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.**

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

The Plaintiffs' Steering Committee's ("PSC") summary judgment motion is remarkable for its tardiness. *See* CMO 26 [ECF 5185] at 3 & CMO 27 [ECF 5186] at 2-3 (setting the dispositive motion deadlines in *Swartz* and *Abbott* for July 9, 2019).[1] Beyond this fatal defect as to *Swartz* and *Abbott*, PSC's motion seeks to apply the wrong substantive law—ignoring the actual governing precedent—to all remaining cases in this MDL and without any consideration of the distinct issues each case presents. Because the finder of fact must make individualized determinations regarding questions of foreseeability of the likelihood of harm and the related punitive damages inquiry into whether there was a great probability of substantial harm in each of these cases, the Court should deny PSC's summary judgment motion.

I. INTRODUCTION

PSC's renewed motion seeks to preclude E. I. du Pont de Nemours and Company ("DuPont") from having its day in court with respect to the post-global settlement cases—involving Plaintiffs with circumstances markedly distinct from the three Plaintiffs whose cases were tried to verdict. PSC's motion also neglects to address the fact that many of the post-global settlement cases involve a new defendant: The Chemours Company ("Chemours"), which is not subject to this motion, and the concomitant unfair prejudice to DuPont that would result from an instruction to jurors that DuPont was negligent when those same jurors had to evaluate the same evidence that would be used in an effort to hold Chemours directly liable. PSC's motion seeks an

[1] Notably, PSC filed a substantially similar motion earlier this year, and subsequently withdrew that motion [ECF 5220]. Nothing of substance that motivated PSC's prior withdrawal (which PSC claims was PTO 51 and multi-plaintiff trials) has changed. Indeed, the parties just submitted their case selections for Joint Trial No. 2. PSC nonetheless sought and promptly obtained—without any time for contested briefing—an Order expediting the briefing of its pending motion in view of the November 4, 2019 trial date in *Swartz*. (ECF 5274) at 2-3 (requesting expedited briefing in view of the *Swartz* trial); (ECF 5275) (order granting expedited briefing). This was done over three months after the July 9, 2019 deadline for summary judgment motions in *Swartz* and *Abbott*. At least as to those two cases, PSC's motion should be denied on this basis alone.

unprecedented, constitutionally unviable, and fundamentally unfair expansion of the doctrine of non-mutual offensive collateral estoppel.

PSC hopes to block any challenge of their claims of duty and breach pertaining to all claims of negligence, and effectively foreclose any defense to claims for punitive damages in all of the pending and future cases in this MDL. PSC also seeks application of offensive collateral estoppel regarding "issues relating to class membership and causation and the inapplicability of the Ohio Tort Reform Act" [ECF 5274 at 2] that this Court, much less any jury, has never addressed.

Although PSC purports to justify its motion based on certain federal legal precepts, the United States Supreme Court has held—in cases that *post-date* the authorities on which PSC relies—that, for *res judicata* purposes, the applicable law is that which "would be applied by state courts in the State in which the federal diversity court sits." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-508 (2001); *see also Taylor v. Sturgell*, 553 U.S. 880, 891 n.4 (2008) (reaffirming *Semtek*). Thus, Ohio law governs PSC's motion—a reality that should result in the Court swiftly and confidently denying PSC's renewed motion because Ohio law generally bars the use of offensive non-mutual collateral estoppel. *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, syllabus at 1 (1983); *see also, e.g., State v. Miller*, 2019-Ohio-92, ¶ 15 (Ct. App.).

In addition, federal law as applied by the Sixth Circuit is congruent with Ohio law on the general unavailability of offensive, non-mutual collateral estoppel, particularly in mass tort cases. Governing precedent recognizes that "the Supreme Court [has] explicitly stated that offensive collateral estoppel could not be used in mass tort litigation," further undercutting PSC's renewed motion. *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 n.11 (6th Cir. 1984) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 & n.14 (1979)). Unsurprisingly, PSC's renewed motion asks this Court to disregard those governing precedents.

PSC's renewed motion also ignores a basic constitutional consideration, namely that the Seventh Amendment gives DuPont a right to a jury trial and places punitive damages determinations within the sole province of the jury, not the Court. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). PSC's renewed motion flouts precedent in seeking to bar the litigation of undecided issues, including those that directly impact the question of punitive damages in this MDL. (*See, e.g.*, Renewed Mot. at 17-18). For example, as this Court has previously observed, the question of foreseeability of harm to a person in the position of a particular Plaintiff impacts both negligence *and* punitive damages. Negligence by DuPont requires a finding that it knew or should have known that C-8 at community exposure levels was likely to cause harm to a person in the position of a particular Plaintiff.[2] Punitive damages requires a similar finding—that DuPont knew (was "conscious" of the fact) that C-8 at levels of exposure in the specific manner, context, and timing alleged by a particular Plaintiff created a "great probability" of substantial harm.[3] In the pending cases, DuPont has a Seventh Amendment right to have a jury decide these precise issues, which are not the same as the issues determined in prior cases.

