IN THE 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	**CASE NO. 2-13-MD-2433** **JUDGE EDMUND A. SARGUS, JR.** **MAGISTRATE JUDGE ELIZABETH P.DEAVERS**

This document relates to: ALL CASES.

PLAINTIFFS' RENEWED MOTION FOR THE APPLICATION OF THE DOCTRINE OF ISSUE PRECLUSION/COLLATERAL ESTOPPEL

(expedited briefing requested)

Plaintiffs, by and through Counsel, and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby move for summary judgment on the elements of duty, breach, and general causation in Plaintiffs' negligence claim involving damages arising from kidney and testicular cancers.[1] Based upon issue preclusion (collateral estoppel), there are no genuine issues of fact relating to duty, breach, and general causation in Plaintiffs' negligence claim, no issues of fact relating to the interpretation of the *Leach* agreement and no genuine issues of fact relating to the inapplicability of the Ohio Tort Reform Act. Three juries in this MDL already have found that defendant, E. I. du Pont de Nemours and Company ("DuPont"), owed Plaintiffs a duty and

[1] On January 27, 2017, a similar motion was filed on behalf of the Group 1 Plaintiffs in this MDL. Pls.' Mot. For Summ. J. on Pls.' Negligence Claims Pursuant to the Doctrine of Issue Preclusion/Collateral Estoppel [ECF No. 5056]. DuPont did not file a reply to Plaintiffs' motion because a global resolution was reached before DuPont's reply was due. *See* Feb. 13, 2017 Order [ECF No. 5086] (vacating all then current scheduling orders). Plaintiffs' filed a second collateral estoppel motion on April 19, 2019 [ECF No. 5202] and Defendants' filed their reply on May 19, 2019 [ECF No. 5208]. Plaintiffs withdrew their motion on May 23, 2019 after Pretrial Order No. 51 was issued, "reserving the right to re-file in the future, should circumstances warrant." [ECF No. 5220.] Since then, Defendants have continued to file motions on issues that this Court has already resolved. *See, e.g.*, DMO 32 [ECF No. 5241] (denying DuPont's motion, once again, to reconsider its prior rulings regarding the interpretation of the *Leach* agreement.)

breached that duty by the negligent discharge of C-8 into the environment, and that the C-8 that each Plaintiff, as a *Leach* class member, was exposed to was capable of causing each such Plaintiff's kidney or testicular cancer. Plaintiffs therefore seek to use issue preclusion offensively to preclude DuPont from re-litigating, *once again*, the issues of duty, breach, and general causation with respect to Plaintiffs' exposures to C-8, as *Leach* class members, being capable of causing Plaintiffs' kidney and testicular cancers.

This Court has also ruled numerous times on issues relating to the interpretation of the *Leach* Agreement, including on issues relating to class membership and causation,[2] and the inapplicability of the Ohio Tort Reform Act,[3] and further challenges to its prior rulings on these issues are a waste of the Court's and Plaintiffs' time and resources. Indeed, not only has this Court issued numerous rulings on these issues, but DuPont has also fully briefed and argued these issues before the Sixth Circuit only to dismiss its appeal at the eleventh hour. (Joint Mot. to Dismiss Appeal, *Bartlett v. E. I. du Pont de Nemours & Co*, No. 16-3310 (6th Cir) [ECF No. 41]). DuPont vigorously fought the three bellwether lawsuits through verdict and post-trial motion, including one appeal to the Sixth Circuit. It had a full and fair opportunity to litigate all liability issues. And the jury's determinations on key issues were reduced to final judgments subject to appeal. To allow DuPont to continually re-argue these issues is an afront to judicial economy and interests of fundamental fairness and finality.

Plaintiffs' respectfully request an expedited briefing schedule considering the scheduled November 4, 2019 trial date in *Swartz v. E. I. du Pont de Nemours & Co*, No. 2:18-cv-136. This

[2] *See, e.g.,* DMO 1 [ECF No. 1679], DMO 1-A [ECF No. 3972]; DMO 12 [ECF No. 4306].
[3] *See, e.g.,* DMO 10 [ECF No. 4215]; DMO 18 [ECF No. 4597]; DMO 23 [*Vigneron* ECF No. 180]; DMO 29 [ECF No. 5007]; DMO 30 [ECF No. 5230].

should not prejudice Defendants as Plaintiffs' current brief is very similar to its May 2019 brief [ECF No. 5202] which Defendants have already prepared a reply to [ECF No. 5208].

