**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. 24

## DuPont's Motion to Drop Misjoined Plaintiffs from the *Gregory* and *Bauman* Actions

This matter is before the Court on DuPont's Motion to Drop Misjoined Plaintiffs from the *Gregory* and *Bauman* Actions ("DuPont's Motion") (ECF No. 271), Plaintiffs' Memorandum in Opposition (ECF No. 283), and DuPont's Reply (ECF No. 342). For the reasons that follow, the Court **GRANTS** DuPont's Motion.

## I.

On January 31, 2014, the law firm of Wright & Schulte, LLC filed in the Court of Common Pleas for Washington County, Ohio a case titled *Robin Gregory, et al. v. E I. du Pont de Nemours and Company* on behalf of thirty individual plaintiffs and a second case titled *Jimmy Bauman, et al. v. E. I. du Pont de Nemours and Company* on behalf of thirty-three individual plaintiffs. DuPont removed the actions to this Court and they were added to this MDL. (ECF No. 167, 195.) After removing the cases and engaging in the proper extrajudicial negotiations, DuPont moves to drop the allegedly misjoined plaintiffs.

## II.

### A. Rule 20 of the Federal Rules of Civil Procedure

Rule 20 of the Federal Rules of Civil Procedure governs permissive joinder of plaintiffs and provides in relevant part:

> Persons may join in one action as plaintiffs if:
>
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.

Fed. R. Civ. P. 20(a)(1).

"The Sixth Circuit has noted that the terms 'transaction' and 'occurrence' are to be given a broad interpretation." *Brown v. Worthington Steel, Inc.*, 211 F.R.D. 320, 324 (S.D. Ohio 2002) (citing, among others, *Lasa Per L'Industria Del Marmo Societa Per Azioni v. Alexander,* 414 F.2d 143, 147 (6th Cir. 1969)). "The Rule is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits." *Id.* (citation omitted).

### B. Rule 21 of the Federal Rules of Civil Procedure

Rule 21 of the Federal Rules of Civil Procedure provides the vehicle to drop parties or sever claims and provides:

> Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.

Fed. R. Civ. P. 21.

Rule 21 "vests great discretion in the court in determining whether to add or drop parties or to order severance." 4 James Wm. Moore et al., Moore's Federal Practice § 21.02(1) (3d ed.

2007) (citing, *inter alia*, *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 682 (6th Cir. 1988)).

## III.

### A. Severance for Just Result

In DuPont's Motion, it argues that joinder of the thirty or more plaintiffs in the *Gregory* and *Bauman* cases is improper "[b]ecause the plaintiffs in these two actions do not and cannot allege claims 'arising out of the same transaction, occurrence, or series of transactions or occurrences' within the meaning of Rule 20 of the Federal Rules of Civil Procedure, they are not properly joined, and should be required to file individual complaints." (DuPont's Mot. at 2 – 3) (quoting Fed. R. Civ. P. 20.) DuPont maintains that "[t]he only commonality among the plaintiffs in each of the *Gregory* and *Bauman* Actions is their alleged exposure to 'C-8' from DuPont's Washington Works Plant. They otherwise diverge, often considerably, in key demographics, exposure histories, and alleged diseases." *Id.* at 2. Further, DuPont contends that the only explanation for joinder of this many individuals in a single action is to avoid the cost associated with filing individual complaints. Finally, DuPont asserts that, "[e]ven if the plaintiffs in the *Gregory* and *Bauman* Actions could meet the standards of Rule 20 for permissive joinder, dropping the misjoined plaintiffs is still appropriate to achieve a just result." *Id.* at 7.

In response, Plaintiffs contend that the right to relief asserted by each plaintiff in the *Gregory* and *Bauman* actions arises out of the same transaction or occurrence as that phrase is interpreted under Rule 20. Plaintiffs posit that the *Gregory* and *Bauman* plaintiffs' claims arise from "the common issues concerning whether the Plaintiffs' injuries are caused by C-8 exposure, and the common issues raised by the *Leach* Settlement." (Mem. in Opp. at 4.)

This Court agrees with DuPont that the *Gregory* and *Bauman* actions should not proceed as filed. Whether the *Gregory* and *Bauman* plaintiffs are properly joined, however, is of no moment in the Court's instant analysis. The Sixth Circuit has explained that Rule 21 does not pertain only to misjoined parties, but instead authorizes the dropping of parties properly joined. *Safeco Ins. Co. of Am. v. City of White House, Tenn.*, 36 F.3d 540, 546 (6th Cir. 1994) ("declin[ing] to follow" a case which held "that Rule 21 pertains only to misjoined parties and does not authorize the dismissal of parties properly joined," referring to the case as "stand[ing] alone" and "an aberration"); *see also* 4 James Wm. Moore et al., Moore's Federal Practice § 21.02(1) (3d ed. 2007) (courts may issue severance orders under Rule 21, even in the absence of misjoinder and non-joinder of parties, "to construct a case for the efficient administration of justice"). In such circumstances the relevant inquiry is whether the remedy is "on such terms as are just." Fed. R. Civ. P. 21. Consequently, it is unnecessary to determine whether the *Gregory* and *Bauman* plaintiffs are properly joined because the Court finds that breaking these actions into single-plaintiff cases is necessary to achieve a just result.

