

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.

PRETRIAL ORDER NO. 18

DuPont's Motion to Modify Case Management Orders Based on State-Court Filings

This matter is before the Court on DuPont's Motion to Modify Case Management Orders Due to Recent Hill Peterson State Court Filings (ECF No. 236), Plaintiffs' Memorandum in Opposition (ECF No. 242), and DuPont's Reply (ECF No. 248). For the reasons that follow, DuPont's Motion is **DENIED**.

The law firm of Hill, Peterson, Carper, Bee & Deitzler ("Hill Peterson") recently filed 966 complaints in the Circuit Court of Wood County, West Virginia, alleging personal injuries from exposure to C-8 emitted from DuPont's Washington Works facility. The firm advised this Court at the April 1, 2014 status conference it anticipates filing more than 1,800 additional complaints in state court in the coming months. In response, DuPont filed the instant Motion requesting that this Court modify its existing Case Management Orders "to provide appropriate and proportional incentives for Plaintiffs" to file the additional cases in federal court. (DuPont's Mot. at 2, ECF No. 236.) DuPont argues that "[f]iling many hundreds of these cases in Wood

County is directly contrary to the reasons behind the creation of the MDL and guarantees the unnecessary expense, duplication of effort, and waste of judicial resources that all Parties agreed could be avoided by the MDL.” *Id.* DuPont specifically asks that the Court modify its Case Management Orders as they relate to cases removed to the federal court and transferred to this MDL (the “Removed Cases”) as follows:

- Plaintiffs will reimburse DuPont for \$200 of the \$400 in removal costs;
- DuPont’s obligation to file an answer in any Removed Case is stayed until further order of the this Court;
- In any Removed Case the Plaintiff Fact Sheet shall be due within 30 days after the Removed Complaint is transferred to the MDL Court;
- DuPont shall have 90 days to respond to any deficiency in the Plaintiff Fact Sheets submitted in the Removed Cases; and,
- Plaintiffs shall be required to obtain and produce to DuPont’s counsel all records of their diagnosing and treating physicians, and all C8 Health Project Records (including those held by Reliant Consulting) at their expense in any Removed Case.

This will provide appropriate incentives to Hill Peterson and other firms to file their cases in federal court, where they belong based on all parties’ arguments to the Judicial Panel on Multidistrict Litigation (the “JPML”). It will also equitably adjust the plaintiffs’ attempt to shift all of the federal court filing fees to DuPont.

Id. at 2–3. DuPont maintains that the filing of these cases is a “drastic change” in circumstances “and the inequitable, unforeseen financial and procedural burden that DuPont is facing” as a result of the recent state-court filings presents good cause for this Court to modify the current Case Management Orders. (DuPont’s Reply at 1, ECF No. 248.)

Among other arguments, Plaintiffs respond that “[t]here is no basis in fact or in law to support DuPont’s basic premise that participation in a federal Multidistrict Litigation (“MDL”) by plaintiffs’ counsel somehow prevents these same counsel from pursuing rights on behalf of plaintiffs in a proper state court jurisdiction, as well.” (Pls.’ Opp. at 1, ECF No. 242.) Further, Plaintiffs contend, DuPont’s “demands that this Court change DuPont’s previously-negotiated and agreed answer deadlines, the Parties’ previously negotiated and agreed PFS requirements, and (once again) that this Court relieve DuPont of its previously-negotiated and agreed commitment to pay for whatever medical records it chooses to collect” are completely “unrelated in any way to the issue of whether plaintiffs should share in DuPont’s removal costs.” *Id.* at 3. Finally, Plaintiffs assert that the filing of these cases was not unforeseen in that DuPont has known since this action was being considered by the JPML that thousands of plaintiffs would be filing cases at approximately this time. Plaintiffs’ arguments are well taken.

While DuPont is correct that the parties negotiated the Case Management Orders before Hill Peterson filed the 966 cases, these lawsuits clearly were foreseeable. DuPont has known since before this case was centralized that the potential number of plaintiffs was extraordinary. Indeed, DuPont represented in its initial motion before the JPML that “[s]ince the *Leach* class was comprised of approximately 80,000 persons, many additional lawsuits may be filed.” (London Decl., Ex. A, ECF No. 242-2). In fact, Plaintiffs’ counsel noted in their initial briefing before the JPML the likelihood of numerous cases being filed by Hill Peterson in particular, expressly stating that it “has been retained by well over 3000 *Leach* Case class members to pursue such individual claims against DuPont,” and that “West Virginia is the nexus of this litigation.” (Mace Decl., Ex. A, ECF Nos. 236-1, 236-1.) Additionally, at several of the monthly status conferences held before this Court, including the very first conference held on

May 21, 2013, Plaintiffs' counsel apprised the Court and defense counsel that there would likely be "thousands" of cases ultimately filed in this MDL. (May 21, 2013 Status Conf. Tr. at 4–5, ECF No. 21).