I. INTRODUCTION

Plaintiffs' cases, like the three earlier cases in this MDL that have been tried to verdict, involve the identical claim that DuPont acted negligently in discharging C-8 into the environment, exposing Plaintiffs, as *Leach* class members, to a sufficient amount of C-8 to cause their cancer. In the first bellwether case, *Bartlett v. E. I. du Pont de Nemours & Co.*, No. 2:13-cv-170 (S.D. Ohio), the jury, after a four-week trial, awarded Mrs. Bartlett $1.6 million in compensatory damages for kidney cancer caused by her exposure to C-8. The evidence showed that DuPont discharged C-8 into the environment, even though it knew C-8 was toxic and a carcinogen, would contaminate groundwater, and would bio-persist and bio-accumulate in human tissue. The result was the poisoning of drinking water supplies in Ohio and West Virginia serving approximately 80,000 people, including Mrs. Bartlett, sufficient to be capable of causing kidney and testicular cancers.

In *Freeman v. E. I. du Pont de Nemours & Co.*, No. 2:13-1103 (S.D. Ohio), a testicular cancer case and the second of the bellwether cases to go to trial, the jury, after a nearly six-week trial during which it considered the *same conduct* of DuPont, ruled for Mr. Freeman and awarded $5.1 million in compensatory damages and $500,000 in punitive damages, plus attorneys' fees and costs. In *Vigernon v. E. I. du Pont de Nemours & Co.*, No. 2:13-cv-136 (S.D. Ohio), another testicular cancer case and the third case to go to trial in this MDL, the jury, after a nearly eight-week trial during which the *same conduct* of DuPont was again considered, ruled for Mr. Vigneron and awarded $2 million in compensatory damages and $10.5 million in punitive damages, plus attorneys' fees and costs.

II. ARGUMENT

Offensive issue preclusion (often referred to as collateral estoppel),[4] "forecloses a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *United States v. Guy*, 257 Fed. Appx. 965, 967 (6th Cir. 2007) (quoting *United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984)). In *Parklane Hosiery Co., Inc. v Shore*, the Supreme Court observed that "[c]ollateral estoppel [or issue preclusion] . . . has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." 439 U.S. 322, 326 (1979). "It has come to be widely accepted that usually little good and much harm can come from allowing a determined [party] to retry the same issues in exhausting fashion against successive [parties]." *McLaughlin v. Bradlee*, 803 F.2d 1197, 1204 (D.C. Cir. 1986).

Issue preclusion has many benefits. It conserves judicial resources by minimizing repetitive litigation; it avoids expenditure of unnecessary time and expense by the parties; it avoids the risk of inconsistent judgments "which undermine the integrity of the judicial system;" and it avoids "the harassment of parties through repeated litigation." *Liang v. AWG Remarketing, Inc.*, 2015 U.S. Dist. LEXIS 168139, at *27 (S.D. Ohio 2015). Three separate juries, comprising members of the surrounding communities, have unanimously found that DuPont acted negligently in discharging C-8 into the environment after considering and reviewing weeks and

[4] Although the phrases "issue preclusion" and "collateral estoppel" are often used interchangeably, "issue preclusion" appears to be the preferred term. *Taylor v. Sturgell*, 553 U.S. 880, 892 n.5 (2008); *Roe v. Boland*, 596 B.R. 532, 546 n. 11 (B.A.P. 6th Cir. 2019).

weeks of testimony and evidence. Requiring Plaintiffs to, once again, prove that DuPont acted negligently based on this same conduct is an inefficient use of judicial resources and presents an unnecessary burden on Plaintiffs, the Court, and the jurors for future trials. This is particularly true in the context of the present MDL proceedings, which were initiated and created at DuPont's own request over *six* years ago to purportedly streamline and efficiently manage the more than 3,500 cases brought by commonly exposed and commonly defined class members, which cases DuPont itself viewed as being based upon and presenting certain basic common underlying claims and defenses. (*See* DuPont's Mem. in Supp. of Mot. for Coordination & Consolidation & Transfer Pursuant to 28 U.S.C. § 1407 [ECF No. 1-1] at 1, 7 (DuPont argues that "consolidation in a single District will likely promote early and efficient resolution of all the cases [because] the transferee court will be able to explore various alternatives to resolve the cases in an expeditious manner" and that "the complaints each involve the same core factual allegations regarding DuPont's conduct, and also raise the same theories of legal liability."); *In re: C-8* MDL 2433 Transfer Order [ECF No. 1] at 1 ("Centralization will . . . conserve the resources of the parties, their counsel and the judiciary.").[5]

To determine whether issue preclusion, or collateral estoppel applies, the Sixth Circuit has explained that a prior decision shall have preclusive effect on an issue raised in a later case when:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in

[5] DuPont previously has relied on this common factual background and common conduct to seek summary judgment on the claims of all Plaintiffs in this MDL. (*See*, *e.g.*, DMO 4 [ECF No. 3973] (ruling on Def's. Mot. for Partial Summ. J. on "Inapplicable Causes of Action [ECF No. 1898]).

the prior proceeding.[6]

Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 908 (6th Cir. 2001) (citations omitted).

For non-mutual offensive issue preclusion,[7] however, these traditional elements are required but not sufficient by themselves. In *Parklane*, the Supreme Court explained that offensive issue preclusion raises additional policy concerns. Under *Parklane*, a plaintiff in current litigation, though not a party to the earlier suit, can make offensive use of the collateral estoppel doctrine to estop a defendant from relitigating previously tried and lost issues, provided at least four conditions are satisfied in addition to the general requirements of collateral estoppel listed above:

> (1) Could Plaintiffs have effected joinder in the first action between himself or herself and the present adversary? If so, the court should consider denying offensive collateral estoppel because Plaintiffs just sat back to wait and see how the first suit would turn out;
>
> (2) If defendant was sued initially for small or nominal damages, defendant may have had little incentive to defend vigorously, particularly if future suits are not foreseeable;
>
> (3) Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied on as a basis for the estoppel is inconsistent with one or more

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[6] The Sixth Circuit, when faced with determining the issue-preclusive effect of a prior federal court judgment based upon diversity has held "that the scope and effect of a district court judgment in a diversity action is to be determined by federal, not state, law . . . ." *J.Z.G. Res. v. Shelby Ins. Co.*, 84 F.3d 211, 213-14 (6th Cir. 1996) (quoting *Silcox v. United Trucking Serv. Inc.*, 687 F.2d 848, 852 (6th Cir. 1982)).

> One of the strongest policies a court can have is that of determining the scope of its own judgments. It would be destructive to the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity.

J.Z.G., 84 F.3d at 214 (quoting *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962); *see also In re Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987*, 776 F. Supp. 316, 319-23 (E.D. Mich. 1991) (in mass tort context, "this court looks to federal law of issue preclusion in deciding what preclusive effect, if any, to afford a federal diversity judgment in a subsequent diversity action.").

[7] As the *Parklane* Court explained, the Court had abandoned the much-criticized mutuality doctrine in *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971), when it permitted the defensive use of issue preclusion by a non-party to the earlier litigation. *Parklane*, 439 U.S. at 327-28.

previous judgments in favor of defendant; and

> (4) It might be unfair to apply offensive collateral estoppel when the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

439 U.S. 322 at 330.

The *Parklane* majority granted trial courts "broad discretion to determine when it should be applied." *Id.* at 331. The general rule after *Parklane* is that offensive issue preclusion is not appropriate *only* in situations "where a plaintiff could easily have joined in the earlier action or where, either for the [four] reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant . . . ." *Id.*

In the present case, the traditional elements of issue preclusion are present, and none of the special *Parklane* factors that might counsel hesitation in permitting the non-mutual offensive use of issue preclusion apply. As stated *supra*, the Sixth Circuit in *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, held that a prior decision has preclusive effect on an issue raised in a subsequent case if the following conditions are met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

253 F.3d 900, 908 (6th Cir. 2001) (citations omitted).

Applying these principles to the facts of the cases at bar, the doctrine of collateral estoppel clearly should apply. The precise/identical issue of negligence in Plaintiffs' cases was raised and litigated in the *Bartlett*, *Freeman,* and *Vigneron* cases and this finding of negligence was necessary to support each verdict. (*See*, *e.g.*, *Bartlett* Final Instrs. [*Bartlett* ECF No. 140-1]

at 20-25 (negligence instructions); *Bartlett* Jury Verdict Form for Negligence Claim [*Bartlett* ECF No. 142] at 1 ("Do you find in favor of Mrs. Bartlett on her negligence claim?).)

