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' REPLY TO DUPONT'S OPPOSITION TO THE PLAINTIFFS' STEERING COMMITTEE'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF ISSUE PRECLUSION/COLLATERAL ESTOPPEL

Plaintiffs, by and through Counsel, respectfully files this Reply to E.I. du Pont de Nemours and Company's ("DuPont's") Opposition to the Plaintiffs' Steering Committee's Renewed Motion for Summary Judgment on the Grounds of Issue Preclusion/Collateral Estoppel (Def's. Opp'n") [ECF No. 5278]. As stated in Plaintiffs' Renewed Motion [ECF No. 5274], three juries in this MDL have found that DuPont owed plaintiffs a duty and breached that duty by the negligent discharge of C-8 into the environment. This Court has issued numerous rulings on these issues and issues relating to class membership, general causation, and the inapplicability of the Ohio Tort Reform Act. (*See* Pls.' Renewed Mot. at 2.) Repeatedly relitigating these issues is an inefficient use of judicial resources and will only serve to delay these proceedings. DuPont had a full and fair opportunity to litigate these issues and presented a vigorous defense in each of the three separate trials. DuPont also appealed these issues to the Sixth Circuit where they were fully briefed, and oral argument was held. DuPont then voluntarily dismissed its appeal of these issues before an opinion was issued and settled over 3,500 cases involving *Leach* class members

whose negligence claims were identical to the negligence claims of the plaintiffs whose cases went to trial and which claims are the subject of Plaintiffs' Renewed Motion.

In its Opposition, DuPont ignores the overwhelming common issues between Plaintiffs' cases and the three prior trial cases. DuPont also misunderstands the relief requested in Plaintiffs' Renewed Motion, incorrectly arguing that DuPont will be prohibited from presenting evidence regarding punitive damages even though Plaintiffs have *not* requested that collateral estoppel be applied to the prior jury findings related to punitive damages. Lastly, DuPont raises issues that it feigns will prejudice it at trial if Plaintiffs' Motion is granted yet the issues it raises are related to specific causation which are not a part of Plaintiff's Renewed Motion.

I. <u>ARGUMENT</u>

A. Collateral Estoppel/Issue Preclusion is Proper Regardless of whether Federal Law or Ohio Law is Applied

DuPont argues that Ohio law applies when determining the preclusive effect of a prior federal court judgment based upon diversity. (Defs' Opp'n at 7-8.) Although it has been generally held or recognized that in cases involving *state* court judgments a federal court sitting in diversity applies the law of the state in which the federal court sits, the Sixth Circuit has held that a federal court sitting in diversity applies *federal* law when considering the preclusive effect of a *federal* court judgment. In *GE Med. Sys. Eur. v. Prometheus Health*, the Sixth Circuit held:

> The parties rely on Ohio res judicata law. Ohio law does not apply here, however, because the issue – [DuPont] liability – was previously determined by a federal court, not a state court

394 Fed. Appx. 280, 283 n.2 (6th Cir. 2010) (citation omitted); *see also J.Z.G. Resources v. Shelby Ins. Co.,* 84 F.3d 211, 213-14 (6th Cir. 1996) (holding that federal [issue preclusion] principles apply in federal diversity actions involving prior District Court judgment on state-based claims); *Power Mktg. Direct Inc. v. Clark*, 2006 U.S. Dist. LEXIS 63582, at *19 (S.D.

Ohio 2006) (recognizing that in a diversity action involving state claims a "federal court . . . looks to federal law on collateral estoppel to determine the preclusive effect of a prior federal judgment") (citation omitted); *Logan Farms v. HBH, Inc.,* 282 F. Supp. 2d. 776, 787 (S.D. Ohio 2003) (same).

DuPont relies on a narrow ruling in *Semtek Int'l., Inc. v. Lockheed Martin Corp*., 531 U.S. 497 (2001) in support of its argument that Ohio law applies. The *Semtek* decision, however, was decided on the very narrow issue of whether the dismissal of a *claim* under Fed. R. Civ. P. 41(b) also precludes the assertion of the *claim* under state law and therefore has limited application to issue preclusion cases. *See, e.g., In re Univ. Serv. Fund Tel. Billing Practices Litig*., 300 F. Supp. 1107, 1134 (D. Kan. 2003) (recognizing that *Semtek* does not address issue preclusion); *Matosantos Commer. Corp. v. Applebee's Int'l. Inc*., 245 F.3d 1203, 1207-08 (10th Cir. 2001) (same); *CSX Transp., Inc. v. Gen. Mills, Inc*., 846 F.3d 1333, 1338 (11th Cir. 2017) (same).