More fundamentally, instructing jurors that they must begin their punitive damages inquiry by pre-supposing that community levels of exposure to C-8 were likely to cause harm would effectively direct the jury in each trial to reach a certain result—preventing the jurors from actually resolving the issues bearing on punitive damages, and thus violating the Seventh Amendment. It would similarly violate "the Constitution's Due Process Clause" by "us[ing] a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Although these basic legal principles alone should result in

[2] *See, e.g., Freeman* ECF 102 at 23.

[3] *See, e.g., Freeman* ECF 102 at 32.

the denial of PSC's motion, the fact that the three trials that have resulted in verdicts have reached ***inconsistent*** results on the propriety of punitive damages independently justifies the rejection of PSC's request to employ non-mutual offensive collateral estoppel in this MDL.

The application of non-mutual offensive collateral estoppel to these questions would also frustrate any claimed trial efficiencies because of the overlap in the evidence that is material to both the negligence and punitive damages inquiries.

PSC's renewed motion likewise ignores numerous critical factual and legal variables in each of the three prior trials, both as to each other and as to the specific context of each of the separate cases now pending, such as the *Swartz* case set for trial on November 4, 2019. Significantly, PSC acknowledges that issue preclusion can only potentially apply where the "identical issue" or "precise issue" was previously litigated fully. (Renewed Mot. at 4, 5.) Yet PSC does not even attempt to demonstrate that the "precise issues" in the prior and pending cases are "identical." Nor could it do so. The negligence issues in each case are *not* identical, as the Court's jury instructions make clear. *See, e.g.*, *Vigneron* ECF 195 at 24 ("To prove the existence of a duty, Mr. Vigneron must show by a preponderance of the evidence that a reasonably prudent corporation would have foreseen at the relevant time that injury was likely to result *to someone in Mr. Vigneron's position* from DuPont's conduct." (emphasis added)).

Since the Global Settlement Agreement ("GSA"), a number of other Plaintiffs have filed suit claiming injuries arising from exposure in other water districts, during different periods, asserting loss of consortium claims (which in the pre-GSA cases were always dropped before trial). For example, Angela Swartz, who lived over 50 river miles from the Washington Works plant and who did not live in any of the affected water districts, primarily claims exposure from working part-time for about 15 months at a grocery store in Pomeroy, Ohio in 1992-1993, at which time

the claimed levels of C-8 in water ranged (according to *Shin* modeling[4] on which her own expert relies) only from about 0.06 ppb to 0.075 ppb—far below DuPont's CEG of 3 ppb.[5] Also, unlike each of the first three trial Plaintiffs, Mrs. Swartz does ***not*** claim that she lived in one of the water districts referenced in the *Leach* settlement. The jury in her case could easily find that DuPont had no reason to foresee a likely injury to someone in Mrs. Swartz' position. Further, while some pre-GSA spouses initially asserted and then abandoned loss of consortium claims, Mrs. Swartz's husband persists in pursuing a consortium claim. These are just a few examples of the many factual, temporal, and legal distinctions related to Mrs. Swartz that vary from any prior Plaintiff.

Similarly, various Plaintiffs in the current cases allege exposure in Pomeroy, Mason County, and other water districts with extremely low levels of C-8, and infrequent exposure in widely disparate years—which dramatically affects application of the legal standards to the facts, especially in light of the changing state of the science over decades. PSC also cherry-picks testimony of prior Plaintiffs' retained experts as though it reflects the binding rationale of the jurors' earlier verdicts. PSC fails to mention that the pending cases involve different Plaintiffs asserting new claims, and that many of these new Plaintiffs have asserted their claims against a new Defendant as well: Chemours. PSC has not sought, or advanced any basis for, the application of non-mutual offensive collateral estoppel against Chemours. The fact that not all the same parties were involved—Chemours is a party in some cases now, but never was in the past—is also a reason why preclusion should not be applied against DuPont.

