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

CASE MANAGEMENT ORDER NO. 20

Defendant's Objection to the November 2016 and January 2017 Trial Schedules

On August 1, 2016, Defendant E. I. DuPont de Nemours and Company ("DuPont") filed a document titled "Objection to the Acceleration and Selection of Trial Cases for November 2016 and January 2017 and [the Governing] Case Management Orders Nos. 18 and 19" ("Objection"). (ECF No. 4603, 4604[1].) Specifically, DuPont asks for an 11 month hold on all trial activity by vacation of the two trials scheduled to replace the two bellwether cases that the parties settled. Unlike more common motions or objections the Court receives, or opposition to a motion or objection from an opposing counsel, DuPont's filing challenges the propriety of this Court's actions, suggesting they are unconstitutional and/or an abuse of discretion. Consequently, in this decision the Court is necessarily placed in the position of explaining its actions, which DuPont has mischaracterized throughout its Objection.

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[1] DuPont requested permission to file its Objection under seal because, *inter alia*, it contains confidential medical information. (ECF No. 4589.) The Court granted DuPont permission to file under seal and directed it to contemporaneously file a public version with any confidential medical information redacted. (ECF No. 4592.) DuPont subsequently filed its Objection under seal (ECF No. 4603) and contemporaneously filed a public version (ECF No. 4604).

I.

A brief background and assessment of the current procedural posture of this MDL are necessary to establish the context in which DuPont makes its Objection.

A. Background

In its Transfer Order (ECF No. 1), the Judicial Panel on Multidistrict Litigation ("JPML") indicated that the cases that make up this multidistrict litigation ("MDL") are a subset of cases that originated in *Leach v. E. I. Du Pont de Nemours & Co.*, No. 01-C-608 (W. Va. Cir. Ct. Wood County Aug. 31, 2001) ("*Leach* Case"). The *Leach* Case was brought by a group of individuals who alleged a variety of claims related to DuPont's contamination of their drinking water with the chemical C-8, a synthetic perfluorinated carboxylic acid and fluorosurfactant also known as perfluorooctoanoic acid ("PFOA") or ammonium perfluorooctanoate ("APFO")). For decades DuPont discharged C-8 from its Washington Works Plant near Parkersburg, West Virginia. It is undisputed that DuPont's release of the C-8 has contaminated six water districts and several private wells in West Virginia and Ohio.

In 2002, the West Virginia trial court certified the case as a class action ("*Leach* Class") with respect to "all common fact and legal issues relating to [DuPont's] underlying liability for all claims in this case," including the class members' claims for personal injury, wrongful death, and "liability for punitive damages." *Leach*, 2002 WL 1270121, at *18 (April 10, 2002). After three years of litigation, involving extensive discovery and motion practice, including three issues taken to the West Virginia Supreme Court of Appeals, the parties executed the *Leach* Settlement Agreement to effectuate a class-wide settlement of the *Leach* Case. (*Leach* Settlement Agreement "S.A.," ECF No. 820-8.)

In the *Leach* Settlement Agreement, the parties fashioned a unique procedure to determine whether the approximately 80,000 putative members of the *Leach* Class would be permitted to file actions against DuPont based on any of the human diseases they believed had been caused by their exposure to the C-8 that was in their drinking water. The procedure required DuPont and the plaintiffs to jointly select three completely independent, mutually-agreeable, appropriately credentialed epidemiologists ("Science Panel") to study human disease among the *Leach* Class. The Science Panel was tasked with determining whether "it is more likely than not that there is a link between exposure to C-8 and a particular Human Disease among Class Members[,]" or whether it is not more likely than not there is link between exposure to C-8 and a particular human disease among the *Leach* Class. (S.A. §§ 1.49, 313.) The Science Panel's conclusions would be issued in Probable Link Findings or No Probable Link Findings.

Until the Science Panel reached its conclusions, the *Leach* Class members' claims for damages relating to C-8 exposure were *stayed*. After the Science Panel conducted a world-class epidemiological study *that lasted over seven years*, it delivered No Probable Link Findings for a variety of diseases suffered by the *Leach* Class and also issued Probable Link Findings for the following six human diseases ("Linked Diseases"): kidney cancer, testicular cancer, thyroid disease, ulcerative colitis, diagnosed high cholesterol (hypercholesterolemia), and pregnancy-induced hypertension and preeclampsia.

In addition to a seven year reprieve from defending any litigation related to its discharge of C-8 into the drinking water of approximately 80,000 people, DuPont received the benefit of the No Probable Link Findings. Once a No Probable Link Finding issued, DuPont was "forever discharge[d] from any and all claims, losses, damages, attorneys' fees, costs, and expenses,

whether asserted or not, accrued or not, known or unknown, for personal injury and wrongful death, including but not limited to any claims for injunctive relief and special, general and punitive and any other damages whatsoever associated with such claims [for which a No Probable Link Finding issued], that: (a) relate to exposure to C-8 of Class Members from any and all pathways including, but not limited to, air, water and soil; (b) are based on the same factual predicate as raised in the Lawsuit . . . ." *Id.* § 3.3.

Out of the nearly 70,000 *Leach* Class members who participated in the Science Panel's studies, over 3500 alleged that they suffered from a Linked Disease and are the plaintiffs in this MDL. Those individuals had, at the time of filing this MDL three and one-half years ago, waited over a decade for the opportunity to have their claims brought before a court. The benefit these class members received in return for waiting for the Science Panel to determine that it was more likely than not there is a link between their exposure to C-8 and their Linked Disease (Probable Link Finding) is that DuPont agreed not to contest whether C-8 is capable of causing their Linked Disease (general causation). DuPont retained the right to contest whether C-8 caused the Linked Disease in that particular class member (specific causation).

An additional distinctive feature of this MDL is that all six of the water districts contaminated with the C-8 released from DuPont's Washington Works plant are located in either the Southern District of Ohio or the Southern District of West Virginia. The majority of plaintiffs reside in Ohio. These matters are unlike the traditional MDL that centralizes cases for pretrial proceedings and bellwether trials. If no global settlement is reached the various cases are then remanded to numerous home jurisdictions around the country for individual trials. Instead, in this MDL, remand would result in the majority of the cases remaining in this district. And, because of the Local Rules on related cases, the cases would stay before the undersigned.

Additionally, on numerous occasions the parties have indicated that *Lexecon* waivers would be provided for the portion of the plaintiffs' cases that would otherwise be remanded to West Virginia under 28 U.S.C. § 1407.

B. Procedural Posture

On August 2, 2013, the Court established trial dates for the first two bellwether trials, and on August 6, 2014, the Court set aside the dates for the remaining four bellwether trials. (CMO 2 at 5 ¶ VI, ECF No. 30); (CMO 7 at 2 ¶ 6, ECF No. 602.) The six bellwether trials were scheduled to be held between September 2015 and October 2016. Each side selected three of the six cases for trial.

On September 14, 2015, Carla Marie Bartlett's case, the first bellwether plaintiff, went to trial. On October 7, 2015, the jury returned a verdict of $1.6 million dollars in Mrs. Bartlett's favor and found against her on the punitive damages claim.

On December 2, 2016, the Court discussed the scheduling of the over 3500 non-bellwether trials, and ultimately entered CMO 17, which scheduled those trials to begin in May 2017. (CMO 17, Initial Pretrial Schedule for the 40 Cancer Trails to Begin in May 2017, ECF No 4459.) The trials would be divided into four tranches. The parties began individual discovery of the first tranche of 12 plaintiffs on May 2, 2016.

On May 31, 2016, the second bellwether trial, plaintiff David Freeman's case, began. On June 9, 2016, the parties informed the Court that they had settled the last two bellwether trials. On June 24, 2016, the Court informed the parties that it was replacing those bellwether trials with two of the plaintiffs whose cases had been chosen to be tried in the first tranche of the May 2017 trials.

On July 6, 2016, the jury returned a verdict in favor of Mr. Freeman for $5.1 million. The case then went to a second phase on punitive damages, which resulted in a $500,000 jury verdict in favor of Mr. Freeman.