Also, it is of no matter whether Ohio or West Virginia law applies to an individual Plaintiff's claim[8] because, as this Court has recognized, "[w]ith regard to the issue of duty, the law in Ohio and West Virginia is nearly identical." DMO 6 at 6 [ECF No. 4184]. DuPont does not dispute this and has affirmatively acknowledged that "the law governing many of plaintiffs' claims is substantially similar in Ohio and West Virginia (*e.g.* for ***negligence claims***) . . . ." (DuPont's Brief Regarding Choice of Law at 5 [ECF No. 2284]) (emphasis added). Indeed, in DuPont's Opposition to Plaintiffs' Third Motion for Summary Judgment [ECF No. 2302], DuPont argues at great length (almost eleven pages) as to why summary judgment is not appropriate on the issue of duty while citing simultaneously to *both* Ohio and West Virginia law in support of its arguments without one time identifying *any* difference between the two jurisdictions' law on duty. (*Id.* at 11-22.) Moreover, DuPont has never argued that the issue of general causation as between C-8 exposure and either kidney or testicular cancer varies depending on whether the plaintiff is from Ohio or West Virginia.

Furthermore, the fact that Plaintiffs may have drank water from different water districts is also of no matter. The testimony that was presented at the *Bartlett*, *Freeman* and *Vigneron* trials and the resulting verdicts made clear that the duty breached by DuPont was to the *entire* communities surrounding its Washington Works plant and *not* just a duty to customers of individual water districts. For example, in the *Bartlett* trial, Mrs. Bartlett's expert, Dr. Siegel, testified as follows:

> Q. From a public health standpoint, sir, from just pure, basic standards for public health, is there anything wrong with that?

[8] *See* DMO 3 [ECF No. 3551] (court order relating to choice of law).

> A. Well, absolutely. I think that, given the knowledge that the company had that there was contamination of the water in Little Hocking and in Lubeck, and also given the fact that the C-8 emissions were going to increase over time, and also given the increasing evidence, over time, of the hazards of this substance and, finally, given the levels at which the substance was found in Lubeck and Little Hocking, I think the company had a responsibility of public health duty and care to monitor the water in ***all of the surrounding areas*** to make sure that it wasn't reaching those areas in detectable levels.

(Sept. 16, 2015, Trial Tr. [*Bartlett* Case ECF No. 115] vol. 3 at 178:3-15) (emphasis added).

> Q. Did management for DuPont fall below a standard of care that was a public health standard in not warning the communities around Washington Works and in the vicinity down river all the way to Tuppersville -- Let me put it like that -- in regard to potential health risks?
>
> A. Yes, I believe that the company as a whole failed to disclose important health information to the surrounding community, I meant the public community in the surrounding area, that I believe violated the duty of care starting in 1984 and that the violation of that duty of care continued to become worse and worse as time went on as more and more evidence accumulated that C-8 was a possible human carcinogen . . . .

(Sept. 17, 2015, Trial Tr. [*Bartlett* Case ECF No. 116] vol. 4 at 147:7-16) (emphasis added).

> Q. Did DuPont comply with the standards of care in relation to the fields of environmental science, exposure assessment and human health risk analysis when investigating the extent and the scope of C-8 contamination in ***all communities***, where C-8 emanated down through the ***various communities***?
>
> A. No, I believe – Well, up until 1984, I don't see – I believe that they did follow the duty of care. However, from 1984 on, from that point on, I believe they violated the duty of care that they did not sufficiently investigate the extent of the C-8 contamination in the environment and the potential for human exposure.

(*Id.* at 147:23-6) (emphasis added).

Likewise, in the *Freeman* and *Vigneron* trials, Mr. Freeman's and Mr. Vigneron's experts also testified regarding a duty that was owed to the surrounding communities and not just to the individuals who were supplied water from Little Hocking, which is the water district that supplied water to Mr. Freeman and Mr. Vigneron. (*See, e.g.*, June 2, 2016, Trial Tr. [*Freeman* Case ECF No. 108] vol. 3 at 90:14-17; 161:24 to 162:2; 178:24 to 179:4; 191:24 to 192:5;