Currently, this MDL consists of 531 single-plaintiff [1] cases. The Court anticipates as many as several thousand more individual plaintiffs will soon be added. Allowing multiple plaintiffs' claims to proceed in a single case, as DuPont points out, raises significant practical issues regarding the effective management of the pretrial process and settlement or trial of the various claims. Further, each of these plaintiffs paid a fee to have their case filed, which has a beneficial purpose, as noted by a sister district court when severing claims under Rule 21: "Individual suits would also ensure that the salutary purposes of the statutorily mandated filing fee—including the modest threshold barrier it provides against the filing of baseless claims—are

[1] There are a few cases that have two named plaintiffs, with one of them asserting only derivative claims. *See e.g.*, *Molessa et al v. E. I. du Pont de Nemours and Company*, Case No. 2:14-cv-1107.

preserved." *Third Degree Films, Inc. v. Doe*, No. 12-cv-14106, 2013 U.S. Dist. LEXIS 44131, *34 (E.D. Mich. Mar. 18, 2013). And as is particularly relevant here, other courts have addressed this cost factor in the context of multidistrict litigation:

> The payment of court filing fees is mandated by statute. Specifically, the "district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350." 28 U.S.C. §1914(a). Of that amount, "$190 shall be deposited into a special fund of the Treasury to be available to offset funds appropriated for the operation and maintenance of the courts of the United States." 28 U.S.C. §1931(a).
>
> In multidistrict cases considering severance of cases, courts have noted that the filing fee has:
>
> > two salutary purposes. First, it is a revenue raising measure. . . Second, §1914(a) acts as a threshold barrier, albeit a modest one, against the filing of frivolous or otherwise meritless lawsuits. Had each plaintiff initially instituted a separate lawsuit as should have occurred here, a fee would have been collected for each one. . . . Thus, the federal fisc and more particularly the federal courts are being wrongfully deprived of their due. By misjoining claims, a lawyer or party need not balance the payment of the filing fee against the merits of the claim or claims.

*In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 92 (E.D. N.Y. May 1, 2012) (citing *In re Diet Drugs*, 325 F. Supp. 2d 540, 541–42 (E.D. Pa. 2004); *In re Seroquel Prods. Liability Litig.*, 2007 U.S. Dist. LEXIS 17603, 2007 WL 737589, at *2–3 (M.D. Fla. Mar. 7, 2007) (denying reduction of filing fees, noting the burden on the court and the "gatekeeping feature of a filing fee")).

Finally, the Court notes that a main purpose underlying Rule 20 – "to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits" – is not present here. This MDL has been centralized for the promotion of trial convenience and expedition of the final determination of the C-8 litigation, thereby preventing multiple lawsuits.

**B. Procedure for Severance**

As to the process by which the *Gregory* and *Bauman* cases will be disbursed, DuPont's preference is dismissal without prejudice of all but the first-named plaintiffs in each case. Plaintiffs are concerned that they may suffer prejudice from this suggested process because courts have found dismissals without prejudice under Rule 21 do not toll the statute of limitations. *See Brennan v. Kulick*, 407 F.3d 603, 605–606 (3d Cir. 2005) (noting the "general principle that a statute of limitations is not tolled by the filing of a complaint which is dismissed without prejudice"). Thus, Plaintiffs worry that upon their refiling the cases, DuPont may argue that they are untimely. Plaintiffs contend that if the Court were to sever the claims of these plaintiffs, as opposed to dropping the plaintiffs, the suit simply continues in another guise without a break in the tolling of the statute of limitations. *See e.g., Elmore v. Henderson*, 227 F.3d 1009, 1011–12 (7th Cir. 2000). Plaintiffs' arguments are well taken.

As the Seventh Circuit explained in *Elmore*:

> As an offshoot of the original suit, Elmore's separate, severed suit, though separate from the original suit for other purposes, would not have affected the tolling of the statute of limitations by the original suit. That is, it would have been a continuation of the original suit so far as he was concerned.