On July 18, 2016, the plaintiffs selected Kenneth Vigneron, Sr. for the November 2016 trial and Larry Moody for the January 2017 trial. Both of these plaintiffs were from the first tranche of the 2017 trials. The Court then issued CMO 18 and CMO 19, setting out the trial schedules for these two plaintiffs. (CMO No. 18, Pretrial Schedule for Vigneron Trial, ECF No. 4588); (CMO 19, Pretrial Schedule for Moody Trial, ECF No. 4591.)

On August 1, 2016, DuPont filed its Objection that is currently before the Court. In its Objection, DuPont suggests that in scheduling the *Vigneron* and *Moody* trials, this Court abused its discretion in the "effective administration of this MDL" and/or violated DuPont's constitutional due process rights." *Id.* at 9, 14. The Court will address both of these contentions below.

II.

DuPont maintains that this Court should vacate the scheduled November 2016 and January 2017 trials and place an ***11 month hold on any trial activity*** "to advance the broader goals of this MDL." (Def.'s Objection at 15, ECF No. 4604.)

A. Standard

Trial judges have "a great deal of latitude in scheduling trials." *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Granting or denying a request "for a continuance is committed to the sound discretion of the trial judge and will not be reversed on appeal absent a showing of a clear abuse of discretion." *Tolbert v. Horn*, No. 89-4073, 909 F.2d 1485 (6th Cir. 1990). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error

of judgment." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996) (quoting *Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989)).

B. Analysis

The "broader goals of the MDL" DuPont claims it seeks to advance are (1) global settlement, and (2) fair and just administration of the cases that make up this MDL. DuPont contends that this Court's trial schedules "ensure that the upcoming trials will have minimal impact" on these goals. (Def.'s Objection at 2, ECF No. 4604.)

1. Global Settlement

Throughout DuPont's Objection, it explicitly and implicitly takes the position that the Court's scheduling the November 2016 and January 2017 trials spoils any possibility that DuPont could engage in the meaningful global settlement negotiations it desires to pursue, and can only be intended as punishment for DuPont's failure to have already globally settled this MDL.

As to the latter contention, DuPont refers to its "Preservation Objection," previously filed to preserve its "objections to the Court's trial selection procedures for the initial 40 cancer cases to be tried beginning in May 2017." (Def.'s Preservation Objection to the Court's Trial Selection Procedures at 1, ECF No. 4535.) DuPont refers to the Preservation Objection to support its contention that this Court scheduled the non-bellwether "cases as a *de facto* punishment for DuPont's alleged intransigence towards settlement." *Id.* at 4. DuPont points to no evidence to support such an accusation. This Court has ***never*** even suggested to DuPont that it believed global settlement was the appropriate course of action for it to take in this MDL. The Court repeatedly informed the parties that it would assist them in *their stated desire* to reach global settlement, appointing a mediator and ordering mediation at a time the parties had previously

indicated would be appropriate to engage in global settlement negotiations. This Court has never tried to strong-arm either party into settlement by taking a position as to the value in total and/or the value of the cases that individually make up this MDL. Instead, the Court has consistently indicated that it could best assist the parties by getting each side to reveal their best possible settlement position. To suggest now that the Court has unfairly scheduled the non-bellwether trials as punishment for DuPont failing to globally settle is simply not based on any fact. [2]

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[2] In the Preservation Objection, DuPont relies upon case law that supports overturning a district court's trial schedule because it violated due process or violated a party's Seventh Amendment right to a jury trial. (Def.'s Preservation Objection, ECF No. 4535 at 4–5.) This Court addressed the due process issue *infra*. As to the latter argument, DuPont relies only upon *In re Rhone Poulence Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), which it cites as "granting writ of mandamus overturning district court's trial plan because plan would have forced settlement of cases." *Id.* at 5.

Just a brief overview of *In re Rhone Poulence Rorer Inc.*, makes questionable any explanation of DuPont's reliance on the case as support for its contention that this Court's trial schedule is a penalty. The *In re Rhone Poulence Rorer Inc.* court found that the district court exceeded its authority by partially granting class certification in hemophiliacs' action against manufacturers of antihemophiliac factor concentrate (AHF), alleging that they became infected with Human Immunodeficiency Virus (HIV) as result of using AHF. The trial court planned to try the issue of the negligence of the defendant *by one jury* and bind the thousands of plaintiffs and the defendant by that verdict. The Seventh Circuit characterized the plan as follows:

> [The trial judge] explained this decision in an opinion which implied that he did not envisage the entry of a final judgment but rather the rendition by a jury of a special verdict that would answer a number of questions bearing, perhaps decisively, on whether the defendants are negligent under either of the theories sketched above. If the special verdict found no negligence under either theory, that presumably would be the end of all the cases unless other theories of liability proved viable. If the special verdict found negligence, individual members of the class would then file individual tort suits in state and federal district courts around the nation and would use the special verdict, in conjunction with the doctrine of collateral estoppel, to block relitigation of the issue of negligence.

Id., 51 F.3d at 1297. The court found that the defendants (when preliminary indications are were that they were not liable) could not be forced to stake their companies on the outcome of single jury trial (which would require the court to instruct jury on merged negligence standards of 50 states and District of Columbia), or be forced by fear of risk of bankruptcy to settle even if they had no legal liability, when it was entirely feasible to allow final, authoritative determination of their liability to emerge from decentralized process of multiple trials. The facts and law in *In re*

For the last three and one-half years, the Court has focused on preparing and trying bellwether cases to assist the parties in their stated goal of global settlement – a desire DuPont had continuously reaffirmed to this Court and its opposing counsel. DuPont's current contention that the Court's trial schedule prohibits DuPont from engaging in meaningful settlement negotiations is simply untenable. DuPont has repeatedly given voice to its stated desire to engage in global settlement negotiations, but then failed to make ***any*** global settlement offer ***at all*** until the mediation just one month ago. The fact that only two trials have been scheduled between now and May 2017 demonstrates that DuPont and the plaintiffs have ample time to negotiate.

At the inception of this MDL DuPont expressed its desire to attempt global resolution of this MDL even before this MDL was centralized in this Court. In its motion to the JPML requesting creation of this MDL, DuPont asserted that forming the MDL would "promote the just and efficient conduct of the actions," because "consolidation in a single District *will likely promote early and efficient resolution of* ***all*** *the cases*." (Def.'s Mem. in Support of Mot. for Coordination and Consolidation and Transfer Pursuant To 28 U.S.C. § 1407 at 6, 7, ECF No. 4613-2) (emphasis added). According to DuPont, the "transferee court will be able to explore various alternatives to resolve the cases in an expeditions manner." *Id.*

In this same vein, global settlement has been a topic in this MDL from the beginning. (Pretrial Order No. ("PTO") 7, ECF No. 33.) At the conference held on July 29, 2013, DuPont's counsel represented to the Court that DuPont would be in a position to begin seriously discussing global settlement as soon as DuPont had a better idea of the total number of cases to be filed by class members already-diagnosed with one of the Linked Diseases, and had a chance to review

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Rhone Poulence Rorer Inc., leave no question that the holding has no bearing on maters at issue in this case.

some basic discovery on those plaintiffs and exchange initial expert reports. (Tr. of July 29, 2013 Status Conf. at 22, ECF No. 34.) DuPont's counsel indicated he envisioned proceeding with mediation at the time of expert disclosures and depositions. *Id.* at 59 ("We would propose March, Your Honor, because then we'll have the expert reports and the expert depos, and I think that's the information we need."). Thus, a few days later the Court ordered the parties to meet and confer on the selection of a mediator and establishment of a mediation schedule. (Case Management Order No. ("CMO") 2 § VII, ECF No. 30.) Pursuant to CMO 2, on November 1, 2013, the parties stipulated and agreed to the appointment of Mr. Frank A. Ray, Esq. as the Court-appointed mediator. (PTO No. 11, Stipulation and Agreed Order Regarding the Selection of a Mediator for Settlement Purposes, ECF No. 84.)