In *Semtek*, the Supreme Court held that a diversity case dismissed under Rule 41(b) due to expiration of the California state statute of limitations did not preclude a later suit under a different state's laws with a different statute of limitations because the "expiration of the applicable statute of limitations merely bars the remedy and does not extinguish the substantive right, so that the dismissal on that ground does not have *claim-preclusive effect* in other jurisdictions with longer, unexpired limitations periods." *Id* at 504 (citations omitted) (emphasis added). *Semtek* involved the preclusive effect of a dismissal with prejudice under Rule 41(b) -- *not* issue preclusion -- and therefore has limited application to the issue before this Court. *See Zanke-Jodway v. Fifth Third Mortg. Co.*, 557 B.R. 560, 565 (Bankr. E.D. Mich. 2016) ("Essentially, *Semtek* means that when a federal court dismisses an action while incorporating

state law, it does not necessarily mean that the action is barred from being brought in another state where the law is different.").

DuPont's citation to *Leonard v. RDLG,* LLC, 644 Fed. Appx. 612 (6th Cir. 2016) does not assist its argument and instead supports Plaintiffs' position. In *Leonard*, the Sixth Circuit found that the federal law of issue preclusion controlled because there was a federal interest in the case given that the relevant state law was incompatible with federal bankruptcy interests, therefore it applied *federal* law by default, *id.* at 616, which is not uncommon in Bankruptcy cases. *See Gonzalez v. Moffitt*, 252 B.R. 916, n.4 (6th Cir. 2000) ("The Sixth Circuit, when faced with determining the issue-preclusive effect of a prior federal court judgment, has followed the majority rule and applied federal law.") (citations omitted). *Leonard* did *not* reach the issue of whether state or federal law applied to issue preclusion relating to a federal court judgment in a diversity case and also did not address the prior decision in *G.E. Med. Sys. Eur.*, which held that Ohio issue preclusion law does *not* apply if liability was "previously determined by a federal court, not a state court." 394 Fed. Appx. at 283 n.2 (6th Cir. 2010).

However, even if this Court extends *Semtek* to issue preclusion as some courts have done,[1] collateral estoppel still precludes DuPont from litigating the issues in Plaintiffs' Renewed Motion because, as the Supreme Court recognized in *Semtek*, state law will not apply where "the state law is incompatible with federal interests." 531 U.S. at 509. Here, this Court clearly has a compelling and overriding federal interest in the effective and uniform administration of justice. This Court has overseen three trials on identical issues against the same defendant and three separate juries issued identical rulings on the issues that are the subject of Plaintiffs' Renewed Motion. DuPont appealed numerous issues to the Sixth Circuit which heard oral argument on

[1] *See, e.g., Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 2016 U.S. Dist. LEXIS 186668, at *19 (D. Nev. 2016).

DuPont's appeal. DuPont voluntarily dismissed its appeal and a final judgment has been entered in the three cases that went to trial. This Court clearly has a significant federal interest in administering its docket, streamlining litigation proceedings, conserving judicial resources and preventing "panel shopping." "The basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function . . . and should be determined by federal law." *Restatement (Second) of Judgments* § 87, comment b; *see also In re Air Crash at Detroit Metro. Airport*, 776 F. Supp. 316, 322 (E.D. Mich. 1991) (noting that federal courts have a strong interest in determining the scope and finality of their own judgments).

Furthermore, this Court does not necessarily need to determine whether *Semtek* applies to Plaintiffs' case because, even if Ohio law is applied, Plaintiffs are still entitled to the preclusive effect of the three juries' prior findings in this MDL. Under Ohio law, collateral estoppel applies with an issue that "(1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *State v. Pub. Emps. Ret. Bd.*, 881 N.E.2d 294, 301 (Ohio Ct. of Appeals 2007). "The essential test in determining whether collateral estoppel is to be applied is whether the party against whom the prior judgment is being asserted had full representation and a full and fair opportunity to litigate that issue in the first action." *State ex rel. Bradford v. Ohio Dep't of Rehab. & Corr.*, 2017 Ohio App. LEXIS 3597, at *10 (Ohio Ct. App. 2017) (citations omitted).