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[4] Shin et al., *Envt'l. Fate & Transport Modeling for Perfluorooctanoic Acid Emitted from the Washington Works Facility in W. Va.*, Environ. Sci. Technol. 2011, 45 (D.2142) [hereinafter "*Shin*"].

[5] As the Court will recall, DuPont's Community Exposure Guideline ("CEG") was 3 ppb for someone with all of their exposure from drinking water (like Mrs. Swartz). It was 1 ppb if only 20% was from drinking water and 80% of the exposure was from air. In addition to the grocery store, Mrs. Swartz claims exposure based on visits to the residences of her mother and sister, and her expert acknowledges that all of those claimed exposures were also below 1 ppb.

Only three trials have gone to verdict in the course of this MDL, which at one point had approximately 3,500 cases. The first trial involved a Plaintiff who claimed kidney cancer from exposure to water containing C-8 in the Tuppers Plains-Chester Water District, in which she resided from 1970 to 1990, and 1993 onward. It resulted in an award of compensatory damages and a jury finding that Plaintiff was ***not*** entitled to punitive damages. The second trial involved a Plaintiff from Little Hocking who claimed that exposure to water containing C-8 from the Little Hocking Water Association from 1993 onward caused his testicular cancer. This second trial resulted in an "upside down" verdict with an award of both compensatory and punitive damages, with the punitive award being less than 10% of the compensatory award. The third trial was the first non-bellwether trial, selected by PSC and set for trial over DuPont's objections,[6] and involved a Plaintiff who claimed exposure to water containing C-8 from the City of Belpre, in which he resided from 1960 to 1969, and from the Little Hocking Water Association, which supplied his residential water from 1981 to 1987 and 1990 to 2014. After these three verdicts, DuPont and all the then-existing Plaintiffs entered into the GSA, resolving all of the then-pending claims and lawsuits.

In light of the significant factual and other differences from the three pre-GSA trials, there are grave problems with PSC's request that this Court give preclusive effect—in *Swartz*, *Abbott*, and in all future MDL trials—to the prior determinations regarding DuPont's duty and breach, and the related, but inconsistent, determinations of punitive damages. Those problems are precisely why the governing law bars the application of offensive non-mutual collateral estoppel in this litigation, and why this Court should deny PSC's renewed motion.

[6] *See* MDL ECF Nos. 4603 and 4604 (setting forth DuPont's objections to the scheduling of *Vigneron* and other trials); CMO 20 [ECF 4624] (denying DuPont's objections).

II. LAW AND ARGUMENT

A. Legal Standards

Summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record that demonstrate "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Even if these steps are accomplished, the nonmoving party may nevertheless defeat summary judgment by "set[ting] forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In the event of controversy, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (*citing Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

B. Ohio Law, Which Governs The Preclusive Effect Of Prior MDL Judgments, Bars Offensive Non-Mutual Collateral Estoppel

In determining the preclusive effect of a prior federal-court judgment rendered within the Court's diversity jurisdiction, "the federally prescribed rule of decision [is] the law that would be applied by state courts in the State in which the federal diversity court sits." *Semtek Int'l Inc.*, 531 U.S. at 507-08; *see also Taylor*, 553 U.S. at 891 n.4 (reaffirming *Semtek*); *Leonard v. RDLG, LLC (In re Leonard)*, 644 F. App'x 612, 616 (6th Cir. 2016) (embracing and applying *Semtek*).

PSC's motion ignores *Semtek* (and *Taylor* and *Leonard*)—which DuPont previously identified in its opposition to a similar motion that PSC filed earlier this year (*see* ECF 5208 at 6-7). PSC once again incorrectly calls for the application of federal law without regard to the Court's obligation to apply the law of the state of Ohio in this diversity case. Ohio law does *not* permit offensive non-mutual collateral estoppel:

> In Ohio, the general rule is that mutuality of parties is a requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. A judgment, in order to preclude either party from relitigating an issue, must be preclusive upon both.

Goodson, 2 Ohio St. 3d 193, *syllabus* at 1;[7] *accord Carpenter v. Long*, 196 Ohio App. 3d 376, 386-87 (2011) (affirming Ohio's mutuality requirement); *Erie Ins. Prop. & Cas. Co. v. Crawford*, No. 2:12-cv-1080, 2014 U.S. Dist. LEXIS 24613, at *15 n.4 (S.D. Ohio Feb. 25, 2014) (same).