Within the first few months of this MDL the Court and the parties focused upon the selection of cases to be utilized as bellwether trials. Six cases were chosen for a special purpose that all parties and this Court recognized – information gathering that would facilitate valuation of cases to assist in global settlement. *See* Eldon E. Fallon, Jeremy T. Grabill, Robert Pitard Wynne, *Bellwether Trials In Multidistrict Litigation* at 2332, Tulane Law Review (2008) ("The ultimate purpose of holding bellwether trials in [*In re Propulsid Products Liability Litigation* (MDL No. 1355) and *In re Vioxx Products Liability Litigation* (MDL No. 1657)] was not to resolve the thousands of related cases pending in either MDL in one 'representative' proceeding, but instead to provide meaningful information and experience to everyone involved in the litigations."); Alexandra D. Lahav, *Bellwether Trials*, at 577–78, The George Washington Law Review (2008) ("Judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases and to encourage settlement.").

The Manual for Complex Litigation, § 22.315 (2004), a litigation manual produced by federal judges for use by other judges, states that bellwether trials are meant to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims . . . and what range of values the cases may have." Other circuits have utilized this approach, such as the Fifth Circuit in *In re Chevron U.S.*A., 109 F.3d 1016, 1019 (5th Cir. 1997), which explained that "[i]f a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts." *See also Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1051 (9th Cir. 2015) ("A bellwether trial is a test case that is typically used to facilitate settlement in similar cases by demonstrating the likely value of a claim or by aiding in predicting the outcome of tricky questions of causation or liability."). In accord with this direction, the parties all agreed to choose representative cases as opposed to cases that most strongly favored to either side.

By February 2014, the parties selected six representative cases for trial. (CMO 6, Identification & Selection of Discovery Pool Plaintiffs, ECF No. 194); (CMO 7, Selection of the Initial Trial Cases and Expert Disclosures Schedule, ECF No. 602). The parties jointly agreed to select representative cases from the higher value cases, carving out both high cholesterol-only and preeclampsia-only cases from the bellwether process. (CMO 6 at ¶ 4, ECF No. 194.)

The Court ultimately accepted the six cases to serve as bellwether trials – three plaintiffs' choices and three chosen by DuPont. Those six cases consisted of three kidney cancer cases, one testicular cancer case, and two ulcerative colitis[3] cases. From this list of six bellwether plaintiffs,

[3] The plaintiffs withdrew one of their three bellwether cases in recognition that it was not ideal for the bellwether process, as the parties disputed the ulcerative colitis diagnosis.

the first tried was a case selected by DuPont and involved the claims of Carla Marie Bartlett, who had suffered from kidney cancer.

For obvious reasons courts, including this one, do not permit litigants to schedule their own trial dates. The bellwether process, however, is somewhat exceptional. Because a main purpose is to obtain information to assist the parties in the valuation of cases, the Court allowed significant input from the parties in scheduling the bellwether trials. The parties agreed and the Court established the bellwether trial dates beginning with Mrs. Bartlett in September 2015 and ending in November 2016 with Mrs. Baker. (CMO 2, § VI, ECF No. 30; PTO 19, May 6, 2014 Conf. Order at 2, ECF No. 265); (CMO 7, Selection of the Initial Trial Cases and Expert Disclosure Schedule, ECF No. 602); (CMO 9, Pretrial Schedule for Initial Two Trial Cases, ECF No. 3549); (CMO 10, Pretrial Schedule for Bartlett Trial, ECF No. 4183); (CMO 11, 12, Pretrial Schedules for Wolf Trial, ECF Nos. 4247, 4250); (CMO 13, Pretrial Schedule for Freeman Trial, ECF No. 4263); (CMO 14, Pretrial Schedule for Dowdy Trial, ECF No. 4268); (CMO 15, Pretrial Schedule for Baker Trial; ECF No. 4269).

The time scheduled for expert disclosures and depositions passed without DuPont making any offer to globally settle this MDL. Instead, DuPont's counsel advised that it intended to pursue meaningful mediation discussions after the filing of dispositive motions, but before the Court decided those motions. (Tr. of June 9, 2014, Status Conf. 15–16, ECF No. 286); (Tr. of Aug. 13, 2014, Status Conf. at 20–21, ECF No. 766.)

Later in October 2014, DuPont advised that it would discuss global settlement after the Court decided the dispositive and *Daubert* motions. Counsel for DuPont stated that "the first logical time period [for mediation discussions] is probably after the briefing of the summary judgment on the substantive claims. . . . And then failing that, after Your Honor's decision, the

Court's decision, on those motions." (Tr. of Oct. 29, 2014, Status Conf. at 19–20, ECF No. 1412.)

The Court thereafter ruled on the parties' dispositive motions and *Daubert* motions for the first and second bellwether trials. The Court granted in part and denied in part DuPont's and the plaintiffs' *Daubert* motions. (Evidentiary Motions Order No. ("EMO") 1, Pl.s' and Def.'s Mot. for Expert Opinions Related to Causation, ECF No. 4079); (EMO No. 1-A, Def.'s Mot. to Exclude Specific Causation Expert, ECF No. 4226); (EMO No. 2, Def.'s Mot. to Exclude Expert Opinions Related to Corporate Conduct, ECF No. 4129); (EMO No. 3, Def.'s Mot. to Exclude Expert Opinions Related to Narrative Testimony, ECF No. 4518.). The Court also granted in part and denied in part DuPont's motions for summary judgment that were directed at eliminating numerous claims for relief filed by the plaintiffs. (DMO 4, Def.'s Mot. Summ. J., ECF No. 3973.) Specifically, the Court denied DuPont's request for summary judgment on the specific causation portion of the plaintiffs' negligence claims, and granted DuPont's motion on plaintiffs' claims for (1) strict product liability; (2) [violations of] state consumer protection laws; (3) battery; (4) ultrahazardous or abnormally dangerous activity; and (5) negligence per se. *Id.*

The Court also ruled on several other dispositive motions brought by the parties. (DMO No. 1, Class Membership and Causation, ECF No. 1679); (DMO No. 1-A, Def.'s Mot. for Clarification of DMO No. 1, ECF No. 3972); (DMO No. 2, DuPont's Prior Admissions, ECF No. 2557); (DMO No. 3, Choice of Law, ECF No. 3551); (DMO No. 5, Def.'s Mot. for Summ. J. Related to Specific Causation, ECF No. 4113); (DMO No. 6, Pls.' Mot. for Summ. J. on the Issue of Duty, ECF No. 4184); (DMO No. 7, Def.'s Mot. for Summ. J. on Punitive Damages, ECF No. 41885); (DMO No. 8, Def.'s Mot. to Bifurcate Punitive Damages, ECF No. 4197);

(DMO No. 9, Def.'s Mot. on Fraud and Emotional Distress, ECF No. 4211); (DMO No. 9-A, Def.'s Mot. for Reconsideration of DMO No. 9, ECF No. 4234); (DMO No. 10, App. Of the Ohio Tort Reform Act, ECF No. 4215); (DMO No. 11, Def.'s Mot for Judgment as a Matter of Law on Punitive Damages, ECF No. 4235.)

In spite of DuPont's stated position, after the Court ruled on the dispositive and *Daubert* motions, DuPont still made *no offer* of global settlement. The plaintiffs have submitted affidavit testimony that they made a demand for global settlement on June 17, 2015 (Aff. of Michael A. London ¶ 3, ECF No. 4272-1) and that this demand was made in the presence of the Court-appointed mediator.[4]

The first bellwether trial, Mrs. Bartlett's case, began on September 14, 2015, as scheduled, and lasted five weeks. As anticipated, the unsuccessful party, in this case DuPont, filed post-trial briefs asking for judgment as a matter of law and/or a new trial. (Def.'s Mot. for Judgment as a Matter of Law or, Alternatively, for a New Trial and Remittitur, Bartlett ECF 151.)

At the December 2, 2015 in-person status conference, after giving the parties one and one-half months to digest the information produced in Mrs. Bartlett's trial, the Court questioned counsel as to when the parties "can be serious with the mediator" regarding global settlement. Mrs. Bartlett's case provided the anticipated information as to the value of a representative kidney cancer case, and the second bellwether trial was not scheduled for several more months

[4] DuPont disputes whether the plaintiffs made a demand for global settlement prior to this date, but does not offer sworn testimony. The plaintiffs have indicated that they made such a demand in February 2014. DuPont, however, has informed the Court that the lawyer to whom this demand was allegedly made is no longer affiliated with DuPont's counsels' firm and denies that such a demand was made.