Clearly, the first two elements are satisfied. Regarding privity, the Ohio Supreme Court has recognized that "[w]hat constitutes privity in the context of [collateral estoppel] is somewhat amorphous" and "that certain situations warrant a broader definition of privity" *Brown v. City of Dayton*, 730 N.E. 2d 958, 961 (Ohio 2000). Therefore, the Ohio Supreme Court has "applied a

broad definition to determine whether the relationship between the parties is close enough to invoke the doctrine," *Kirkhart v. Keiper*, 805 N.E.2d 1089, 1092 (Ohio 2004) (citing *Brown*), and has "shown that it is willing to relax the rule where justice would reasonably require it." *Goodson v. McDonough Power Equip.*, 443 N.E.2d 978, 984 (Ohio 1983). "In ascertaining whether there is an identity of such parties [to support application of issue preclusion,] a court must look behind the nominal parties to the substance of the cause." *Id.* at 985. "As a general matter, [under Ohio law] privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the [collateral estoppel]." *State ex rel. v. Public Emps. Ret. Bd.*, 881 N.E.2d 294, 301 (Ohio 2007) (citations and internal quotations omitted); *see also Kiara Lake Estates, LLC v. Bd. of Park Comm'rs.*, 2014 U.S. Dist. LEXIS 23603, at *14 (S.D. Ohio 2014) (holding that under Ohio law mutuality can be relaxed "in the interests of justice, provided the party to be precluded had the opportunity to fully litigate the issue"); *Scherer v. Wiles*, 2015 U.S. Dist. LEXIS 96892, at *59-60 (S.D. Ohio 2015) ("collateral estoppel applies in Ohio when a party against whom the doctrine is asserted had his day in court and was permitted to litigate the specific issue sought to be raised in a later action") (citations omitted); *Dudee v. Philpot*, 2019 Ohio App. LEXIS 4019, at *12-13 (Ohio Ct. App. Sept. 27, 2019) ("Where the defendant clearly had his day in court on the specific issue brought into litigation at the later proceeding, he is estopped from relitigating the issue.").

Therefore, under the relaxed concept of privity that Ohio courts apply for purposes of collateral estoppel, neither a contractual nor a beneficial relationship is necessary. *Brown*, 730 N.E.2d at 962. Even though Plaintiffs *do* have a contractual relationship with DuPont by virtue of the *Leach* Settlement Agreement, Plaintiffs *also* clearly have a mutuality of interest and an

identity of a desired result. All Plaintiffs with cases pending in this MDL allege that they have been injured as a result of drinking water contaminated with DuPont's C-8, have a substantive legal contractual relationship with DuPont by virtue of being *Leach* class members, and share the identity of a desired result – namely damages as a result of contracting cancer. Moreover, DuPont and *Leach* class members are also in privity as they are both bound by the judgement in *Leach* which has preclusive effect on claims between the parties. *Blakely v. United States*, 276 F.3d 853, 866 (6th Cir. 2002) ("consent judgment which has been freely negotiated by the parties, and has been approved by the court, has the full effect of a final judgment for purposes of claim preclusion."); *see also 533 Short North LLC v. Zwerin*, 2015 Ohio App. LEXIS 3894, at *36 (Ohio Ct. App. 2015) (class members and defendants are in privity for the purposes of collateral estoppel).

Also, Ohio law does not, as argued by DuPont, require strict mutuality. (DuPont's Opp'n at 7-8.) DuPont cites to two cases in support of its argument, neither of which are instructive. *Carpenter v. Long,* 196 Ohio App.3d 376 (Ohio Ct. App. 2011) involved *defendants* who were not bound to the prior judgment and *Erie Ins. Prop. & Cas. Co. v. Crawford*, 2014 U.S. Dist. LEXIS 24613, at *15 n.4 (S.D. Ohio Feb. 25, 2014) was a criminal case with no relevance to Plaintiffs' case.