*Elmore*, 227 F.3d at 1012. *See also Kittay v. Korff (In re Palermo)*, 739 F.3d 99, 105 (2d Cir. 2014) (explaining that the statute of limitations is held in abeyance when a suit is severed under Rule 21, permitting the refiled cases to proceed so long as the initial filing was within the limitations period); *DirecTV, Inc. v. Leto*, 467 F.3d 842, 845 (3d Cir. 2006) ("Because a district court's decision to remedy misjoinder by dropping and dismissing a party, rather than severing the relevant claim, may have important and potentially adverse statute-of-limitations consequences, the discretion delegated to the trial judge to dismiss under Rule 21 is restricted to what is 'just.'"). Indeed, as the *Elmore* court pointed out, when a district court formulates a

remedy under Rule 21 it should "avoid gratuitous harm to the parties, including the misjoined party." *Elmore*, 227 F.3d at 1012; *see also Berry v. Illinois Dep't of Human Servs.*, No. 00 C 5538, 2001 U.S. Dist. LEXIS 1041, 2001 WL 111035 (N.D. Ill. Feb. 2, 2001) ("Severance is not to be effected in a manner that results in a dismissal prejudicing a substantial right.").

DuPont, however, contends that this District has rejected this line of reasoning in *DirectTV Inc. v. Hudson*, No. 2:03-cv-457, 2004 U.S. Dist. LEXIS 30132 (S.D. Ohio July 1, 2004). In that case, DirectTV asked the court to fashion a severance under Rule 21 that included a "savings clause," similar to the one utilized in *Berry*. The court explained:

> Specifically, the [*Berry*] court stated that its order was "not to be considered the dismissal of the original case and the refiling of new cases; it is a severance pursuant to Rule 21." *Id.* The court went on to explain that the re-filed claims would be continuations of the original action, and if filed within a reasonable period of time, the filing date of the claims, for statute of limitations purposes, would be the date of the original action. *Id.*

*Hudson*, 2004 U.S. Dist. LEXIS 30132 at *10–11. The *Hudson* court rejected DirectTV's request, finding that DirectTV should not be shielded from its choice to take the "risk" of filing suit against multiple defendants "rather than file separate actions and incur substantial litigation costs in the process." *Id.* at *6. Yet, even though the court rejected DirectTV's request, it made clear that "Rule 21 does, of course, provide[] for the dropping of misjoined defendants 'on such terms as are just,' [and] what is 'just' depends upon the facts and circumstances of each individual case." *Id.* at *11. The *Hudson* court concluded that, "under the circumstances of [it]s particular case, dismissal without prejudice [wa]s a just disposition . . . ." *Id.*[2]

Reviewing, the facts and circumstances related to joining, dropping, and/or severing the *Gregory* and *Bauman* plaintiffs in cases that are a part of this MDL, the Court concludes that

[2] This Court finds no other case that has relied upon *Hudson* to dismiss without prejudice pursuant to Rule 21 when the statute of limitations could prevent those dismissed cases from being brought. In fact, the only citation to *Hudson* is with disapproval by *DirecTV, Inc. v. Leto*, 467 F.3d 842, n.4 (3d Cir. 2006).

dismissal without prejudice all but the first-named plaintiffs does not operate to reach a just result. Instead, the Court finds that a just disposition is as follows:

1. The Clerk is **DIRECTED** to **REMOVE** from *Gregory*, Case No. 2:14-cv-145, and *Bauman*, Case No. 2:14-cv-224 all but the first-named plaintiffs, *i.e.*, Robin Gregory and Jimmy Bauman.

2. Plaintiffs have thirty (30) days from the date of this Opinion and Order to refile the claims of the other named plaintiffs in those actions.

3. If filed within that period, the new complaints will be considered a continuation of the *Gregory* and *Bauman* actions that were filed on January 31, 2014. Thus, for statute of limitations purposes the new actions will be considered to have been filed on January 31, 2014.[3]

**IV.**

Based on the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** DuPont's Motion to Drop Misjoined Plaintiffs from the *Gregory* and *Bauman* Actions in accordance with this Opinion and Order. (ECF No. 271.)

**IT IS SO ORDERED.**

8-21-2014
**DATE**

**EDMUND A. SARGUS, JR.**
**UNITED STATES DISTRICT JUDGE**

**ELIZABETH A. PRESTON DEAVERS**
**UNITED STATES MAGISTRATE JUDGE**

[3] The Court notes that this remedy is very similar to the one DuPont previously suggested that the parties jointly propose to dispose of this issue, which was based upon an order issued in *In re: Mirena IUD Products Liability Litigation*, No. 13-MD-2434, slip. op. at 3 (S.D. N.Y. April 29, 2014). (DuPont's Mot. at 9, Ex. F.) Plaintiffs declined to accept DuPont's suggested remedy.