(March 2016). DuPont affirmed that it was interested in global settlement, but for the first time indicated that it could not negotiate in earnest pending adjudication of its appeal:

> Mr. Mace: We need more information than we have now, Your Honor. We also need -- We are going to see what Your Honor does in the post-judgment motion. And we're going to need some rulings by the court of appeals I think.

(Tr. of Dec. 2, 2015, Status Conf. at 25; ECF No. 4271.)

The parties informed the Court on February 3, 2016, that they had settled the second bellwether case scheduled for trial the following month. The Court advised the parties that it was considering moving up the third bellwether trial to fill in the March 2016 scheduled trial, but ultimately determined that one month was insufficient time to prepare.

On May 31, 2016, the second bellwether trial, *Freeman*, began. On June 9, 2016, counsel contacted the Court via email requesting "a very brief call with the Court regarding the *Dowdy* and *Baker* cases to give the Court an update." *Dowdy* and *Baker* were the remaining two bellwether trials that were scheduled for August 29, 2016 and November 14, 2016. Counsel indicated that they did "not expect the call to be more than a few minutes." The Court responded that it was pressed for time during the *Freeman* trial and would prefer to discuss the last two bellwether cases after the trial unless they felt "something needs addressed immediately (*e.g.*, a deadline issue)." Without any further conversation with the Court, the next business day the parties reported to the Court that the last two bellwether cases were settled.

The Court was, to put it mildly, surprised. For over three years the parties had taken the position that the purpose of the bellwether trials was to gather information regarding the valuation of cases. The Court was granted special staffing to provide the resources to engage in this endeavor. The parties and the Court had worked for several years choosing and preparing the bellwether plaintiffs for trial.

On July 6, 2016 and July 8, 2016, the jury returned a verdict in Mr. Freeman's favor. At this stage, all six bellwether cases had been tried or settled.

Because all of the parties had indicated previously that an opportune time to mediate global settlement would be after the bellwether trials, the Court ordered the parties to mediation.[5] (Notice of Court-Ordered Mediation, ECF No. 4583.) In preparation for this mediation, DuPont informed the Court that ***it had never made any offer of global settlement***. The mediation lasted less than one day and was notably unsuccessful.

It is clear from the facts that DuPont has never been prevented from serious settlement negotiations. In its Objection, DuPont contends that the scheduling order issued by the Court frustrates meaningful settlement negotiations. This claim is simply frivolous and patently false in light of the record in this case. DuPont has repeatedly represented that it would be ready to engage in settlement negotiations once an event occurred. By the Court's count, the event triggering serious negotiations has been moved unilaterally by DuPont no fewer than five times.

This Court has never strong armed either party into settlement.[6] Every party in this case has a right to a jury trial, which the undersigned is prepared to provide. If, however, settlement

[5] At the mediation, DuPont was for the first time represented by Attorney Kevin T. Van Wart, of Kirkland & Ellis, LLP. When questioned by the Court, DuPont's counsel indicated that Mr. Van Wart would be entering his appearance on behalf of DuPont. DuPont's counsel confirmed that position in an email sent to chambers a month ago (August 1, 2016), indicating that, "[a]s noted last week, [Mr. Van Wart] will also be formally entering his appearance forthwith." Mr. Van Wart, however, has made no appearance despite the fact that he appeared for DuPont during the mediation. If he fails to either enter his appearance or otherwise explain his failure to do so, the Court will take further action on the matter.

[6] The Court conducted the one mediation in this case on the record. DuPont objected to the presence of a court reporter, which the Court overruled. While the transcript is sealed for now, the Court notes that the record will reflect that the Court never suggested its own view of the value of all or part of the claims. The parties were told repeatedly that the Court was a facilitator only.

is not desired by any party, then the party must be prepared to go to trial and not make claims as to settlement it has no intention of following.

Further, when the Court is confronted with 3500 cases pending for twelve years in another court, the cases must be scheduled quickly and fairly. Years of delay may appeal to DuPont, but it is fundamentally unfair in the administration of justice.

2. Fair and Just Administration of the 3500-plus Cases in this MDL

DuPont contends that the Court has abused its discretion by scheduling the November 2016 and January 2017 trials and by "deci[ding] to abdicate the selection of those cases to the Plaintiff Steering Committee ("PSC")." (Def.'s Objection at 1, ECF No. 4604.) DuPont maintains that the PSC failed to abide by the Court's selection criteria in choosing the two plaintiffs. Further, DuPont asserts that "[t]here are many non-trial tasks to which the Court's staff could and will be dedicated during the window created by the *Dowdy/Baker* settlement," such as "enlist[ing] its staff to oversee a process by which the plaintiffs would be required to provide information about their claims [to] provide a basis for categorizing cases for dismissal, resolution, or future trials," and overseeing a procedure for resolving the purported deficiencies in a number of the Plaintiff Fact Sheets ("PFS"). *Id.* at 14. DuPont suggests this "docket clean-up" activity "would be a far better allocation of the parties' resources while awaiting the Sixth Circuit's guidance on critical docket-wide issues." *Id.* at 15, 18.

DuPont also contends that its proposed 11 month hiatus from trial activity would permit it "to realize the benefit of its bargain with the PSC, *which agreed that there should be no acceleration of other trials* in the wake of resolving the *Dowdy* and *Baker* cases." *Id.* at 15 (emphasis added). The Court rejects these claims.

On December 2, 2015, this Court told the parties that when the bellwether cases were concluded, trying the non-bellwether cases would become the priority. The 3552 cases were then over two years old in this court and fourteen years had passed since the claims were first filed. This Court, and most district courts, endeavor to complete cases within two years.

At the same conference, the Court explained to the parties that once the bellwether trial process was complete, global settlement of this MDL would no longer have its then-prominent position as to scheduling of cases. As discussed *infra*, at that conference DuPont informed the Court that it had changed its position on global settlement, deciding that it would not engage in negotiations until the Sixth Circuit decided DuPont's appeal of the first bellwether trial. At that time, the appeal had not been briefed.

With DuPont exhibiting no interest in global settlement, the Court turned its attention to scheduling the 3500-plus non-bellwether cases. Thus, in December 2015, the Court established a briefing schedule for the parties to offer their proposals on "the procedure that may be utilized to provide trials to the approximately 3500 plaintiffs that are part of the multidistrict litigation but are not one of the plaintiffs whose case was chosen as a bellwether trial." (PTO 40 at 2–3, Dec. 2, 2015 Conf. Order, ECF No. 4267.) In accordance with that schedule, DuPont filed its Litigation Proposal. (ECF No. 4284.) DuPont, however, presented no proposed trial schedule involving the 3500-plus non-bellwether cases. Rather, DuPont "proposed working up 18 high cholesterol, thyroid disease, and preeclampsia claims (6 randomly selected cases for each of these three diseases) to be a trial pool from which a number of single-plaintiff trials would be held in 2017." (DuPont's 2017 Litigation Proposal at 1, ECF No. 4284.)

The plaintiffs opposed DuPont's proposal, *inter alia*, stating:

> While it is DuPont's right and prerogative to engage in meaningful mediations or not to, it is also the right of thousands of local Ohio and West Virginia residents

> who have suffered terrible injury to have their claims resolved in an expeditious manner, a position which DuPont advocated for when moving the JPML for consolidation of these claims in the first place. However, DuPont seems quite content in trying just a handful of cases every year, no more than one or two at a time. At the pace of four to six trials per year, it will take between ***583-875 years*** to try every case. This is simply not justice.

(PSC's Trial Proposal for Post-Bellwether Trials at 13, ECF No. 4275); *id.* at 7 ("While the MDL strategy of remand has become an increasingly popular means to efficient resolution of an MDL, this strategy, *which increases the litigation pressure on both parties* by typically requiring *both sides to try cases simultaneously all over the country, is* ***not available here*** in its traditional framework.") (emphasis added).