Courts in Ohio and the Sixth Circuit recognize the importance of "striking a balance between the need to eliminate repetitious and needles litigation, and the interest of litigants in a full and fair adjudication of their claims" and that "a party should not be collaterally stopped from relitigating an issue when its subsequent use ***could not be foreseen or where the party had little knowledge or incentive to litigate fully and vigorously***." *Hopp v. Arthur J. Gallagher & Co.*, 2019 U.S. Dist. LEXIS 26877, at *9-10 (N.D. Ohio Feb. 20, 2019) (citations omitted)

(emphasis in original). "The main legal thread which runs throughout the determination of the applicability of [collateral estoppel] is the necessity of a fair opportunity to fully litigate and to he 'heard' in the due process sense." *Id.* at *10 (citations omitted); *see also In re Air Crash at Detroit Metro. Airport*, 776 F. Supp. 316, 321-22 (E.D. Mich. 1991) (noting that the required elements of collateral estoppel, including mutuality, reflect concerns of fairness, judicial economy, and finality)

The Supreme Court "grant[s] trial courts broad discretion to determine when [collateral estoppel] should be applied." *Parklane Hosiery Co., Inc.*, 439 U.S. 322, 327-28 (1979). DuPont has been 'heard' *three* times on the issues that are the subject of Plaintiffs' Renewed Motion and *three* separate juries have found DuPont liable. DuPont, by its own admissions, vigorously litigated these issues including an appeal to the Sixth Circuit which it voluntarily withdrew. DuPont has clearly had more than a fair opportunity to litigate these issues.

B. The Individual Issues Raised by DuPont are Related to Specific Causation and Do Not Bar a Finding of Collateral Estoppel/Issue Preclusion.

DuPont's argument that Ohio's law relating to collateral estoppel contains a "precise factual issue" requirement is baseless. (DuPont's Opp'n at 15-18.) To the extent there are any alleged differences in the remaining Plaintiffs' cases relating to the various water districts (*e.g.*, level of contamination or duration of consumption), these issues are related to specific causation and DuPont is free to present such evidence to the jury during the specific causation phase of the future trials. Regarding the "precise factual issue" standard advanced by DuPont, there is no such standard under Ohio law, even assuming that Ohio law on issue preclusion applies.

As stated *supra*, Ohio law relating to collateral estoppel/issue preclusion requires that the issue "(1) was actually and directly litigated in the prior action; (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral

estoppel is asserted was a party in privity with a party to the prior action." *State v. Pub. Emps. Ret. Bd.*, 881 N.E.2d 294, 301 (Ohio Ct. App. 2007). There is no "precise factual issue" requirement as suggested by DuPont. (Def's Opp'n at 15.) In fact, this phrase is contained in a dissent in *Fort Frye Teacher's Ass'n v. State Empls. Rels. Bd.*, 692 N.E.2d 140, 148 (Ohio 1998) and is obviously not authority on this issue and Plaintiffs could not find any other cases in the Ohio collateral estoppel/issue preclusion context that contain this phrase.

DuPont cannot genuinely dispute that the issues that are the subject of Plaintiffs' Renewed Motion were "actually and directly litigated" in the prior three trials, so DuPont attempts to create a standard that does not exist. DuPont also relies on dicta from *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984). In that case, the Supreme Court held that "to allow [a party] to litigate twice with the same party an issue arising in both cases from virtually identical facts . . . would substantially frustrate the [collateral estoppel' doctrine's purpose of protecting litigants from burdensome relitigation and of promoting judicial economy." *Id.* at 172 (citing *Parklane*, 439 U.S. at 326). Therefore, *Stauffer* supports the application of collateral estoppel to Plaintiffs' cases because, as described in detail in Plaintiffs' Renewed Motion, the testimony that was presented at the *Bartlett*, *Freeman* and *Vigneron* trials and the resulting verdicts made clear that the duty DuPont breached was to the *entire* communities surrounding its Washington Works plant and *not* just a duty to customers of individual water districts, and the facts relating to DuPont's duty and breach were virtually identical. (Pls.' Renewed Mot. at 8-10.)

Moreover, to the extent that are any alleged differences in the remaining Plaintiffs' cases relating to the various water districts (*e.g.*, level of contamination or duration of consumption), these issues are related to specific causation and DuPont is free to present such evidence to the jury during the specific causation phase.

Lastly, regarding Chemours, it is at best merely an indemnitor of DuPont and its conduct is not *per* se at issue in this litigation. Therefore, DuPont's feigned concern over Chemours' well-being, who has sued DuPont for fraud relating to the Chemours spin-off thereby putting the validity of its actual indemnitor status at issue, is meritless.

C. Plaintiff's Renewed Motion Does Not Request Collateral Estoppel/Issue Preclusion on Punitive Damages so there are no Seventh Amendment or Due Process Concerns.

