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. 5

Plaintiffs' Motion for Protective Order – Limits of Discovery on Discovery Pool Plaintiffs

This matter is before the Court on Plaintiffs' Motion for a Protective Order (ECF No. 227), Defendant E. I. du Pont de Nemours and Company's ("DuPont") Memorandum in Opposition (ECF No. 238), and Plaintiffs' Reply (ECF No. 246). Plaintiffs seek an order compelling DuPont to withdraw written discovery recently propounded on the discovery pool plaintiffs and requiring DuPont to seek leave of Court before filing discovery in this multidistrict litigation ("MDL") beyond that expressly authorized under existing orders. For the reasons that follow, Plaintiffs' Motion is **GRANTED IN PART AND DENIED IN PART**.

On April 2, 2014, DuPont and a Plaintiffs' Steering Committee ("PSC") designee each selected ten Plaintiffs to be included in a group of discovery pool plaintiffs, the pool from which the bellwether trials will be selected. On April 3, 2014, DuPont served extensive written discovery on each of the twenty discovery pool plaintiffs.

Plaintiffs assert that DuPont's service of this written discovery violates the parties' prior,

agreed-upon discovery procedures and this Court's existing orders. Plaintiffs rely specifically upon Case Management Order Number Six ("CMO No. 6"), asserting that this Order memorializes more than six months of the parties' negotiations and establishes the parameters of permissible discovery upon the discovery pool plaintiffs. According to Plaintiffs, CMO No. 6 does not contemplate written discovery at this stage of the litigation and only permits up to four depositions per side per discovery pool plaintiff. Plaintiffs posit that Case Management Number Two ("CMO No. 2"), Pretrial Order Number 7 ("PO No. 7"), and Case Management Number Four ("CMO No. 4") further support their interpretation of CMO No. 6. Plaintiffs seek a protective order requiring DuPont to withdraw the written discovery it served on the discovery pool plaintiffs. Plaintiffs also ask this Court to order DuPont to seek leave of Court before filing any additional discovery beyond that expressly authorized under existing case management orders. Finally, Plaintiffs seek reimbursement of the costs they incurred in bringing the subject Motion.

DuPont opposes Plaintiffs' Motion. DuPont submits the affidavit of its counsel, Mr. Damond Mace, in which Mr. Mace states as follows:

> At no time have the parties ever discussed, nor has DuPont ever agreed to, any limitation on written discovery on the "Discovery Plaintiffs." Indeed, throughout my discussions with the PSC, I never understood that any limitations—other than on the number of depositions—were being proposed or under consideration.

(Mace Aff. ¶ 3, ECF No. 238-1.) In DuPont's view, the only limitation on its ability to take discovery during this phase is the cap on the number of depositions set forth in CMO No. 6. DuPont also appeals to authority governing the permissible scope of discovery as set forth in Federal Rule of Civil Procedure 26, as well as principles of fairness, asserting that it has

responded to Plaintiffs' written discovery.

In their Reply, Plaintiffs make clear that they are not disputing whether the written discovery DuPont propounded is relevant or permissible under the Federal Rules of Civil Procedure. Plaintiffs emphasize that instead, the dispute turns on whether DuPont's written discovery is prohibited under the language of this Court's orders.

The Court agrees with Plaintiffs that CMO No. 6 sets forth the parameters of permissible discovery at this stage of the litigation. DuPont's contention to the contrary runs counter to a number of Court orders that clearly reflect that the discovery upon the discovery pool plaintiffs would be limited in nature and governed by a case management order. (*See, e.g.*, CMO No. 2 at § III.B.1, ECF No. 30 (indicating that the "scope and parameters" of permissible discovery of the discovery pool plaintiffs "will be governed by a subsequent CMO"); PO No. 7 at 2, ECF No. 33 ("The parties anticipate conducting additional discovery on [the discovery pool plaintiffs], with full discovery for those Plaintiffs selected for trial."); CMO No. 7 at § I.3, ECF No. 68 ("Such additional discovery [beyond Plaintiffs' production of the Plaintiff Fact Sheets and records authorizations] shall be carried out in accordance with the applicable Rules of Civil Procedure and will be the subject of a subsequent CMO."). Consistently, the introductory paragraph of CMO No. 6 states that "in accordance with the parameters suggested in CMO No. 2," one of the purposes of CMO No. 6 is "to establish guidelines for discovery for these discovery pool cases of which some will be proposed and designated as the initial trial cases." (CMO No. 6 1, ECF No. 194.)