The plaintiffs suggested that the Court utilize multi-plaintiff trials (30–50 at a time). The plaintiffs argued that not only would multi-plaintiff trials be fair and efficient, they would also redound to DuPont's benefit by "permit[ing] DuPont to continue to enjoy the reduction in costs that consolidation of cases has provided throughout these multidistrict proceedings." *Id.* at 12. The plaintiffs further suggested that DuPont's approach offers a paradigm in which "everyone loses" because it "could possibly force the expenditure of more in litigation expenses than the case would be valued at." (PSC's Reply to DuPont's Litigation Proposal at 7, ECF No. 4288.)

DuPont argued vigorously against multi-plaintiff trials as "patently unfair to DuPont." (Def.'s 2017 Litigation Proposal at 9.) DuPont maintained that "multi-plaintiff trials of this sort are inherently prejudicial, create confusion for the jurors and, under the circumstances of this case, the unfair prejudice that results substantially outweighs the minimal judicial economy that would be obtained by consolidated proceedings." *Id.* at 10.

On January 27, 2016, at an in-person status conference, the Court informed the parties that it agreed with DuPont that large multi-plaintiff trials were not appropriate at this juncture of this MDL. (PTO 42, Jan. 27, 2016 Conf. Order, ECF No. 4294.) The Court also gave

consideration to DuPont's suggestion that the appellate rulings may impact these non-bellwether cases, indicating that it would begin the non-bellwether trials in April 2017, most likely after the Sixth Circuit ruled on the *Bartlett* appeal.[7] (PTO 42, January 27, 2016, Status Conf., ECF No. 4291.) Most importantly, however, the Court planned to schedule the non-bellwether trials beginning in April 2017 because there were ***three bellwether trials scheduled over the next 11 months that demanded the parties' and the Court's attention***.

The Court, however, disagreed with DuPont's suggestion that "facilitate[ing] broad resolution of the MDL" is any longer a point of emphasis. The Court had previously explained to the parties on several occasions that once the bellwether process was complete, the Court would focus its attention on the effective administration of the thousands of cases that constitute this MDL. Therefore, at the January 2016 conference, the Court established the initial parameters for trying the non-bellwether cases, which it also set forth in PTO 42:

> 1. The Court informed the parties that it had reviewed their submissions regarding the future management of the cases that make up this MDL (ECF Nos. 4275, 4284, 4288) and had decided the following:
>
> a. The approximately 260 cancer cases will be tried first. Beginning April 2017, forty cases will be tried per year on a ten month cycle. Specifically, four cases per month will be tried, one starting each Monday of the month. The Court will not schedule any cases for trial from Thanksgiving through the Christmas/New Year holidays.
>
> b. The Court will continue to try cases but will also manage a trial schedule that will utilize other judges from this District as well as visiting judges.
>
> c. The parties shall meet and confer in an attempt to come to agreement as to the population for the first forty cases. The parties shall report their conclusions at the next in-person status conference. If the parties are unable to agree, the Court will have the cases randomly drawn.

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[7] In a civil case, the median time from filing a notice of appeal with the Sixth Circuit to a decision is 10.2 months. *See* http://www.uscourts.gov/statistics/table/b-4a/judicial-business/2014/09/30. By this estimate, the Sixth Circuit Court of Appeals will most likely issue a decision in January of 2017, four months before significant number of cases are set for trial.

> d. The parties shall agree on a proposed scheduling order for the first forty cases, also to be submitted and discussed at the next in-person status conference.

(PTO 42 at 1–2, Jan. 27, 2016 Conf. Order, ECF No. 4294.)

A few weeks after the Court issued PTO 42, in February 2016, the parties reported that they settled the second bellwether case that was scheduled to begin in March. The parties therefore had over three months to address settlement, prior to the June 2016 trial in *Freeman*. DuPont also had this time to engage in any of the non-trial activity it now touts as important enough to place an 11 month hold on any trials. Specifically, DuPont could have, but did not, attempt to resolve the alleged significant deficiencies it claims are in a number of PFS. The procedure to deal with deficient PFSs at that time had been *established for nearly two and one-half years* (*i.e.*, on October 24, 2013). (CMO 4, Plaintiff Fact Sheets and Records Authorizations, ECF No. 68.) In CMO 4, the plaintiffs were directed to provide DuPont with PFSs, and the CMO provided a detailed procedure for DuPont to follow if it disputed the sufficiency of any PFS, including bringing the dispute before the Court. DuPont *has never pursued this procedure*, yet now contends that the Court should forego trying any cases so that DuPont may pursue this previously unutilized procedure.

Similarly, nearly three years ago the parties selected, and the Court-appointed, a mediator who was available to oversee the categorizing of cases for dismissal, resolution, or future trials. Categorizing and valuing cases is a common method in working toward resolution of MDLs similar to this one. The plaintiffs submit that, "[w]hile the PSC will not reveal what transpired during the failed settlement efforts since Mediator Frank Ray was appointed nearly two years ago, suffice to say, plaintiffs have provided completed PFSs, as well as census data about their claims, that DuPont specifically requested, and which DuPont somehow claim plaintiffs should

be required to submit again." (Plaintiff's Opp. to Def.'s Objection, ECF No. 4614 at 6.) And, whether DuPont disputes receiving the information during mediation, it does not change the fact that DuPont has had ample opportunity to engage in the important non-trial activity on which it now wishes to focus. Thus, DuPont's stated-position that it has not been afforded the opportunity to pursue this important non-trial activity is untrue and disingenuous.

The next relevant event was the Court's decision denying DuPont's post-trial motions filed in *Bartlett*. (DMO 12, Def.'s Mot. for J. as a Matter of Law or, Alternatively, for a New Trial and Remittitur on Plaintiff Carla Marie Bartlett's Claims, Bartlett ECF No. 161.) As all anticipated, the unsuccessful party, in this case DuPont, appealed to the United States Court of Appeals for the Sixth Circuit on March 17, 2017. (Notice of Appeal, Bartlett ECF No. 162.)

On March 22, 2016, in contravention of all previously negotiated, agreed-upon, and approved schedules of the bellwether trials, ***DuPont for the first time in the three years*** since this MDL was transferred to this Court, raised its desire to have ***all bellwether cases stayed pending decision from the Sixth Circuit*** on DuPont's appeal of the first bellwether trial. DuPont addressed this new issue in its March 22, 2016, Motion to Stay. (ECF No. 4353.) This Court denied the stay on March 29, 2016, indicating that

> The Court starts with the most important aspect of the issue before it: The rights of the parties in this MDL to have a determination without undue delay. This case was born fifteen years ago in a 2001 state court class action between DuPont and a class of nearly 80,000 persons residing in six water districts whose drinking water had been contaminated with perfluorooctoanoic acid ("C-8") that was discharged from DuPont's Washington Works Plant near Parkersburg, West Virginia.
>
> . . . .
>
> Understanding the gravity of this case to all parties involved, a bellwether process was supported by the parties and the Court since the earliest stages of this MDL. With the Court's approval and direction, the parties developed and engaged in a selection process for the bellwether trials to which all discovery was directed. It was envisioned that, regardless of the results of the jury verdict

> (whether it would have necessitated DuPont or the bellwether plaintiff to appeal) the Court would press on with the anticipated bellwether trials.

(CMO 16, Denying DuPont's Motion to Stay at 3–4, ECF No. 4382.) As the plaintiffs' counsel correctly recognized in its verbal opposition to DuPont's request:

> But we entered this bellwether process knowing somebody was going to win, and somebody was going to lose in the process of the motions. Somebody was going to win, and somebody was going to lose motions *in limine*. Nothing about this result, except that [DuPont] lost, is surprising [to DuPont].

(Tr. of March 23, 2016 In-Person Conf. at 14, ECF No. 4379.)