DuPont's arguments relating to the Seventh Amendment and Due Process are based on a misreading of Plaintiffs' Renewed Motion. (DuPont's Opp'n at 20-23.) Plaintiffs have *not* moved for summary judgment on punitive damages. DuPont's argument in this regard is, therefore, meritless as Plaintiffs fully intend to put on evidence at trial in support of each plaintiff's claim for punitive damages. As such, there are no Seventh Amendment or Due Process implications.

Under Ohio law, to recover for punitive damages, a plaintiff must prove that (1) the acts or omissions of the defendant, directly or as principal, demonstrate "malice, aggravated or egregious fraud, oppression, or insult," and (2) the plaintiff proves actual damages resulting from such acts or omissions. R.C. 2315.21(C); DMO 7 [ECF No. 4185]. Punitive damages are recoverable for misconduct that has a great probability or high foreseeability of causing substantial harm. *Calmes v. Goodyear Tire & Rubber Co.*, 575 N.E.2d 416 (Ohio 1991). "Misconduct greater than negligence is required for an award of punitive damages" and "mere foreseeability cannot be equated with great probability." *Id.* at 420.

Under Ohio law the foreseeability standard for negligence – mere foreseeability – is not the same as the standard for punitive damages which is a "great probability" or "high foreseeability" of harm, *id.*, and that Plaintiffs must prove by "clear and convincing evidence that

DuPont acted with acual malice. (*See Freeman* Phase II Jury Instrs. [*Freeman* ECF No. 103].) Therefore, Plaintiffs will present evidence that DuPont acted with malice (*i.e.*, a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm"), *id.*, to which DuPont will have an opportunity to respond. Nothing in Plaintiffs' Renewed Motion will strip DuPont from explaining its malicious conduct to subsequent juries. Indeed, Plaintiffs look forward, once again, to presenting evidence showing that "DuPont knew that C-8 was harmful, that it purposefully manipulated or used inadequate scientific studies to support it position, and/or that it provided false information to the public about the dangers of C-8." (DMO 7 at 10.)

D. The Application of Issue Preclusion Would Streamline these Proceedings and Would Not Prejudice DuPont.

DuPont's argument that applying issue preclusion to the prior *three* jury findings would not result in efficiency gains is wrong. (Def's Opp'n at 23-24.) A finding of issue preclusion on duty/breach will significantly streamline these proceedings as Plaintiffs will not be required to present evidence on 'mere foreseeability' and instead will focus on evidence relating to malice, a much different and higher standard. DuPont's argument is suspect considering that these MDL proceedings 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.").[2]

Despite DuPont's argument to the contrary, courts routinely utilize collateral estoppel in the mass tort and/or class action context. (Pls.' Renewed Mot. at 16-17) (citing cases)*; see also Phillip Morris, USA, Inc. v. Douglas*, 110 S.3d 419, 429 (Fla. 2013) (citing cases).[3] For example, in the *Engle* tobacco litigation, the Supreme Court of Florida held that a jury's prior finding of liability precluded the defendants from relitigating the same liability issues in subsequent trials. *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006). Specifically, "the [*Engle*] Phase I common liability jury determined general causation [leaving] specific or individual causation . . . to be determined on an individual basis." *Douglas*, 110 S.3d at 428. Therefore, for a plaintiff to prevail on a subsequent individual claim, he or she must establish (i) membership in the [ ]class; (ii) individual causation . . .; and (iii) damages. *Id.* at 430.

The Phase I findings in *Engle* were given preclusive effect because the claims in the subsequent individual actions were *the same causes of action* between *the same parties*. *Id.* at 432. ("[collateral estoppel] prevents *the same parties* from relitigating *the same cause of action* in a second lawsuit and is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.") (internal citations and quotations omitted) (emphasis in

---

[2] 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]).

[3] *In re Air Crash at Detroit Metro. Airport,* 776 F. Supp. 316, 325 (E.D. Mich. 1991) (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."); *Ramirez v. Vintage Pharms., LLC*, 852 F.3d 324, 332 (7th Cir. 2017) (recognizing that issue preclusion may be appropriate in mass tort litigation)

original); *see also Daenzer v. Wayland Ford, Inc.,* 210 F.R.D. 202, 205 (W.D. Mich. 2002) (entering summary judgment on the issue of liability, decertifying the class on the issue of damages and stating that "[t]he Court's decision as to liability is res judicata in any damages action individual class members decide to bring").

