relates to the RFAs.

III.

DuPont propounded 26 interrogatories to Trial Plaintiff Bartlett and 28 interrogatories to Trial Plaintiff Wolf. DuPont takes issue with the Trial Plaintiffs' answers to 11 of these interrogatories.

A. Rule 33

Rule 33 of the Federal Rules of Civil Procedure provides the following regarding interrogatories:

> (b) Answers and Objections.
>
> (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objections and shall answer to the extent the interrogatory is not objectionable.

The parties agree that all of the interrogatories at issue except one, Interrogatory No. 18, are contention interrogatories. As to contention interrogatories, Rule 33 provides:

> An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

Fed. R. Civ. P. 33(a)(2) (regarding permissible scope of interrogatories). Interrogatories and responses call for a balance between the need for fair access to material information and the burden of producing it.

B. Analysis

DuPont contends that it propounded the interrogatories at issue to "discover the specific factual bases for" the Trial Plaintiffs' claims and to "prepare for trial." (DuPont's Mot. to Compel at 2.) DuPont takes issue with the Trial Plaintiffs' answers to the following 11 interrogatories:

- List and fully describe in as much detail as possible each and every specific act or omission by which you contend DuPont caused, in whole or in part, your alleged injuries, and separately, for each act or omission, state what individual performed the act (or wrongfully failed to act), identify every person you contend has first-hand knowledge of such act or omission (listing the person you contend has the most knowledge first, and continuing in order of decreasing knowledge), identify all documents you contend are related to such alleged act or omission, and identify all facts and documents on which you rely to support your contentions. (Interrogatory No. 1.)

- State the date on which you contend that DuPont should have foreseen that you were likely to be harmed by an act or omission of DuPont, and identify all facts, witnesses and documents that you contend support your answer. (Interrogatory No. 2.)

- If you claim that DuPont violated any law, regulation, statute, code, or other written provision, identify, with as much particularity as possible (including the section number, full title, and year of promulgation or effective date) the specific written provision you claim DuPont violated; describe in as much detail as possible how you claim DuPont violated such provision; and fully identify all persons and all documents you rely on in claiming that DuPont violated such provision. (Interrogatory No. 4.)

- For each Human Disease with which you claim to have been diagnosed and for which there has been a Probable Link Finding, state both the concentration in the blood and the concentration in drinking water at which you contend that C8 will cause such disease, and identify all witnesses and documents that you contend support your answer. (Interrogatory No. 5.)

- List and describe in detail each specific act or omission or other conduct on the part of DuPont that you claim entitles you to punitive damages, and identify all facts, witnesses and documents which you contend support your claims, including the bates number(s) for any document(s) that has/have been produced by any party. (Interrogatory No. 9.)

- If your response to any Request for Admission below is anything other than a

complete and unqualified admission, then fully state the basis for each such answer, including but not limited to identifying each fact, witness and document that you contend supports your response and your failure to fully admit. (Interrogatory No. 15.)

- State each fact upon which you base each and every claim that DuPont was negligent, and identify each witness and each document you contend supports your claims. (Interrogatory No. 16.)

- List each and every false statement or omission (if any) that you claim constituted fraud or misrepresentation by DuPont, the date it was made, and by whom, when you first learned of it, and identify all facts, witnesses and documents that you contend support your claim of fraud, misrepresentation, and/or concealment, including but not limited to any evidence supporting your contention of an intent to mislead by DuPont, any acts you claim you took in reliance, and any related duty you claim DuPont owed to you. (Interrogatory No. 17.)

- List and fully identify any and all documents that were quoted, cited, and/or referenced in your Complaint, and/or were relied upon in preparing your Complaint, and provide the bates numbers of any and all such documents that have been produced by any party. (Interrogatory No. 18.)

- Identify each other person with whom you contend DuPont was in a conspiracy, the dates you contend such a conspiracy existed, and each unlawful act in which you allege the conspirators engaged, and fully identify all facts, witnesses and documents that you contend support your claim of conspiracy. (Interrogatory No. 19.)

- List each deceptive trade practice that you contend was committed by DuPont, and for each identify what employee committed it, when, how and identify each fact witness and document that you contend supports your claims. (Wolf Interrogatory No. 20.)

The Trial Plaintiffs argue that they have fully responded to the interrogatories and/or lodged justified objections. This Court agrees.

The Trial Plaintiffs properly objected to Interrogatory Nos. 1, 2, 16, 17, 19, and Wolf Interrogatory No. 20, because the requests are premature insofar as they seek the identity of specific documents and/or witnesses the Trial Plaintiffs intend to rely upon at trial. Pursuant to Case Management Order ("CMO") 7, and in accordance with a forthcoming CMO that will

govern specific pre-trial matters including witness lists and exhibit lists, the Trial Plaintiffs will be required at a later time to identify specific documents and/or specific fact witnesses that they will use to support their claims at trial. The Trial Plaintiffs are also, of course, under a continuing duty to supplement their responses. At this juncture, however, the Trial Plaintiffs' objections are proper.

The Trial Plaintiffs also justifiably objected to Interrogatory Nos. 1, 2, 4, 5, 16, 17, 19, and Wolf Interrogatory No. 20, because they call for an expert opinion or analysis. The Trial Plaintiffs refer DuPont to the expert reports that have been produced in this case. DuPont responds that

> vague and unspecified references to Trial Plaintiffs' "expert disclosures" are not sufficient to relieve them of their discovery obligations. As the United States District Court for the Eastern District of Wisconsin explained in *French v. Wachovia Bank, N.A.*, 2010 U.S. Dist. LEXIS 82222, *4 (E.D. Wis.), "[r]efferring to a multiple page [expert] report does not constitute a proper response to an interrogatory. It is not the defendant's duty to sift through an expert report in an attempt to glean the information sought in the interrogatory."