Although some courts have "relaxed" this requirement to permit non-mutual collateral estoppel in cases that involve its ***defensive*** application, none has ever recognized its availability in the context of ***offensive***, non-mutual collateral estoppel. *See, e.g.*, *Miller*, 2019-Ohio-92, ¶ 15 (Ct. App.); *McAdoo v. Dallas Corp*., 932 F.2d 522, 525 (6th Cir. 1991) ("We do not read Ohio law as insisting on mutuality in *defensive* collateral estoppel cases . . . .") (emphasis added); *see also, e.g.*, *Schroyer v. Frankel*, 197 F.3d 1170, 1178 (6th Cir. 1999) (citing *McAdoo* with approval).

The strict mutuality generally required in Ohio may be relaxed only in rare and narrow circumstances such as where "the party to be precluded had the opportunity to fully litigate the issue, and . . . the preclusion is defensive." *Kiara Lake Estates, LLC v. Bd. of Park Comm'rs*, No. 2:13-cv-522, 2014 U.S. Dist. LEXIS 23603, at *14 (S.D. Ohio Feb. 24, 2014). If "the identical issue was not litigated in [a previous case], the proposed use is not defensive, and . . . there are other fairness concerns," issue preclusion is unavailable. *Id*. Ohio law requires denial of PSC's renewed motion for the application of offensive non-mutual collateral estoppel.

[7] In *Goodson*, the Ohio Supreme Court acknowledged that it had—in a prior case, *Hicks v. De La Cruz*, 52 Ohio St. 2d 71 (1977)—permitted offensive non-mutual collateral estoppel. But Ohio's Supreme Court relegated *Hicks* to a case-specific exception "where justice would reasonably require it" based in large part on a question of which entities enjoy governmental immunity. *Goodson*, 2 Ohio St. 3d at 199. This exception obviously has no application to the present controversy, and PSC does not suggest otherwise.

C. Even Under Federal Law, Offensive Collateral Estoppel Is Barred In Mass Tort Litigation

Federal preclusion doctrines have historically been lumped together under the term *res judicata* because they all govern the effect of the previous adjudication of some thing—the *res*. Over time, this collective characterization has generated much confusion, masked important differences between discrete preclusion doctrines, and prompted the Sixth Circuit to use more precise language in identifying the governing rules:

> [T]he preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

Barnes v. McDowell, 848 F.2d 725, 728 n.5 (6th Cir. 1988) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 (1984)).

The form of issue preclusion referred to as collateral estoppel serves "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." *Parklane Hosiery Co.*, 439 U.S. at 326 (citing *Blonder-Tongue Labs., Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 328-329 (1971)). Offensive collateral estoppel describes "a plaintiff . . . seeking to estop a defendant

from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Id.* at 329.[8]

Historically, attempts to collaterally estop the litigation of issues required the strict mutuality (or identity) of parties—*i.e.*, the same plaintiff litigating against the same defendant. *Parklane Hosiery*, 439 U.S. at 326-327. Federal courts have more recently relaxed this mutuality requirement, but only with respect to ***defensive*** collateral estoppel. *See, e.g.*, *Blonder-Tongue Labs.*, 402 U.S. at 350 (holding that defensive non-mutual collateral estoppel could be applied to the relitigation of a patent previously deemed invalid). Indeed, courts have repeatedly recognized that ***offensive*** non-mutual collateral estoppel presents *dramatically different circumstances* that persist in counselling great reluctance to preclude litigation of even a seemingly identical issue. Thus, congruent with Ohio law, the United States Supreme Court has urged caution and restraint in the application of offensive collateral estoppel:

> First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. . . .
>
> . . . . Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

Parklane Hosiery, 439 U.S. at 329-31 (internal citations omitted).

[8] When "the defendant . . . is the party invoking issue preclusion, defensive collateral estoppel, rather than offensive collateral estoppel, applies." *Ga.-Pac. Consumer Prods. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098 (6th Cir. 2012).

The Court in *Parklane Hosiery* used the following illustration to explain the persistent limitations on non-mutual, offensive collateral estoppel:

> [A] railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff 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.

Id. at 330 n.14 (citing Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 304 (1957)).[9]

The Sixth Circuit has applied these observations and guidelines from the Supreme Court in holding that "offensive collateral estoppel could not be used in mass tort litigation." *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (citing *Parklane Hosiery*, 429 U.S. at 330 & n.14) (emphasis added). Since making that pronouncement, the Sixth Circuit has never revisited or altered it.