The Florida Supreme Court revisited this issue in a subsequent individual smoker case, *Phillip Morris, USA, Inc. v. Douglas*, 110 S.3d 419 (Fla. 2013), where the defendants challenged the validity of the *Engle* decision. *Id.* The court rejected the defendants' challenges stating that its decision in *Engle* "allowing the common liability findings to stand would serve no purpose and would in fact be obliterated if the *Engle* defendants were permitted to relitigate matters pertaining to their conduct." *Id.* at 429.[4]

DuPont's argument relating to bellwether trials also misses the mark. *See Adams v. United States*, 2010 U.S. Dist. LEXIS 116051, at *24 (D. Idaho 2010) (issue preclusion applies to findings of bellwether trial where "DuPont had a full and fair opportunity to litigate" the relevant issue). DuPont fails to understand that every plaintiff in this MDL is part of the *Leach*

---

[4] The court also stated:

> we are not alone in holding that a defendant's common liability may be established through a class action and given binding effect in subsequent individual damages actions. *See, e.g., Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (recognizing that a class action may be decertified after the liability trial and that the liability findings may be used in subsequent damages actions); *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 628–29 (5th Cir.1999) (holding a defendant's common liability to all class members for negligence may be tried by one jury and that plaintiff-specific matters such as causation and damages may then be tried by different juries in separate cases that do not revisit the first jury's findings regarding the defendant's conduct); *Daenzer v. Wayland Ford, Inc.,* 210 F.R.D. 202, 205 (W.D. Mich. 2002) (following summary judgment on liability the court decertified the class for individual damages trials and stated that "[t]he Court's decision as to liability is res judicata in any damages action individual class members decide to bring"); *In re Copley Pharm., Inc.,* 158 F.R.D. 485, 492 (D.Wy.1994) ("[T]he Defendant's liability for the contaminated Albuterol . . . may be tried to a single jury in a unified trial. Then, if the Plaintiffs are successful, class members may pursue their individual cases in separate trials to determine if they suffered an injury from the contaminated Albuterol, and if so, the proper measure of any damages.").

Douglas, 110 So.3d at 429.

class and as such is entitled to the benefits of the *Leach* Settlement Agreement. Simply because these cases are being tried in the MDL context, does not relieve DuPont from the benefits of class membership, including the recognized fact the determinations made in individual class member trials can have preclusive effect in subsequent trials, notwithstanding that DuPont did not specifically agree to such preclusive effect. Certainly, if the juries in the first *three* individual trials had found for DuPont, DuPont would vigorously argue that those findings had preclusive effect on future class member trials.

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. (Pls.' Renewed Mot. at 8-10.) Each jury has found for Plaintiffs on their respective negligence claims after considering the *same* conduct of DuPont. As this Court previously recognized, 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 at 33 [ECF No. 4624] (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.

The Supreme Court grants "trial courts broad discretion to determine when [collateral estoppel] should be applied, *Parklane*, 439 U.S. at 331, and 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) (citation omitted). Granting Plaintiff' Renewed Motion 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].)

DuPont also voluntarily forfeited its appellate rights when it settled the *Bartlett* case and is now bound by this Court's decisions in that case, including decisions relating to general causation and the Ohio Tort Reform Act. (Pls.' Renewed Mot. at 10-11); *see Remus Joint Venture v. McNally*, 116 F.3d 180, 186 (6th Cir. 1997) (finding that a party cannot destroy the preclusive effect of final judgments "by deliberately mooting questions on appeal" and subsequent appeals will be dismissed "for lack of an Article III case or controversy.") (citation omitted).

Every factor that is considered in an issue preclusion analysis is present here and each shows the fundamental fairness of issue preclusion because of the same claims, the privity of parties, burden of proof, and opportunity to litigate in the three prior cases. Allowing DuPont to retry these same issues against successive parties is an inefficient use of judicial resources and would only serve to unduly burden this Court, Plaintiffs and future jurors.

III. CONCLUSION

For the reasons set forth above and in Plaintiffs' Renewed Motion, offensive issue preclusion should apply, and Plaintiffs Motion should be granted.

Respectfully submitted,

DATED: October 21, 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 21st day of October, 2019 and was thus served electronically upon all counsel of record.

/s/ Michael London