(DuPont Mot. to Compel at 12.) This Court is not persuaded that *French* dictates that reference to multi-page expert reports is improper. As a sister district court explained, the *French* court did not establish a "general rule" that it is inappropriate to answer an interrogatory by referring the requesting party to a multi-page report. *Sec. Exch. Comm'n v. Berry*, No. C07-04431, 2011 U.S. Dist. LEXIS 64437, at n. 2 (N.D. Calif. June 15, 2011) (finding the case to be "highly fact specific and of little help" to the case *sub judice*). A court's decision on the propriety of interrogatories is fact specific. Here, the parties' disputes are centered on whether it is probable that exposure to C-8 caused a particular Human Disease in the Trial Plaintiffs, *i.e.*, specific causation, and on DuPont's corporate conduct regarding what it knew about the harmful effects of C-8 and when it knew it. The parties have retained experts to opine on these issues and have

deposed the experts. It is overly burdensome to ask the Trial Plaintiffs to repeat the opinions given by their experts or to give their lay opinion on these topics.

Additionally, the Trial Plaintiffs appropriately objected to Interrogatory Nos. 1, 2, 5, 16, 17, 18, 19, and Wolf Interrogatory No. 20, because the information requested is already in DuPont's possession by virtue of having been produced by or to DuPont and/or is information that is publicly available. Where, as here, contention interrogatories will impose great burdens, "at least in cases where defendants presumably have access to most of the evidence about their own behavior, it is not at all clear that forcing plaintiffs to answer these kinds of questions . . . is sufficiently likely to be productive to justify the burden that responding can entail." *In re Convergent Technologies Securities Litigation,* 108 F.R.D. 328, 338–39 (N.D. Cal. 1985). Moreover, the interrogatories at issue are not directed at eliciting previously unknown information, but rather appear to be directed at uncovering the Trial Plaintiffs' roadmap of the universe of discovery that has already been exchanged, *i.e.*, the Trial Plaintiffs' work product. *See e.g., Norwood v. Radtke*, No. 07-cv-624, 2008 U.S. Dist. LEXIS 108765, at *2 (W.D. Wis. Feb. 26, 2008) ("[A party] cannot simply ask [the opposing party] to give him a copy of everything . . . that they intend to use [to support claims]. This puts an impossible burden on [a party] and it invades their attorney-client and work product privileges.").

All 11 of the interrogatories at issue here possess many of the characteristics other courts have found to be overly broad and unduly burdensome. For example, in *IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 321 (D. Kan. 1998), the court considered broad, contention interrogatories similar to those in the case *sub judice*. The *IBP* court indicated the following reasons that the RFAs were objectionable:

> To the extent they ask for every fact and every application of law to fact which supports the identified allegations, the court finds them overly broad and unduly

> burdensome. . . . To require specifically "each and every" fact and application of law to fact, however, would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details. The burden to answer then outweighs the benefit to be gained. Other discovery procedures, such as depositions and production of documents, better address whatever need there be for that kind of secondary detail.

cite This Court finds the DuPont RFAs objectionable for these same reasons. In this same vein, the *Hilt v. SFC, Inc.* court further explained:

> [The interrogatories] seek "each and every fact" supporting the allegations of plaintiff, no matter how insignificant or minor. They make no distinction between admitted and contested allegations. . . . As to [the allegations in the] complaint Interrogatories 10 through 13 thus ask for "each and every fact," together with the identification of each knowledgeable person and supporting document. This would require plaintiff to provide the equivalent of a narrative or otherwise detailed account of her entire case in chief, together with identification of virtually all supporting evidence for each fact.
>
> Whatever may be said for the virtues of discovery and the liberality of the federal rules, which perhaps all courts recognize, there comes at some point a reasonable limit against indiscriminately hurling interrogatories at every conceivable detail and fact which may relate to a case. Fed. R. Civ. P. 1 states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Indiscriminate use of blockbuster interrogatories, such as these, do not comport with the just, speedy, and inexpensive determination of the action. To require answers for them would more likely cause delay and unreasonable expense of time, energy, and perhaps money.

170 F.R.D. 182, 186–87 (D. Kan. 1997).

This Court finds this analysis equally applicable to the interrogatories at issue here. The Trial Plaintiffs are not required to provide the "equivalent of a narrative or otherwise detailed account of [their] entire case[s] in chief, together with identification of virtually all supporting evidence for each fact." *Id.* Consequently, the Court **DENIES** DuPont's Motion to Compel as it relates to the interrogatories at issue.

IV.

For the reasons set forth above, the Court **DENIES** DuPont's Motion to Compel. (ECF No. 1895.)

IT IS SO ORDERED.

5-20-2015
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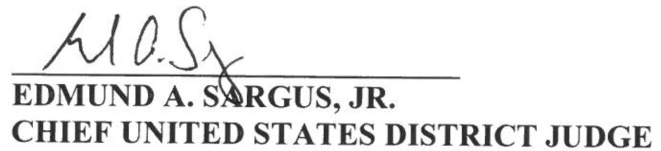
EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE