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:

***Angela and Teddy Swartz v. E. I. du Pont de Nemours and Company*, Case No. 2:18-cv-136**

***Travis and Julie Abbott v. E. I. du Pont de Nemours and Company*, Case No. 2:17-cv-998**

DISCOVERY MOTIONS ORDER NO. 16

Plaintiffs' Motion to for a Protective Order from Deposition of Bernard Reilly

This matter is before the Court on Plaintiffs' Motion for a Protective Order Regarding DuPont's Notice of Deposition to Preserve the Testimony of Bernard Reilly (ECF No. 5247, Multidistrict Litigation ("MDL") Docket 2:13-md-2433[1]), Defendant's Memorandum in Opposition (ECF No. 5249), and Plaintiffs' Reply (ECF No. 5252). The parties have asked for "Immediate Consideration" because the deadlines for the *Swartz* trial, which will be held in approximately two months, are fast approaching. For the reasons that follow, the Court **GRANTS** Plaintiffs' Motion.

[1] Plaintiffs direct their Motion to the *Swartz* and *Abbot* cases. The Court will, therefore, docket this order in the main MDL docket and in both the *Swartz* and the *Abbott* cases.

I.

Mr. Reilly is a recently-retired employee of DuPont, who is in his late seventies, and lives in Philadelphia, Pennsylvania. Mr. Reilly may be traveling out of the country during the *Swartz* and/or *Abbott* trials. Mr. Reilly's deposition testimony has been entered into evidence in the prior four trials in this MDL, as explained *infra*.

The trial of *Carla Marie Bartlett*, Case Number 2:13-cv-170, was the first held in this MDL. Mrs. Bartlett's case took five weeks to try and began on September 14, 2015. After the close of discovery in the *Bartlett* case, and only two months before the trial, the parties agreed to a deposition of Mr. Reilly because he is outside of this Court's subpoena power. (ECF No. 5247-7.) The deposition was taken on July 2, 2015. Mr. Reilly's deposition testimony was entered into evidence at the *Bartlett* trial. Mr. Reilly's deposition was also entered into evidence at the second trial, *David Freeman v. E. I. du Pont de Nemours and Company*, Case Number 2:13-cv-1103, held on May 31, 2016.

Before the third trial, *Vigneron v. E. I. du Pont de Nemours and Company*, Case Number 2:13-cv-136, DuPont moved this Court to prohibit Mr. Reilly's deposition from being used at trial because Mr. Reilly was available to testify (ECF No. 4734), which this Court denied (EMO 12, ECF No. 4934). DuPont did not call Mr. Reilly to testify at the *Vigneron* trial, nor did it call him at the fourth trial, *Larry Ogle Moody v. E. I. du Pont de Nemours and Company*, Case Number 2:15-cv-803, which commenced on January 17, 2017.

The *Swartz* and *Abbott* trials are scheduled to be held October 6, 2019 and January 21, 2020, respectively. These trials will be the fifth and sixth held in this MDL, and the first of the

post-settlement cases[2] to go to trial.

Similar to Mr. Reilly's first deposition, taken two months before the *Bartlett* trial, DuPont has noticed Mr. Reilly's deposition to be taken two months before the *Swartz* trial. DuPont filed its Notice on July 11, 2019 (ECF No. 5247-2), indicating in it that pursuant to Case Management Order No. ("CMO") 28 and the Federal Rules of Civil Procedure, it would re-depose Mr. Reilly on July 23, 2019. DuPont served opposing counsel the Notice via email and also offered two alternative dates for the deposition. (Email, ECF No. 5247-3, PAGEID 127272.)

On July 13, 2019, DuPont served its witness list in the *Swartz* case and identified Mr. Reilly as a witness who will be presented either live or by deposition. (Witness List, ECF No. 5247-6, PAGEID 127280.) Of course, Mr. Reilly can certainly be presented as a live witness, regardless of the outcome of Plaintiffs' current motion.

On July 14, 2019, Plaintiffs' counsel responded to DuPont's email, indicating that it objected to the taking of Mr. Reilly's "deposition for a variety of reasons, including, but not limited to, DuPont's violation of Court orders by attempting to take it, failure by DuPont to conduct the requisite meet and confer before unilaterally setting it, and failure by DuPont to demonstrate why the deposition would be necessary." (Email, ECF No. 5247-4, PAGEID 127273.) Plaintiffs' counsel offered his availability to discuss the issue further.

That same day, July 14, DuPont's counsel replied to Plaintiffs' counsel's email, indicating that the Court's deadlines for deposition designations require the "depo to get done on one of the 3 dates" his team had offered and that if Plaintiffs' counsel "do not have a preference

[2] On February 14, 2017, the parties informed the Court that they reached global resolution of all the 3500-plus cases that were part of this MDL. (ECF No. 5086.) There have since been over fifty new cases filed, which are on track to be tried starting with the *Swartz* case on October 6, 2019.

for one of the 3 dates we suggested, we will go forward on the date in the notice, July 23" likely in Philadelphia, Pennsylvania "near where Mr. Reilly lives." (Email, ECF No. 5274, PAGEID 127273.)

The parties exchanged a few more emails, which reflect that the reached impasse on the issue of DuPont's Notice to depose Mr. Reilly. Plaintiffs then filed a Motion for a Protective Order, which is currently before the Court. That Motion is ripe for an expedited review.

II.

Rule 26 of the Federal Rules of Civil Procedure provides that a person resisting discovery may move the court, for good cause shown, to issue an order protecting the person or party from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ.P. 26(c)(1). "The grant or denial of motions for protective orders falls within the 'broad discretion of the district court managing the case.'" *Tolstih v. L.G. Elecs., USA, Inc.*, CIV.A. 2:07-CV-582, 2009 WL 439564, at *4 (S.D. Ohio Feb. 20, 2009) (quoting *Century Prod., Inc. v. Sutter,* 837 F.2d 247, 250 (6th Cir. 1988)).

III.

In their Motion, Plaintiffs contend that they have offered good cause for protection from a second deposition of Mr. Reilly because permitting it would cause Plaintiffs undue burden and undue expense and would provide DuPont with an unfair advantage. Plaintiffs maintain that the expense and burden are undue because DuPont's Notice (A) violates CMO 28 and (B) violates the Federal Rules of Civil Procedure. Plaintiffs posit:

> [T]his new deposition is being improperly sought couched as a "trial preservation" deposition, but it is nothing more than a blatant attempt to get a second bite at the apple in order to hopefully elicit more favorable testimony from Mr. Reilly than he previously proffered at his deposition a few years ago. DuPont is, and always has been, dissatisfied with Mr. Reilly's prior testimony, and thus is now attempting to get a do-over deposition. It is respectfully submitted that such gamesmanship, and

> end-around of the Federal Rules, should not be countenanced by this Court, and DuPont should not be permitted a second-bite at the proverbial apple to elicit more satisfying testimony from Mr. Reilly.

(Pls' Mot. at 2–3, ECF No. 5247.)

DuPont responds that second depositions for the purpose of preserving trial testimony "are routinely used in federal litigation where a discovery deposition has already been taken, and are expressly permitted under CMO 28." (Def's Mem. in Opp. at 1, ECF No. 4259.) DuPont further posits that the deposition that was taken of Mr. Reilly was overwhelmingly spent on cross examination, and it should be permitted to re-depose him so that it can elicit more direct testimony that it contends would be "probative and relevant trial testimony." *Id.* at 4.

A. Case Management Order No. 28

Plaintiffs contend that DuPont's Notice to depose Mr. Reilly was issued in violation of CMO 28 because it is a second deposition and because DuPont failed to meet and confer to make reasonable efforts to reach an agreement about their request to re-depose Mr. Reilly before issuing its Notice. CMO 28 provides:

> Should either party request to preserve one of its own witness's testimony via video tape for use at trial, the other party shall meet and confer and make reasonable efforts to reach agreement on such a request.
>
> If the testimony to be preserved is of a new witness who has not previously been deposed or testified at trial in any Prior Action (as defined in this Court's prior Orders), the other side will be allowed the opportunity to take a discovery deposition at least 30 days in advance of any preservation of trial testimony proceedings.

(CMO 28 at 5, § V.B, ECF No. 5188.)