In addition to these clear indications of the vast number of cases anticipated in this MDL, DuPont was also specifically informed within the last few months of the potential for all of these filings to be made in state court. In particular, the parties conferred from January 2014 through mid-March 2014 in an attempt to reach a tolling agreement for these cases such that the parties could avoid the costs of having to file and respond to them. (*See* Correspondence, ECF No. 242-3.) During those discussions, Plaintiffs' counsel specifically noted that, given that certain two-year statutes of limitations would likely apply to most of these claims, thousands of plaintiffs would be filing their cases before the end of January 2015. (London Decl. at ¶ 6; ECF No. 242-1.) The parties "specifically discussed the cost associated with DuPont having to remove and/or answer these [thousands of] cases." (*Id.*) DuPont informed Plaintiffs in mid-March 2014 that it would not agree to any tolling agreement. *Id.* at ¶ 7. DuPont hardly can claim surprise that numerous plaintiffs began to file their complaints in mid-March.

As to these plaintiffs' choice of a state forum, from the outset of this MDL the Court and the parties contemplated that some portion of the cases would initially be filed in state court and would require removal. Case Management Order Number One, which the parties negotiated and drafted jointly, provides that it applies to "all cases currently pending in [the MDL] and to all related actions that have been or will be originally filed in, transferred to, or removed to this Court" (CMO No. 1 at 1, ECF No. 20.) The parties employed similar language, which the Court incorporated in Pretrial Order ("PTO") Number Six, which noted that the PTO applied to "all cases . . . removed to this Court." (PTO No. 6, ECF No. 32.) Implicit in the wording of

these Orders is the understanding of the parties and the Court that some plaintiffs would file their complaints in state courts, which would require removal to become part of this MDL.

DuPont's contention that the Court should require plaintiffs who file in state court to pay \$200 to DuPont should DuPont decide to remove the action in order to incentivize plaintiffs' "firms to file their cases in federal court, where they belong," (DuPont's Mot. 2–3, ECF No. 236), is wholly unavailing. DuPont makes much of the fact that these plaintiffs argued before the JPML that the matter should proceed as a consolidated MDL. Conspicuously absent from DuPont's briefing, however, is any authority supporting its premise that creation of an MDL elevates the federal forum or otherwise eviscerates a plaintiff's right to file state-law claims in state court. The MDL statute, 28 U.S.C. § 1407, expresses no such preference for the federal forum; nor does it contemplate control over actions proceeding in state court. On this point, The Federal Judicial Center's Manual for Complex Litigation explains as follows:

No single forum has jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court

Manual for Complex Litigation (Fourth), § 20.31 at p. 230 (2004). Indeed, as Plaintiffs point out, parallel federal MDLs and coordinated state proceedings are a common practice. *See id.* at n.687 (citing William W. Schwarzer, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 Va. L. Rev. 1689 (1992) (noting eleven "notable instances of state-federal coordination in litigation")). The removal statute, 28 U.S.C. § 1441, which provides DuPont with access to federal courts if certain requirements are satisfied, likewise expresses no preference for the federal forum. Put simply, no legal authority exists to support DuPont's assertion that the state-court actions at issue "belong" in federal rather than state court

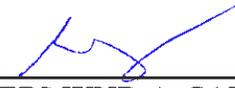
or that the existence of an MDL creates a preference for adjudication in the federal forum.

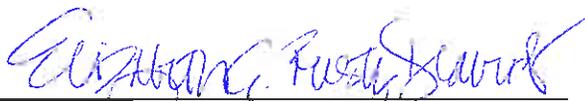
Absent such authority, the Court declines to impose what essentially amounts to a \$200 sanction (payable to DuPont and contingent upon DuPont's unilateral decision to remove an action) upon plaintiffs who exercise their right to file in state court.

In sum, because DuPont has failed to demonstrate good cause for modifying the existing Case Management Orders, its Motion to Modify is **DENIED**. (ECF No. 236.)

IT IS SO ORDERED.

5-5-2014
DATE


EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE


ELIZABETH A. PRESTON DEAVERS
UNITED STATES MAGISTRATE JUDGE