193:20 to 194:12:195:8-12; 221:8 to 222:4; June 3, 2016 Trial Tr. [*Freeman* ECF No. 109], vol.4 at 88:17 to 89:2; 90:16 to 91:3; 93:16 to 94:5; 100:21 to 101:8; 101:21 to 102:11; 181:24 to 182:5; 200:7-14; 202:25 to 203:4; Nov. 16, 2016, Trial Tr. [*Vigneron* Case ECF No. 142] vol. 3 at 65:3-19; 66:19-25; 94:1-6; 113:1-15; 187:11-14; 201:6-16; 204:5-12; 205:20-23; 206:15 to 207:6; 209:17 to 210:6; *see also* June 3, 2016 Trial Tr. [*Freeman* ECF No. 109], vol.4 187:18-19 (DuPont's lawyer states that "you understand this case deals with community levels of exposure, right?").

Therefore, issue preclusion should apply to all cases, regardless of whether a plaintiff's case involves Ohio or West Virginia law. *See* DMO 3 at 21 [ECF No. 3551] (holding that "the West Virginia Plaintiffs (*i.e.*, the plaintiffs who live in and were injured in West Virginia) will have West Virginia law applied to their claims and the Ohio Plaintiffs (*i.e.*, the plaintiffs who live in and were injured in Ohio) will be subject to Ohio law.").

The prior proceedings also resulted in a final judgment on the merits, [*Bartlett* ECF No. 144; *Freeman* ECF No. 101; *Vigneron* ECF No. 200], and DuPont had a full and fair opportunity to litigate the same negligence issue – ***three times***. And DuPont had the opportunity to appeal the trial court's decision, which it voluntarily relinquished when it agreed to dismiss its appeal. (Joint Mot. to Dismiss Appeal, *Bartlett v. E. I. du Pont de Nemours & Co*, No. 16-3310 (6th Cir.) [ECF No. 41]).

Under Supreme Court and Sixth Circuit precedent, dismissal of the appeal means that the trial court's rulings remain vital and preclusive. When "the losing party has voluntarily forfeited" its appellate rights, it remains bound by the trial court's decision. *U.S. Bancorp Mortg. Co. v. Bonner Mail P'ship*, 513 U.S. 18, 25–26 (1994); *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 484 (6th Cir. 2004).

Indeed, the Sixth Circuit explains that when a party "voluntarily abandon[s] their request for reversal of the district court's decision . . . [the losing party] ha[s] lost their ability to contest the merits of [that] dispute." *Remus Joint Venture v. McAnally*, 116 F.3d 180, 185 (6th Cir. 1997). This rule makes sense. When a party decides to settle a case rather than complete an appeal, "[t]he judgment is not unreviewable, but simply unreviewed by his own choice." *Id.* And as a result, the party's *choice* prevents it from re-litigating the same issues. *See, e.g.*, *Kimball v. Orlans Assocs. PC*, 651 F. App'x 477, 481 (6th Cir. 2016) ("No one seriously disputes that a class-action settlement of a certified class qualifies as a final decision on the merits."); *Am. Civil Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1066 (9th Cir. 2012) ("As in *U.S. Bancorp*, the live case was resolved by the strategic decision of the appealing party rather than mere happenstance.").

Regarding the interpretation and application of the *Leach* Agreement[9] and the inapplicability of the Ohio Tort Reform Act,[10] this Court has also issued numerous rulings regarding these issues[11] which DuPont had more than a full and fair opportunity to litigate, including an appeal to the Sixth Circuit that was fully briefed and argued and subsequently voluntarily dismissed. Further challenges to its prior rulings on these issues are a waste of the Court's and Plaintiffs' time and resources and DuPont should not be allowed endless challenges on these settled issues which only serve to "undermine the integrity of the judicial system;" and to "harass[] [Plaintiffs'] through repeated litigation." *Liang v. AWG Remarketing, Inc.*, 2015 U.S. Dist. LEXIS 168139, at *27 (S.D. Ohio 2015).

[9] *See, e.g.,* DMO 1 [ECF No. 1679], DMO 1-A [ECF No. 3972].
[10] *See, e.g.,* DMO 10 [ECF No. 4215]; DMO 18 [ECF No. 4597]; DMO 23 [*Vigneron* ECF No. 180]; DMO 29 [ECF No. 5007]; DMO 30 [ECF No. 5230].
[11] *See, e.g.,* DMO 1 [ECF No. 1679], DMO 1-A [ECF No. 3972]; DMO 10 [ECF No. 4215]; DMO 12 [ECF No. 4306]; DMO 18 [ECF No. 4597]; DMO 23 [*Vigneron* ECF No. 180]; DMO 29 [ECF No. 5007]; DMO 30 [ECF No. 5230].