The Court further explained that not only was a stay never once contemplated in three years, it was also *not the preferred process in MDLs that utilize bellwether trials*, explaining:

> Indeed, it is the normal process for MDL courts to continue to try bellwether cases while the losing parties from the first bellwether trials appeal. For example, in *In re Levaquin Products Liability Litigation*, MDL No. 1943, which was centralized in the District of Minnesota, the first bellwether trial took place in November 2010, and resulted in a jury verdict in favor of the plaintiff in the amount of $700,000 in compensatory damages and $1,115,000 in punitive damages. The defendant's motion for post-trial relief, which was directed at decisions of law and evidentiary rulings similar to DuPont's post-trial motion in the instant MDL, was denied and the defendant appealed to the United States Court of Appeals for the Eighth Circuit. ***While that appeal was pending, the court tried two more bellwether cases,*** both resulting in verdicts for the defendant. *See In re Levaquin Prod. Liab. Litig.*, 2014 U.S. Dist. LEXIS 163777, at 11–14 (Jud. Panel on MDL Nov. 21, 2014) [(emphasis added)].
>
> Further, when presented with a request for a stay in the exact circumstances as in the case *sub judice*, another MDL court refused to grant the request stating:
>
> > I **FIND** that a stay of the [next two bellwether] trials does not serve the interests of justice. . . . This is not the first occasion on which [the defendant] has requested that I revisit my [] ruling [on a legal issue], and on each occasion [the defendant] has failed to make a strong showing that my initial ruling was incorrect. At this time, I remain unconvinced that [the defendant] is likely to succeed on the merits of any appeal related to the [issues before the court]. Further, [the defendant] will not be irreparably injured by waiting until the last two bellwether trials conclude; however, considering the size and expense of this MDL, the plaintiffs might

> be injured by delaying these last two bellwether trials. Finally, the numerosity of cases within [this] MDL mandate celerity in the resolution of the bellwethers pending before me.
>
> *In Re: C. R. Bard inc., Pelvic Repair Sys. Prod. Liab. Litig.*, MDL No. 2187, 2013 U.S. Dist. LEXIS 119177 at *6–7 (S.D. W.V. Aug. 22, 2013) (denying the defendant's Motion to Stay or Alternatively to Certify for Immediate Interlocutory Appeal).

(CMO 16, Denying DuPont's Motion to Stay at 5–6 , ECF No. 4382.)

The Court concluded:

> Similarly, this Court finds that celerity is mandated here, considering that the over 3,500 plaintiffs have waited fifteen years to bring the issue of DuPont's release of C-8 into their drinking water to trial (and DuPont has waited as long to present evidence that it was not negligent or reckless), and further recalling the previously agreed-upon purposes and scheduling of the bellwether trials. The Court concludes that DuPont failed to meet its burden of "establishing both the 'pressing need for delay' and 'that neither the other party nor the public will suffer harm from entry of the order." *Ohio Envtl. Council*, 565 F.2d at 396. Nor has DuPont shown "a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. Consequently, balancing the potential hardships to the parties and the public, the Court finds that the interests of justice here are not served by granting DuPont's request for a stay.

Id. at 6.

The following month, on April 18, 2016, the Court held the regular monthly in-person status conference. At that conference, the parties jointly submitted and the Court issued CMO 17, scheduling the 2017 trials. (CMO 17, Initial Pretrial Schedule for the 40 Cancer Trials to Begin in May 2017, ECF No. 4459.) In CMO 17, the parties agreed to divide the 40 trials into four tranches. The 12 cases that would populate the first tranche would begin discovery on May 2, 2016.

Also during the April 2016 in-person status conference, the Court reiterated its previously-explained position on the MDL trials, *i.e.*, the bellwether trials were for the purpose of gathering information for valuing cases and settlement; the non-bellwether trials on creating a

trial process that focused on efficiency and fairness. (Tr. of April 18, 2016, Status Conf. at 6–7; ECF No. 4461.) To support that latter goal, the Court informed the parties that it had changed its previous position on populating the 40 cases by random draw from the approximately 260 cancer cases. The Court instead chose to treat the MDL cases similarly to any other case on its docket and provide trials first to the most severely impacted plaintiffs. Because this Court has not been involved in any of the discovery regarding the severity of the plaintiffs' illnesses, it is unable to determine which plaintiffs have the most severe medical injury. It is the PSC who have the insight to make such selections, which is certainly a reason why other MDL courts have followed this same procedure. *See e.g., In Re: Vioxx Litig.*, slip. op., (N.J. Super. Ct. Law Div. Oct 11, 2006) (directing the plaintiffs to propose the trial plaintiffs from the 39 identified two months before, and providing the defendant week to object). The Court directed the PSC to choose the 40 plaintiffs for the 2017 trials and to provide that list, including a short summary of the plaintiffs' injuries, to DuPont. The Court provided DuPont the ability to object to any of those chosen. The only other criteria to which the Court alerted the parties was to avoid a particular plaintiff's firm being scheduled for cases for several weeks in a row, since trials will be overlapping.

On May 2, 2016, the plaintiffs provided to DuPont the list identifying the 40 plaintiffs chosen for the 2017 trials. (Def.'s Objection, PSC Letter, May 2, 2016, ECF No. 4535-5.) DuPont did not object to any specific plaintiff. Several weeks later DuPont filed only a "preservation objection to the Court's trial selection procedures." (Def.'s Preservation Objections to the Court's Trial Selection Procedures, ECF No. 4535.)

On May 31, 2016, the second bellwether trial began. As discussed *infra*, during the second week of this trial, on June 9, 2016, the parties settled the last two bellwether trials. A

few days after the parties reported settlement, the Court informed them of its intention to replace the trials with two of the 12 first tranche 2017 trials, ordering the plaintiffs to select the two. The Court informed DuPont that it would have an opportunity to object to the plaintiffs' choice.

The Court had some concern that an August 29, 2016 trial date with a different plaintiff would not allow DuPont sufficient time to prepare. Consequently, the Court vacated the August 29, 2016 trial date, kept the November trial date, and added a January 2017 trial date.

On July 18, 2016, the plaintiffs selected Kenneth Vigneron, Sr. for the November 2016 trial and Larry Moody for the January 2017 trial. DuPont objects to these two plaintiffs, stating that "it appears that the Court only intended to allow DuPont an opportunity to file a preservation-type objection, as opposed to an objection that might be meaningfully weighed and considered in the selection process." (Def.'s Objection at 8, n.3.) DuPont, again, mischaracterizes the Court intent and its actions. The Court intended to and does here address DuPont's objections to Mssrs. Vigneron and Moody.

DuPont contends that these two plaintiffs are not two of the most severely injured plaintiffs and that the same firm represents them both. Both arguments lack merit. First, the Court expressed concern that no particular plaintiff's firm should be "stuck with trying four cases in four weeks." (Tr. of April 18, 2016 Status Conf. at 6–7, ECF No. 4461.) In essence, DuPont is raising a complaint on behalf of a plaintiff's firm, which the plaintiff's firm itself has not asserted. In any event, the firm is tasked with the far less challenging task of trying two cases in three months. Second, the Court finds that Mr. Vigneron and Mr. Moody have severe claimed medical injuries in comparison to the other 2017 trial plaintiffs.

With regard to Mr. Vigneron, his summary provides, *inter alia*:

> As a result of his testicular cancer diagnosis, Mr. Vigneron underwent surgical intervention, as well as three rounds of intense and debilitating in-patient

> chemotherapy. Mr. Vigneron also suffered metastasis of his cancer to his lungs, which was also treated with the chemotherapy. The PSC believes that Mr. Vigneron qualifies for inclusion in the initial pool of 40 cases, because of his intense chemotherapy regiment, and because, today, he suffers from issues related to his mental acuity as a result of his kidney cancer and subsequent treatment.

(Def.'s Preservation Objection, Summary at 12, ECF No. 4535-5.)

> As to Mr. Moody, his summary provides in relevant part:
>
> As a result of his testicular cancer diagnosis, Mr. Moody underwent surgical intervention, as well as time-consuming and draining chemotherapy, during which time he experienced side effects. The PSC believes that Mr. Moody's case is sufficiently severe to warrant inclusion as one of the initial 40 cancer cases, because he endured two surgical interventions for his testicular cancer, including an orchiectomy and a retroperitoneal lymph node dissection, as well as an extensive chemotherapy program.

Id. at 9.

