

Case No. 19-4226

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**United States Court Of Appeals**  
**FOR THE SIXTH CIRCUIT**

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**IN RE: E. I. DU PONT DE NEMOURS AND COMPANY**  
**C-8 PERSONAL INJURY LITIGATION**

**PETITIONER**

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**From the United States District Court for the Southern District of Ohio,**  
**Eastern Division, Case No. 2:13-md-02433**

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**REPLY IN SUPPORT OF**  
**PETITION FOR WRIT OF MANDAMUS**

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## ARGUMENT

DuPont submits this reply to succinctly address five discrete points:

1. PSC Misconstrues The Petition. PSC characterizes DuPont’s “main complaint” to be legal rulings, like the “*Leach* Settlement Agreement” for which mandamus relief would be “not meaningful” because the district court still could apply the same ruling “from one trial to the next.” Opp. at 1-3. The district court’s interpretation of the *Leach* Agreement is *not* a basis for DuPont’s Petition. DuPont expressly limited its Petition to collateral estoppel rulings on duty, breach, and Tort Reform. *See e.g.*, Pet. at 12-13 and n. 2. DuPont’s Petition focuses on triable fact issues that will be taken away from the juries in impending trials.

2. Tort Reform Impacts Trial. Likewise, if the writ issues as to Tort Reform, the damages phase of the trials would change. PSC argues that Ohio Tort Reform is only a simple question of law that will be resolved the same way no matter what. Opp. at 14-15. But the district court itself held that what matters is whether the date of “initial injury” was “before ... 2005.” R.4215, PageID81292. While the three prior trial plaintiffs were diagnosed long before 2005, new plaintiffs were injured after 2005. And jury fact-finding may be required in some trials for Tort Reform’s damages-cap exceptions.

3. The Context Of This MDL Is Critical. PSC argues that saving time and resources does not warrant mandamus. Opp. at 10. But with this MDL, it is not just

one trial: a 2-plaintiff, 5+ week trial starts January 21, 2020, a longer 6-plaintiff trial will start June 1, 2020, and another 6-plaintiff trial may begin in October 2020. *See* Pet. at 6. A normal course appeal would be decided after trials for 14 plaintiffs, creating a tremendous waste of time and resources if preclusion were reversed.

Nor does PSC dispute that mandamus is available for cases raising “questions of unusual importance” or “the economical and efficient administration of justice.” Pet. at 30-31. The unfair playing field created by the district court’s ruling creates inordinate pressure to settle before an ordinary appeal is resolved, which could allow the ruling to stand and threaten bellwether practice. PSC notes that one of the three early trials (*Vigneron*) was not a bellwether—a fact DuPont set forth, *see* Pet. at 1, 8-9. But without the two bellwethers, collateral estoppel throughout the MDL would rest on a single-plaintiff trial cherry-picked by the PSC.

4. PSC Does Not Address Significant Authority. PSC does not mention key decisions featured in DuPont’s Petition showing due process problems specific to the mass tort context. *See, e.g., In re Chevron U.S.A.*, 109 F.3d 1016 (5th Cir. 1997); *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000). On *Parklane*, PSC argues there is no risk of unfairness after three verdicts for individual plaintiffs. Opp. at 25. But PSC does not address the unfairness to defendants of a “heads-I-win, tails-you-lose” rule in the mass tort context, nor that later-filed plaintiffs often present more marginal facts. PSC also provides no circuit-level authority in support

of the district court's collateral estoppel decision. The district court decisions on which PSC relies (Pet. at 31-32) are inapplicable, abrogated by circuit-level authority, and/or do not involve non-binding trials.

5. The Verdict Forms Defeat PSC's Argument. PSC cites to expert testimony to broaden the jury verdicts beyond their actual findings. Opp. at 17-18. But PSC fails to cite anything in the jury instructions or plaintiff-specific verdict forms showing the juries found that DuPont breached duties to "entire communities." *See id.* No such finding was made. *See* Pet. at 9-10, 21-25.

### **CONCLUSION**

For the foregoing reasons, and the reasons stated in its Petition, DuPont respectfully requests that this Court issue a writ of mandamus.

Dated: January 16, 2020

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This Reply complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), 27(d)(2)(C), and 21(d) because it contains 617 words and is 3 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

This Reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman.

*/s/ Damond R. Mace*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2020, a copy of the foregoing reply was filed electronically. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. A copy of the foregoing reply will also be provided to the district court via electronic and overnight mail.

Dated: January 16, 2020

Respectfully submitted,

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