Thus, the traditional elements of issue preclusion are clearly met. Moreover, none of the *Parklane* factors that might counsel hesitation in the non-mutual offensive use of issue preclusion are present.

Joinder/Intervention. In this multidistrict litigation, Plaintiffs did not have joinder options and, therefore, had no alternative but to "sit and wait" until their respective cases were scheduled for trial.

Incentives. DuPont cannot argue that it did not have a strong incentive to defend itself vigorously in the *Bartlett*, *Freeman,* and *Vigneron* cases and that the claimed damages were significant, especially in light of the three jury verdicts with combined damages of nearly $20 million. Indeed in 2014, Chemours stated that "Chemours, through DuPont, denies the allegations in these lawsuits and is defending itself vigorously." (The Chemours Co., LLC, General Form for Registration of Securities (Form 10) (Dec. 18, 2014) at 100) (relevant pages attached at Ex. A).

Inconsistent Judgments. There are no inconsistent judgments in this multidistrict litigation; if there were, this Court could properly consider this factor in determining whether to permit the non-mutual offensive use of issue preclusion. Indeed, each jury has found for Plaintiffs on their respective negligence claims after considering the same conduct of DuPont.

Procedural Opportunities. Plaintiffs cannot identify any procedural opportunities that would be available in this action that were not available to DuPont in any of the three prior cases that DuPont fully-litigated to verdict in this MDL.

None of the factors identified in *Parklane* for counseling hesitation are present, and there are strong affirmative reasons for permitting the non-mutual offensive use of issue preclusion. The use of the multidistrict litigation process permits the federal judiciary to resolve (or simplify)

large and complex disputes that cannot be resolved in traditional litigation with existing joinder devices. But to be effective, district courts must be permitted to use the broad range of procedural tools available to simplify, manage, and resolve litigation, including the offensive use of non-mutual issue preclusion.

In the present multidistrict litigation, there is a single defendant and no danger that issue preclusion might be used against a different defendant who did not have a full and fair opportunity to be heard. The conduct supporting the finding of negligence of DuPont, the single defendant, is identical in the *Bartlett*, *Freeman,* and *Vigneron* cases that have been tried to verdict, and Plaintiffs' cases. As this Court noted previously, evidence "related to DuPont's conduct of releasing the C-8 from the Washington Works plant" is "*the same evidence that will be utilized in every single trial held in this MDL*." (CMO 20 [ECF No. 4624] at 33 (emphasis in original).) "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." (*Id*.) The negligence phase of each of the prior cases, considering all this extensive, common conduct evidence, has taken substantial time at trial, and each tried case resulted in a verdict that included a finding of negligence. Application of the *Leach* contract as to class membership and causation issues is also the same for all Plaintiffs, as are the principles underlying application of the Ohio Tort Reform Act.

The removal of the negligence issue from future trials will simplify this multidistrict litigation and permit the parties and the Court to focus on the key issues of specific causation, damages, and punitive conduct. (*See* Def. E. I. du Pont de Nemours & Co.'s Mem. in Supp. of Mot. for Coordination & Consolidation & Transfer Pursuant to 28 U.S.C. § 1407 [ECF No. 1-1] at 1 (DuPont argues that consolidation will "conserve the resources of the courts and the parties"

and that "the complaints each involve the same core factual allegations regarding DuPont's conduct, and also raise the same theories of legal liability."); C8 MDL Transfer Order [ECF No. 1].)

Likewise, the removal of repeated challenges to this Court's numerous rulings regarding the interpretation of the *Leach* Agreement and the inapplicability of the Ohio Tort Reform Act, will also simplify the litigation and conserve judicial resources.

Finally, the non-mutual offensive use of issue preclusion is particularly appropriate in mass tort litigation, despite the statement in *In re Bendectin Prods. Liab. Litig.,* 749 F.2d 300, 306 n.11 (6th Cir. 1984), that "[i]n *Parklane Hosiery*, the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation." As discussed below, that statement, which is in a footnote, is *not* in the *Parklane* decision, is *not* supported by the rationale of *Parklane*, and is *not* essential to the ruling in *In re Bendectin* and has been criticized by subsequent courts.