The penultimate point in DuPont's Objection is that, "[a]s a matter of fairness" DuPont should be permitted "to realize the benefit of its bargain with the PSC, which agreed that there should be no acceleration of other trials in the wake of resolving the *Dowdy* and *Baker* cases." (Def.'s Objection at 3, 6, 15, ECF No. 4604.) The parties' agreement makes evident that they anticipated the Court replacing the settled trials, which is certainly not surprising. As referenced throughout this decision, the Court has informed the parties, on numerous occasions and in no uncertain terms, that it was fully and specially staffed for administration of this MDL and intended to efficiently administer these cases. The parties' settlement and agreement to oppose trying any cases for an 11 month period is nothing less than an attempt to circumvent this anticipated action of the Court.

More troubling is that DuPont asserts that if the Court does not acquiesce to its attempt to circumvent the Court's anticipated trial schedule, this Court "shifts the playing field so dramatically that it can only be viewed as punitive." *Id.* at 7. This Court, for obvious reasons,

does not permit the litigants to bind trial schedules by private agreement. The parties cannot contract to usurp the Court's most fundamental work of managing the cases on its docket.

As to the PSC's failure to oppose the Court's replacement of the two bellwether trials, it is of no moment. For the reasons that it stated repeatedly throughout the life of this MDL, the Court would have scheduled the trials regardless of whether the PSC opposed the schedule.

The final argument DuPont makes regarding its request for an 11 month hold on trial activity is that it would permit the Court to wait until the Sixth Circuit issues its decision on DuPont's appeal of the first bellwether trial. *Id.* at 3. If the Sixth Circuit's decision had some resolutive impact on any of the cases in this MDL, there may be at least minimal support for DuPont's position. However, in this MDL there are thousands of cases that can only be brought to judgment by *this Court*, and *none* of these thousands of cases will be finalized by a ruling from the Sixth Circuit.

DuPont has raised three assignments of error in the *Bartlett* appeal and if the Sixth Circuit agrees with DuPont on all of its arguments within the three assignments, each case in this MDL may be tried addressing both general causation and specific causation, instead of only the latter; the expert witnesses may be prohibited from discussing certain standards of care issues; and, there may be a cap on damages for the Ohio plaintiffs. *The ruling will not have a dispositive effect on any case. Every single case will remain pending and must be brought to trial or settled.*

In conclusion, the Court's unsurprising replacement of the two settled bellwether trials certainly provides no definite and firm conviction of a clear error in judgment. The PSC's selection of the plaintiffs for the November 2016 and January 2017 trial is in accord with the Court's criteria, with the plaintiffs suffering severe injury and being tried by counsel who do not

have three other cases scheduled that month. DuPont was given notice of the replacement four months before the scheduled November 2016 trial and over six months before the January 2017 trial. The parties had also already been engaged in discovery for over one and one-half months on these particular plaintiffs and a substantial portion of these trials will be focused on DuPont's conduct (which the parties have offered at two prior trials). Further, DuPont failed to support its suggestion that the Court imposed a *de facto* penalty upon it because it did not globally settle this MDL. Moreover, DuPont's claim that it is important to engage in docket clean-up is belied by the fact that it had years to so engage, with appropriate procedures in place, and failed to do so. Finally, waiting for the Sixth Circuit is not reasonable considering the thousands of cases relying on resolution by this Court.

III.

DuPont maintains that the Court's November 2016 and January 2017 trial schedules "unfairly impair DuPont's ability to prepare its defenses in those cases," in violation of due process. (Def.'s Objection at 9, ECF 4604.)

A. Standard

DuPont offers the following standard in its Objection:

> "A fair trial in a fair tribunal is a basic requirement of due process." *Anderson v. Sheppard*, 856 F.2d 741, 745 (6th Cir. 1988) (quoting *In re Murchison*, 349 U.S. 133 (1955)). The right to a fair trial includes the right to adequate time to prepare a defense. *See United States v. Celestine*, 2008 U.S. Dist. LEXIS 51925, at *257 (W.D. La. July 7, 2008) ("[F]orcing defendants to go to trial without adequate opportunity to prepare a meaningful defense is no trial at all."); *Anderson,* 856 F.2d at 745-49 (finding that the trial court's refusal to continue a trial date was an abuse of discretion where the party did not have sufficient time to prepare an adequate defense); *In re Campbell*, 2000 Ohio App. LEXIS 1276, at *6 (Ohio Ct. App. 5th Dist. Mar. 27, 2000) (finding that the "trial court violated the appellant's due process rights when it required him to go forward with the trial without giving him adequate time to prepare a defense.").

(Def.'s Objection at 9, ECF No. 4604.)

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ferensic v. Birkett*, 501 F.3d 469, 480 (6th Cir. 2007); (Def.'s Objection at 14) (citing to *Ferensic* for the proposition that not all requests "for more time . . . violate due process" but a "myopic insistence upon expeditiousness in the face of a justifiable request for delay" can).

B. Analysis

It is not disputed that the Court has provided the parties approximately four months to prepare for the November 2016 trial and six months to prepare for the January 2017 trial. The Court finds unconvincing DuPont's suggestion that these time frames deprive it of constitutional due process.

The cases upon which DuPont relies provide little if any support for its position that the Court's denial of its request to vacate the trial schedules is so arbitrary that it violates due process. Rather, the cases reflect the interplay between the right to counsel and procedural due process, and are based on facts that bear no resemblance to the ones presented in the instant action.

For example, DuPont first cites to the portion of *Anderson v. Sheppard*, that discusses the trial judge's "hostility" and "bias" toward a plaintiff, and the trial court's violation of the plaintiff's "due process rights to retain counsel," by forcing the plaintiff to proceed *pro se* in a "complex Title VII case." 856 F.2d at 745–49. The *Anderson* trial court had directed a verdict in the defendant's favor at the close a race discrimination case. The Sixth Circuit reversed and remanded. After scheduling a second trial, the trial court permitted the plaintiff's counsel to withdraw two days before trial and denied the plaintiff's request for a 60 day continuance, even

though the plaintiff offered a letter from new counsel who pledged to try the case if the court permitted the continuance. The Sixth Circuit highlighted numerous instances where the trial court, seemingly upset because the plaintiff "put egg on [his] face" because of the reversal, exhibited bias and hostility in addition to arbitrarily denying the requested continuance. *Id.* at 747.

Similarly, DuPont cites to *United States v. Celestine*, for the proposition that "forcing defendants to go to trial without adequate opportunity to prepare a meaningful defense is no trial at all." 2008 U.S. Dist. LEXIS 51925 at *257. In *Celestine*, *after jury selection had begun*, the government supplemented its witness list of unindicted co-conspirators it had provided to the defendants three years earlier, *inter alia*, adding three additional, previously unidentified, unindicted co-conspirators. The Louisiana trial court therefore dismissed the indictment with prejudice, finding that the government's conduct was not only unfairly prejudicial, but also actually sanctionable. There is certainly no other reasonable conclusion than it would be "no trial at all," if the court forced the defendant to go to trial *that morning*, without *any time* to prepare a defense to the testimony of three previously unidentified witnesses who were unindicted co-conspirators.

In *In re Campbell*, the appellant failed to appear for a scheduled hearing on a show cause order, and was arrested on a bench warrant and brought before the court. A representative of the Public Defender's office moved for a continuance, representing she had *just met her client moments before the hearing* and had not had an opportunity to prepare. The trial court denied the request and the appellant was convicted of civil contempt. The appellate court vacated the conviction and remanded because, among other things, the trial court violated appellant's due process rights when it denied the motion for continuance.

Finally, in *Ferensic v. Birkett*, the Sixth Circuit found that the trial court myopically insisted on expeditiousness in the face of a justifiable request for delay, explaining:

> Per the instructions of [the defendant] Ferensic's counsel, [the witness] St. John was due to arrive at the courthouse at 11:00 a.m. on the morning in question. Ferensic's father, the lone defense witness, concluded his testimony at 10:25 a.m., a mere 35 minutes earlier. The court then temporarily excused the jury. Although the court allowed Ferensic to make an offer of proof at that time regarding St. John's anticipated testimony, it denied Ferensic's motion for a brief adjournment to allow St. John to actually testify before the jury. The trial judge appeared to base her decision largely on the rationale that she had another trial scheduled to begin at 11:00 a.m. that same morning. Nevertheless, the court then formally recessed for a break at 10:30 a.m. and scheduled closing arguments to begin at 10:57 a.m.