DuPont contends that CMO 28 alone provides sufficient reason for the Court to deny Plaintiffs' Motion for a Protective Order, stating:

> Plaintiffs mischaracterize this section, arguing that CMO 28 only "contemplates a deposition of those witnesses 'who [have] not previously been

> deposed before' [sic]." Mot. at 9. To the contrary, CMO 28 specifically contemplates trial depositions of both witnesses deposed during discovery and new witnesses. *Id.* ("***If the testimony*** . . . is of a new witness who has not previously been deposed or testified at trial in any Prior Action . . . .") (emphasis supplied.) The language clearly contemplates preservation of trial testimony from persons who were previously deposed by the other side during discovery.

(Def's Mem. in Opp. at 4, ECF No. 5249.)

Additionally, DuPont suggests that its meet and confer obligation under CMO 28 was fulfilled by offering two alternative dates for the deposition in its July 11, 2019 email serving Plaintiffs' counsel with the Notice to take Mr. Reilly's deposition. (Def's Mem. in Opp. at 3) (citing Def. Counsel Decl. ¶ 2, ECF No. 5249-1).

The Court agrees with DuPont that CMO 28 contemplates depositions of witnesses who have been deposed during discovery, but disagrees with DuPont's contentions that (1) Mr. Reilly was deposed during discovery, and (2) that CMO 28 unequivocally permits second depositions in the absence of agreement from opposing counsel. Thus, for the reasons explained below, CMO 28 provides no reason to deny Plaintiffs' Motion for a Protective Order.

1. Mr. Reilly's First Deposition

The Court disagrees with DuPont's contention that Mr. Reilly's first deposition is properly considered a discovery deposition. It is undisputed that the July 2, 2015, deposition of Mr. Reilly was taken long after the close of discovery. (Preliminary Pretrial Order No. ("PTO") 23 at 1) (August 18, 2014, parties completed bellwether discovery, including for *Bartlett* case); (PTO 26 at 2) (September 11, 2014, parties reported *all discovery depositions* for *Bartlett* case scheduled). As Plaintiffs correctly note:

> Despite DuPont's inference that this would simply be the first trial preservation deposition of a previously conducted discovery deposition, that is untrue. . . . the parties in MDL 2433 conducted a trial preservation deposition of Mr. Reilly on July 2, 2015, only two months before the *Bartlett* trial was to begin,

> because Mr. Reilly was undisputedly outside this Court's subpoena power and his trial testimony needed to be preserved.
>
> Why DuPont strategically decided to question Mr. Reilly in the limited fashion it did during the July 2, 2015, deposition and why it also strategically decided to never call him live to "preserve" or offer new testimony in the succeeding four trials between September 2015 and February 2017 is known fully only to it and its counsel.

(Pls' Reply at 3, ECF No. 5252.)

In any event, the deposition taken nearly one year past the discovery deadline, ten months after all discovery depositions had been scheduled, and only two months before trial, does not constitute a discovery deposition.

2. Depositions Under CMO 28

Section V.(B) of CMO 28 provides that either party may "request" a trial deposition and that the parties "shall meet and confer and make reasonable efforts to reach agreement on such a request." (CMO 28 at 5, ECF No. 5188.) Under this provision, the parties have the right to *request* a deposition of a witness who has been previously deposed. DuPont did so. And, while the Court disagrees that DuPont met its obligation to meet and confer by serving the Notice with two alternative dates, the parties have since met and conferred and were unable to reach agreement. There is nothing in CMO 28 that would suggest that when the parties are unable to reach agreement on the propriety of scheduling the second deposition, the deposition may simply be scheduled anyway. In the absence of agreement, a motion for judicial resolution of the dispute is appropriate.

B. Second Trial Preservation Deposition

Depositions are a discovery device governed by Rules 26 through 32 of the Federal Rules of Civil Procedure. Depositions also serve to preserve relevant testimony when the deponent might be unavailable to testify at trial. Fed. R. Civ. P. 32(a)(3)(B) (deposition of any

witness may be used for any purpose if court finds that the witness is more than 100 miles from place of trial); Fed. R. Evid. 804(b)(1) (deposition testimony admissible if party against whom the testimony is now offered had opportunity to develop the testimony).

Plaintiffs take the position that DuPont's request for a second deposition is impermissible under the Federal Rules, arguing:

> This is nothing more than an attempted serial deposition to get an impermissible new bite at the Reilly deposition apple. Rule 26(b)(2)(C)(ii) requires the court to consider whether "the party seeking discovery had an ample opportunity to obtain the information by discovery in the action" before allowing the requesting party to go further. Fed. R. Civ. P. 26(b)(2)(C)(ii).
>
> Additionally, as discussed in Plaintiffs' Motion, Fed. R. Civ. P. 32(a) does not distinguish between discovery and preservation depositions and provides the same reasoned limits to both. Mr. Reilly's testimony is already preserved for trial and has been used four times without incident, so there is no need, or basis under the law, for DuPont to conduct this additional deposition.