In *In re Bendectin* the Sixth Circuit concluded that the district court improperly relied on the risk of inconsistent judgments caused by the offensive use of non-mutual issue preclusion as a reason for certifying a mandatory non-opt-out settlement class under Rule 23(b)(1)(A). *Id*. at 305. In reversing the class certification, the Sixth Circuit referred to *Parklane's* "curtailment" of the offensive use of collateral estoppel presumably to support its conclusion that class certification was not necessary to avoid the offensive use of non-mutual issue preclusion when earlier judgments were inconsistent with one another.

The Sixth Circuit was correct in noting that, under *Parklane,* there is no risk of inconsistent judgments resulting from the offensive non-mutual use of issue preclusion. *In re Bendectin,* 749 F.2d at 306 ("[T]his concern has been eliminated by the Supreme Court's

curtailment of the use of offensive collateral estoppel in *Parklane*."). But this was correct only because *Parklane* prevented an overly broad use of non-mutual offensive issue preclusion by treating the risk of inconsistent judgments as one of the factors that counsel hesitation. In effect, the court in *In re Bendectin* recognized that, under *Parklane*, the threat of inconsistent judgments would have made the offensive non-mutual use of issue preclusion improper. But there was no need for the Court to write broadly to conclude that *Parklane* had "explicitly" barred the offensive use of issue preclusion in mass tort litigation and no textual basis exists for such a conclusion.

Clearly, the categorical rejection of non-mutual offensive issue preclusion in mass tort litigation is supported neither by the discussion in *Parklane* nor by its rationale. The Court in *Parklane* rejected absolutes; and its refusal to bar the offensive non-mutual use of issue preclusion in favor of relying on the broad discretion of district courts is the essence of *Parklane.* To be sure, inconsistent judgments do not support issue preclusion,[12] and the *Parklane* Court expressed confidence that district courts would use their broad discretion to avoid the improper offensive use of non-mutual issue preclusion.

The Sixth Circuit's extension of the holding in *Parklane* to prohibit the use of offensive collateral estoppel in all mass tort actions is not only not supported in the language in *Parklane* but has been criticized in subsequent cases. For example**,** a federal district court in Michigan has carefully examined the Sixth Circuit's statement about mass tort litigation and properly recognized in two separate decisions that the broad grant of discretion to district courts under *Parklane* only supported barring the offensive non-mutual use of issue preclusion when the

[12] In mass tort cases that have rejected offensive issue preclusion, courts have focused on the presence of inconsistent verdicts, which is not an issue in this MDL. *See, e.g., Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345-46 (5th Cir. 1982).

Parklane factors justified rejection. *In re Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987*, 776 F. Supp. 316 (E.D. Mich. 1991) and 791 F. Supp. 1204 (E.D. Mich. 1992). The court stated that in light of the broad grant of discretion which is to be exercised pursuant to the *Parklane* factors:

> this court is puzzled by the broad comment of the Sixth Circuit in *Bendectin* that, "[i]n *Parklane Hosiery* the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation. A close reading of *Parklane Hosiery* reveals that the Court (1) authorized the use of offensive collateral estoppel, and (2) *only mentioned, but did not broadly accept, the arguments that have been advanced against the wholesale application of offensive collateral estoppel.*

776 F. Supp. at 324-25 (citation omitted) (emphasis in original); 791 F. Supp. at 1215.

The court continued:

> Accordingly, this court cannot blithely accept the proposition that offensive collateral estoppel is inappropriate because [Plaintiffs] are part of "mass tort litigation." This court interprets *Bendectin* as precluding the utilization of offensive estoppel in a mass tort litigation situation that would be similar to that in Professor Currie's hypothetical and in other situations in which its application would be unfair to the defendant. The contours of when offensive collateral estoppel would be unfair—even in mass tort litigation—should be developed on a case-by-case basis. Invoking the term "mass tort litigation" is meaningless without contextual analysis. The teaching of *Parklane Hosiery* is that the issue is delicate and must be handled in this manner.