In pertinent part, CMO No. 6 provides as follows:

C. Conduct of Case-Specific Core Discovery

1. "Case-specific core fact discovery" of the Discovery Plaintiffs may commence on March 24, 2014. Case-specific fact discovery on the Discovery Plaintiffs shall be concluded by July 31, 2014.

2. "Case-specific core fact discovery" of the Discovery Plaintiffs *may consist of* up to four (4) depositions per side per Discovery Plaintiff. The parties both reserve their right to seek additional depositions in any given Discovery Plaintiff case(s) during this Case-specific core fact discovery period upon a good-cause showing. The parties have agreed that, *for the cases that will subsequently be designated as the Initial Trial Cases*, the parties shall be permitted to conduct additional discovery as may be needed.

(*Id.* at 5 (emphasis added).) Certainly, as DuPont points out, CMO No. 6 could have been clearer in that it could have explicitly stated that written discovery was precluded during the case-specific core fact discovery period. Yet, as set forth above, the Court's prior orders and the foregoing language makes clear that the parties and the Court intended to limit the nature of the discovery and to set forth those limits in CMO No. 6. To this end, the express, agreed-upon language of CMO No. 6 explicitly provides that prior to the selection of the bellwether trial cases, each party may conduct up to four depositions per discovery pool plaintiff, adding that additional discovery may be conducted beyond those deposition following selection of the cases to proceed to trial.

This interpretation is further supported by Section B, paragraphs four and five of CMO No. 6, which provide in pertinent part as follows:

4. Dismissal before *Commencement of Depositions*: For any Defendant-designated Discovery Plaintiff that is dismissed . . . *before depositions are commenced*, such case shall be dismissed with prejudice and shall be replaced with a new Defendant-designated Discovery Plaintiff.

> 5. Dismissal after *Commencement of Depositions*: For any case for which a dismissal . . . is sought for which a settlement is offered *after depositions have commenced*, such case will only be dismissed and/or settled with notice to the Court and/or the Court-appointed Mediator. *The intent of this provision is to eliminate defendant's concern that plaintiffs' attorneys might seek to dismiss defense selected cases after the commencement of case-specific core fact discovery*, as set forth in Section C below. While the PSC represents that this should not occur; this provision is designed to provide Defendant with further protection in this regard by requiring that dismissal after *the commencement of depositions* be with prejudice and notice to the Court.

(*Id.* at 4–5 (emphasis added).) The emphasized language further reflects that the parties and the Court contemplated only depositions during the "case-specific core discovery" phase of this action.

In sum, Plaintiffs' Motion is **GRANTED IN PART AND DENIED IN PART**. (ECF No. 227.) CMO No. 6 sets forth the agreed-upon parameters of the permissible scope of discovery during this case-specific core fact discovery period and permits each party to conduct up to four depositions per discovery pool plaintiff absent demonstration of good cause for conducting additional depositions. The discovery pool plaintiffs may therefore, at this juncture, disregard the written discovery DuPont propounded on April 3, 2014. DuPont may, of course, conduct additional discovery as necessary following selection of the cases to proceed to trial. Given the Court's clear articulation of the permissible scope of discovery at this juncture, it is unnecessary to issue a separate order requiring DuPont to seek leave of Court before pursuing additional discovery. Finally, as set forth above, CMO No. 6 could have been clearer in that it could have explicitly stated that written discovery was precluded during the case-specific core fact discovery period. The Court therefore finds DuPont's opposition to Plaintiffs' Motion to be

substantially justified and declines to award Plaintiffs the costs incurred in filing this Motion.

IT IS SO ORDERED.

4-28-2014
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

ELIZABETH A. PRESTON DEAVERS
UNITED STATES MAGISTRATE JUDGE