(Reply at 3–4). The Court will address both arguments.

1. Discovery Versus Trial Depositions

The parties disagree as to whether it is appropriate to distinguish between discovery and trial depositions, and acknowledge that the Sixth Circuit has not spoken on the issue. Plaintiff's maintain that Rule 30 of the Federal Rules make no distinction, and therefore, the limits on depositions set out in the Federal Rules apply to trial depositions taken for the purpose of preserving witness testimony for trial the same as they do for discovery depositions.

Plaintiffs are correct that "[n]othing in the deposition rules of the Federal Rules of Civil Procedure creates an exception for a deposition for the purpose of preserving testimony, or a so-called *de bene esse* deposition. The Notes of Advisory Committee on Rules for Rule 30 make clear that the rule drafters no longer make a distinction between discovery depositions and *de bene esse* depositions." *In re Horstemeyer*, 557 B.R. 427, 431 (Bankr. D. S.C. 2016) (citing Fed.

R. Civ. P. 30, Notes of Advisory Committee on Rules—1970 Amendment). There is a line of cases that supports Plaintiffs' position, as is explained in *Henkel v. XIM Products, Inc.*:

> Neither the Rules of Civil Procedure nor the Rules of Evidence make any distinction between discovery depositions and depositions for use at trial. The court concludes there is no difference. *See e.g., Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F.2d 887, 890–91 (5th Cir.1969) (erroneous to instruct jury that "discovery" deposition should be given less weight than deposition conducted for use at trial); *United States v. International Business Mach. Corp.*, 90 F.R.D. 377, 381 (S.D. N.Y.1981) (Rule 32 does not evince a distinction as to admissibility at trial between a deposition taken solely for purposes of discovery and one taken for use at trial) (quoting *Rosenthal v. Peoples Cab Co.*, 26 F.R.D. 116, 117 (W.D. Pa.1960)).
>
> A party who makes the tactical decision during a deposition to refrain from examining a witness who is beyond the subpoena power of the court, takes the risk that the testimony could be admitted at trial if the witness will not or cannot appear voluntarily. *See, e.g., Hendrix v. Raybestos–Manhattan, Inc.*, 776 F.2d 1492, 1505–1506 (11th Cir. 1985) (party who failed to cross examine former employee, who died after his deposition, does not preclude use of deposition at trial in a subsequent proceeding) (citing *Wright Root Beer Co. v. Dr. Pepper Co.*, 414 F.2d at 890).

Henkel v. XIM Products, Inc., 133 F.R.D. 556, 557 (D. Minn. 1991); *see also in Tube City IMS, LLC v. Severstal U.S. Holdings, LLC*, No. 5:12CV31, 2014 U.S. Dist. LEXIS 134039, 2014 WL 4782957 (N.D. W.Va. Sept. 24, 2014) (finding the plaintiff was not entitled to deposition after close of discovery because, *inter alia*, "[t]he Fourth Circuit has not recognized a right to such a deposition"); *Integra Lifesciences I, Ltd v. Merck KGaA,* 190 F.R.D. 556, 558 (S.D. Ca. 1999) (while noting that there may be situations that would call for trial deposition, "[w]here a party makes a tactical decision during discovery to refrain from deposing a non-party witness who is beyond the subpoena power of the court, but who has relevant information to offer in the case, that party takes the risk that the testimony will not be presented at trial if the witness does not voluntarily appear.").