776 F. Supp. at 325; 791 F. Supp. at 1215; *see also Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W.V. 2015) (recognizing that in mass tort water contamination context if a defendant "lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent [the defendant] from litigating the issue.") (quoting *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 427 (4th Cir. 2003)); *In re Chinese-Manufactured Drywall Liab. Litig.*, 2014 U.S. Dist. LEXIS 137807, at *36-37 (E.D. La. 2014) (approving use of offensive, non-mutual collateral estoppel in Chinese Drywall mass tort multi-district litigation); *Mooney v. Fibreboard Corp*., 485 F. Supp. 242, 248 (E.D. Tex. 1980) (prior jury verdicts,

"coupled with considerations of judicial economy in deciding mass torts, persuade this Court to rule in favor of the offensive use of collateral estoppel.")

The hypothetical from *Parklane* that the court refers to is as follows:

> In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a Plaintiffs wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow Plaintiffs 27 through 50 automatically to recover.

Parklane, 439 U.S. at 331 n.14.

This example, however, was included simply as an example of why the third prong of the *Parklane* test is important and not as a blanket prohibition on the use of the doctrine in all mass tort litigation. *See, e.g., Glictronix Corp. v. Am. Tel. & Tel. Co.*, 603 F. Supp. 552, 568 (D.N.J. 1984) (Professor Currie's example was to illustrate the potential unfairness of inconsistent judgments); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 329 n.9 (9th Cir. 1988) (same); *Gen. Dynamics Corp. v. AT&T*, 650 F. Supp. 1274, 1285 (N.D. Ill. 1986) (same); *Algie v. RCA Global Commc'n* , 891 F. Supp 839, 856 (S.D.N.Y. 1994) (same); *Syverson v. IBM*, 461 F.3d 1147, 1155 (9th Cir. 2006) ("As [Professor Curries'] examples illustrate, allowing Plaintiffs to cherry-pick favorable prior decisions to preclude issues in an ongoing or subsequent litigation raises serious fairness concerns."); *Wash. Alder LLC v. Weyerhaeuser Co.*, 2004 U.S. Dist. LEXIS 9650, at *10 n.3 (D. Or. 2004) (two verdicts in favor of Plaintiffs support issue preclusion and "Defendant's citation to "Professor Currie's familiar example" is far off the mark.") In fact, in the paragraph directly following the footnote, the Supreme Court stated that "[w]e have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Id.* In this MDL, all three of the cases tried to verdict

have resulted in the same finding on the same basic issue of negligence after considering the same conduct of DuPont (with two cases even finding more than sufficient evidence that such conduct supports an award of punitive damages).

The policy guiding the application of collateral estoppel in any given case is one of fundamental fairness. "[T]he Supreme Court has held that 'no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.'" *Shields v. Reader's Digest Ass'n*, 173 F. Supp. 2d 701, 707 (E.D. Mich. 2001) (quoting *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313, 333-34 (1971). Considering that Plaintiffs' cases involve potentially life-threatening cancers and the fact that *three* separate juries have found DuPont liable for the *exact* same conduct that is at issue in Plaintiffs' cases, it is certainly fundamentally fair for the Court to exercise its discretion and grant Plaintiffs' Motion so that Plaintiffs' day in court is not delayed by repetitive litigation. As the D.C. Circuit recognized in *McLaughlin v. Bradlee*, 803 F.2d 1197, 1204 (D.C. Cir. 1986), "[i]t has come to be widely accepted that usually little good and much harm can come from allowing a determined [party] to retry the same issues in exhausting fashion against successive [parties]."

III. CONCLUSION

For the reasons set forth above, offensive issue preclusion should apply, and Plaintiffs should be granted summary judgment against DuPont on the duty, breach, and general causation elements of Plaintiffs' negligence claims and this Court should also issue an order finding that collateral estoppel applies to the interpretation and application of the *Leach* Agreement and the inapplicability of the Ohio Tort Reform Act and for any other relief that this Court may deem proper.

Respectfully submitted,

DATED: October 11, 2019

/s/ Michael London

Michael London
Douglas & London, PC
59 Maiden Lane, 6th Floor
New York, NY 10038
Telephone: 212-566-7500
Fax: 212-566-7501

Robert A. Bilott
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Telephone: 513-381-2838
Fax: 513-381-0205
Email: bilott@taftlaw.com

Jon C. Conlin
Cory Watson Crowder & DeGaris
2131 Magnolia Ave., Suite 200
Birmingham, AL 35205
Telephone: 205-328-2200
Fax: 205-324-7896
Email: jconlin@cwcd.com

Plaintiffs' Steering Committee Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 11th day of October 2019 and was thus served electronically upon all counsel of record.

/s/ Michael London