501 F.3d at 479–80 ("Even the Warden does not argue that Ferensic's request for less than a 30-minute adjournment was unreasonable. Although St. John's tardiness was entirely Ferensic's fault, Ferensic was asking for the briefest of delays. St. John was scheduled to arrive a mere *three minutes* after the trial court had scheduled closing arguments to begin."). Viewing the "totality-of-the-circumstances," the Sixth Circuit found that "Ferensic was denied his Sixth Amendment right to present a defense." *Id.*; *see also id.* at 475 ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

In stark contrast to the cases upon which DuPont relies, the parties in this case not only engaged in years of discovery in the *Leach* Case, creating millions of documents that were available for use in this MDL, but also engaged in additional Court supervised discovery that continued for over two years in this MDL. (*See* CMO 2, Initial Discovery and Trial Scheduling Order, ECF No. 30); (CMO 3, Service of Plaintiffs' Complaints, Defendant's Abbreviated Answer and Affirmative Defenses, Initial Disclosures, ECF No. 31); (CMO 4, PTO 9,

Stipulation and Agreed Order Regarding Discovery and Use of Electronically Stored Information, ECF No. 65); (Plaintiff Fact Sheets and Records Authorizations, ECF No. 68); (CMO 5, Plaintiff Medical Record(s) Procurement, ECF No. 128; Discovery Order No. ("DO") 1, The Costs of Obtaining C8 Health Project Records & Extension of the Deadline for Selection of the Discovery Pool Plaintiffs, ECF No. 213); (DO 2, Plaintiff Procurement Costs of Obtaining C8 Health Project Records from MRC, ECF No. 223); (DO 5, Plaintiffs' Motion for Protective Order—Limits of Discovery on Discovery Pool Plaintiffs, ECF No. 251); (DO 6, Scheduling the Depositions of Treating Physicians, ECF No. 264); (DO 7, Permissible Scope of Plaintiffs' Counsel's Ex Parte Contact With Treating Physicians, ECF No. 270); (PTO 24, DuPont's Motion to Drop Misjoined Plaintiffs from Gregory and Bauman Actions, ECF No. 712); (DO 9, DuPont's Motion to Compel Discovery Responses from Trial Plaintiffs Carla Bartlett and John Wolf, ECF No. 3550).

Moreover, a significant portion of this discovery is related to DuPont's conduct of releasing the C-8 from the Washington Works plant. That evidence is *the same evidence that will be utilized in every single trial held in this MDL*. Not only will this evidence be consistent through each and every trial, it is also overwhelmingly the majority of all evidence that will be offered at each and every trial that will be held in this MDL.

By way of example, the *Freeman* trial lasted six weeks and consisted of five full weeks of testimony. Out of that five weeks, ***two days were devoted to plaintiff-specific testimony***, *i.e.*, Mr. Freeman's treating physician, his specific causation expert, and Mr. Freeman himself. During the other four and one-half weeks of trial, the parties offered the same evidence that had been presented at the first bellwether trial. DuPont merely asked for this Court to adopt in *Freeman* the dispositive, evidentiary, and *Daubert* rulings from *Bartlett*, which the Court did,

permitting DuPont to preserve its prior objections. (Def.'s Preservation Mot. *in Limine* to Exclude Reference to Lobbying Efforts or to Social Discussions Between Craig Skaggs and a West Virginia Supreme Court Justice, ECF No. 4402); (Def.'s Preservation Mot. *in Limine* to Exclude Testimony or Other Evidence Regarding DuPont's State of Mind, ECF No. 4403); (Def.'s Preservation Mot. *in Limine* to Exclude Evidence or Argument During the Compensatory Phase Trial Regarding the 2005 Department of Justice Subpoena and Related Investigation Concerning PFOA, ECF No. 4404); (Def.'s Preservation Mot. *in Limine* to Exclude Any Statement or Suggestion That C8 Causes Greater Disease or Harmful Effects in Children, ECF No. 4405); (Def.'s Preservation Mot. *in Limine* to Exclude Any Statement or Suggestion that Cattle Diseases or Cattle Deaths Have Been or Are Caused by C8, ECF No. 4406); (Def.'s Preservation Mot. *in Limine* to Exclude Any Statement or Suggestion that Birth Defects Have Been or Are Caused by C8, ECF No. 4407); (Def.'s Preservation Mot. *in Limine* to Exclude Any Argument, Statement, or Suggestion that a Violation of DuPonts Internal Exposure Guidelines Equates to Negligence, Violation of a Legal Duty, or Means that Harm Was Expected, ECF No. 4408); (Def.'s Preservation Mot. *in Limine* to Exclude the Personal E-mails of Bernard J. Reilly and, in the Alternative, Request for Redactions, ECF No. 4409); (Def.'s Preservation Mot. *in Limine* to Exclude Reference to or Introduction of Activist Group Materials, Articles, and Other Hearsay Documents, ECF No. 4411); (Def.'s Preservation Mot. *in Limine* to Preclude Comparisons and Analogies to Other Industries, ECF No. 4412); (Def.'s Preservation Mot. *in Limine* to Exclude Reference to Alleged Wrongful Other Acts or Character Evidence of DuPont, ECF No. 4413); (Def.'s Preservation Mot. *in Limine* to Exclude Any Reference to Other Lawsuits or Claims, ECF No. 4414); (Def.'s Preservation Mot. *in Limine* to Exclude Orders from Prior Lawsuits or Evidence or Comments By Counsel Regarding Alleged Destruction of

Documents, ECF No. 4424); (Def.'s Preservation Mot. *in Limine* to Exclude Reference to the Spin Off of Performance Chemicals, Any Indemnification Agreement Between DuPont and Chemours, or Any Proposed Merger Between DuPont and Dow Chemical Co., ECF No. 4425); (Def.'s Preservation Mot. *in Limine* to Preclude Plaintiffs' Counsel from Commenting on or Discussing Certain Matters and/or Taking Certain Actions in the Presence of the Jury or Potential Jurors, ECF No. 4449); (EMO No. 7, Adopting *Bartlett Daubert* Decisions Regarding Corp. Conduct Experts;ECF No. 4596); (EMO No. 8, Adopting *Bartlett Daubert* Decisions Regarding Corp. Historical Evidence, ECF No. 4617); (DMO No. 18, Adopting *Bartlett* Tort Reform Act Decision, ECF No. 4597). As to DuPont's conduct, the only slight variation between the two trials involved choices made by DuPont concerning which witnesses would present otherwise very similar evidence.

Put another way, approximately 80% of the evidence that will be presented in each and every trial in this MDL, including expert opinion testimony, has already been presented in prior trials, and approximately 20% of the evidence will be plaintiff-specific. Therefore, the parties have four months to prepare approximately 20% of the November 2016 trial and six months to prepare approximately 20% of the January 2017 trial. The remaining 80% of the trials will be filled with evidence that has been presented at two, or three, prior trials. The Court has no doubt that this amount of time is wholly sufficient for the experienced trial counsel appearing on behalf of DuPont to prepare for trial.

Accordingly, the Court finds that the circumstances before it are unlike the cases where the defendants were given minutes to prepare a defense in a criminal case, a defendant was not permitted to present a witness who was less than 30 minutes late in a criminal case that ultimately would have required a three minute continuance, or a civil plaintiff not permitted any

time to prepare a defense to contempt, or one who was forced to represent himself by a hostile and biased trial judge in the face of a justifiable request for continuance. DuPont has been provided more than constitutionally adequate time to prepare for the two upcoming trials.

IV.

Based on foregoing, the Court concludes that scheduling Mr. Vigneron for trial in November 2016, and scheduling Mr. Moody for trial in January 2017 does not violate due process, nor is it an abuse of discretion. The Court therefore **DENIES** DuPont's request to vacate those trial dates and **OVERRULES** its Objection.

IT IS SO ORDERED.

8-30-2016
DATE

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