DuPont argues that, while it is true that the Federal Rules do not specifically provide for trial depositions, "Federal courts routinely permit parties to take the trial preservation depositions

of their witnesses where discovery depositions have already been conducted." (Def's Mem. in Opp. at 5) (citing as examples, *In re Welding Fume Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 146067, at *112-13 n.99 (N.D. Ohio June 4, 2010) (noting case specific governing order permitting both discovery and trial depositions of the same witnesses); *Miller v. Coty, Inc.*, 2018 U.S. Dist. LEXIS 215867, at *20-21 (W.D. Ky. Dec. 21, 2018) (permitting trial deposition of previously deposed witness by agreement of the parties where "both parties expected Mr. Knopf to testify live at trial," but witness was unavailable); *Morrison v. Stephenson*, 2008 U.S. Dist. LEXIS 6512, at *5-6 (S.D. Ohio Jan. 10, 2008) (although the issue not disputed, noting in *dicta* that the expert witness was subject to both discovery and trial depositions). DuPont further contends that, "[t]he Western District of Virginia, in *Lucas v. Pactiv Corp.*, engaged in a broad survey of cases addressing discovery and trial preservation depositions and concluded that the majority of courts have recognized "what can be fairly described as a federal common law distinction between 'discovery depositions' and 'trial depositions' and have held the latter category permissible even after the discovery deadline has past." *Id.* at 5–6 (citing *Lucas*, 2009 U.S. Dist. LEXIS 120157 at *9 (W.D. Va. Dec. 22, 2009)).

The Court, however, need not determine whether, under the current circumstances, the Federal Rules would place a distinction between discovery and trial depositions. That is because, as explained above, the first deposition of Mr. Reilly was a trial deposition – not a discovery deposition. DuPont is asking for a second trial deposition. To the extent these are permitted, they are subject to Federal Rule 26.

2. Federal Rule of Civil Procedure 26

Rule 26(b)(2) provides that the Court, "must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the party seeking

discovery has had ample opportunity to obtain the information by discovery in the action." Plaintiffs contend:

> DuPont has had ample opportunity to gather whatever testimony it needed from Mr. Reilly either through his previous deposition testimony, in which they conducted a full examination, or the four previous trials, in which they strategically decided not to call him live.
> . . . .
> This is nothing more than an attempted serial deposition to get an impermissible new bite at the Reilly deposition apple.

(Pls' Mot. at 7–8, ECF No. 5247; Reply at 3, ECF No. 5252.)

DuPont responds that "Plaintiffs' cited cases involving 'serial depositions' are totally inapplicable to the current situation, as they each involved attempts by the same party to conduct successive discovery depositions." (Def's Mem. in Opp. at 6, n. 2.) DuPont's argument is not well taken.

As the Court explained *supra*, DuPont is requesting a second trial deposition. Thus, even if this Court were to distinguish between trial and discovery depositions, as DuPont asks it to do, this is still a serial deposition subject to the limitations set forth in the Federal Rules.

Plaintiffs are correct that serial depositions are disfavored because of the cost and burden, and because they "provide[ ] the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last." *Franklin v. Highland Park Police Officer Hollis*, Case No. 15-12995, 2016 WL 6652744 (E.D. Mich 2016) (citing *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227, 235 (E.D. Pa. 2008)). Additionally, "each new [serial] deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony" as well as counsel being required to do the same. *New Horizont, Inc.*, 254 F.R.D. at 235.

In the case *sub judice*, there is no new fact or evidence that was not available to each

party when Mr. Reilly was originally deposed. It would not only be an undue burden and expense to permit a second deposition of Mr. Reilly but it would also provide DuPont with an unfair strategic advantage, offering it multiple times to reassess its decisions with regard to Mr. Reilly. Moreover, it would be unfair to require Plaintiffs' counsel to disrupt its trial preparation to prepare for the second deposition and travel to Pennsylvania to engage in the deposition shortly before trial in Ohio. Based on this, and the analysis above, Plaintiffs have shown good cause to grant their Motion for a Protective Order. Fed. R. Civ. P. 26(c)(1).

III.

Based on the foregoing, the Court **GRANTS** Plaintiffs' Motion for a Protective Order Regarding DuPont's Notice of Deposition to Preserve the Testimony of Bernard Reilly. (ECF No. 5247.) Mr. Reilly may be presented live to testify or by the trial deposition that was already taken. The Clerk is **DIRECTED** to docket this Discovery Order in the MDL, 13-md-2433 to dispose of the motion docketed at ECF Number 5247, and to also docket this Order in *Angela and Teddy Swartz v. E. I. du Pont de Nemours and Company*, Case Number 2:18-cv-136 and in *Travis and Julie Abbott v. E. I. du Pont de Nemours and Company*, Case Number 2:17-cv-998.

IT IS SO ORDERED.

8-7-2019
DATE

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