Moreover, following the Sixth Circuit's lead, numerous other courts throughout the nation hold that offensive collateral estoppel is ***not*** properly used in mass tort litigation. *See, e.g.*, *Hoppe v. G.D. Searle & Co.*, 779 F. Supp. 1425, 1427 (S.D.N.Y. 1991) (relying on *Bendectin* to deem "offensive collateral estoppel inappropriate in mass-tort litigation"); *Amore v. G.D. Searle & Co.*, 748 F. Supp. 845, 853 (S.D. Fla. 1990) (citing *Bendectin* and recognizing that use of the doctrine

[9] PSC asserts that this example "was included simply as an example of why the third prong of the *Parklane Hosiery* test [the existence of inconsistent judgments] is important and not as a blanket prohibition on the use of the [collateral estoppel] doctrine in all mass tort litigation." (Renewed Mot. at 17.) This argument fails to confront the reality that the referenced example expressly contemplates that more than half of the potential claimants had already gone to trials resulting in identical final judgments before the question of issue preclusion even first arose. In the example, just one judgment inconsistent with 25 others was sufficient to emphasize the unfairness of precluding relitigation of the relevant issue in the remaining 24 trials yet to come. Here, PSC identifies just three trials that resulted in inconsistent assessments of the propriety of punitive damages, and yet they seek to apply non-mutual collateral estoppel offensively to bar litigation of all of the duty and breach issues in an unknown number of cases yet to come. This request makes absolutely no sense, flies in the face of the referenced example and (unsurprisingly) conflicts with governing law.

in the mass-tort context is "fundamentally unfair"); *cf. Liberty Life Ins. Co. v. W. R. Grace & Co.*, C/A No. 87-3147-17, 1990 U.S. Dist. LEXIS 20203, at *7-9 (D.S.C. Jan. 12, 1990) ("[S]trong policy considerations favor narrowly confining the scope of the use of offensive collateral estoppel in mass tort product liability cases.").

Rather than follow the Sixth Circuit's ruling, PSC would have this Court flout it, characterizing *Bendectin* as a decision that purportedly "has been criticized in subsequent cases." (Renewed Mot. at 14.) The "subsequent cases" that PSC claims are critical of *Bendectin* actually include just the solitary analysis, embraced by a single district court, asserting that *Parklane Hosiery* "only mentioned, but did not broadly accept, the arguments that have been advanced against the wholesale application of offensive collateral estoppel." *In re Air Crash at Detroit Metro. Airport*, 776 F. Supp. 316, 325 (E.D. Mich. 1991); *see also In re Air Crash at Detroit Metro. Airport*, 791 F. Supp. 1204, 1214-15 (E.D. Mich. 1992) (citing *In re Air Crash at Detroit Metro. Airport*, 776 F. Supp. at 325).[10]

Absent this lonely outlier,[11] PSC fails to cite even one case that limits the clear statement in *Bendectin*, or its articulation of the Supreme Court's holding in *Parklane Hosiery*. Meanwhile, many other courts throughout the nation have recognized and applied the wisdom of *Bendectin*.

[10] The other cases cited by PSC do not even mention *Bendectin*, and are inapposite for other reasons as well. For example, *Good v. Am. Water Works Co.*, 310 F.R.D. 274 (S.D. W. Va. 2015) involved a motion for class certification rather than a mass tort MDL, and relied on specific Fourth Circuit authority supporting a hypothetical benefit that class certification may provide in heading off the application of collateral estoppel. *Good*, 310 F.R.D. at 297. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2014 U.S. Dist. LEXIS 137807 (E.D. La. Sep. 26, 2014) is inapposite because it applied a default judgment uncontested by the defendant. *Id.* at *37. *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980), was issued four years *before* the Sixth Circuit even announced *Bendectin*, and in no way can be said to "criticize" it. In addition, none of these cases applied the Ohio preclusion law applicable to this case.

[11] Although this Court surely appreciates the fact that a solitary district judge sitting in the Eastern District of Michigan—or anywhere else—cannot overrule the Sixth Circuit, it is noteworthy that no decisions subsequent to those cited in the main text have ever cited them with approval regarding their unusual interpretation of *In re Bendectin*.

Even courts that have not directly adopted *Bendectin* have nevertheless similarly recognized the restrictive limitations that mass tort litigation inherently places on the application of offensive non-mutual collateral estoppel.

Illustrative of this widespread view is *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981), in which the federal court of appeals for the D.C. Circuit reversed an application of non-mutual collateral estoppel on the issue of causation in the third trial following a single airplane crash even though "[m]any of the criteria" for collateral estoppel were satisfied. *Id.* at 852. Observing "the likelihood that the accident caused each particular [injury] could vary," the court deemed offensive non-mutual issue preclusion unavailable. *Id*.

If application of offensive non-mutual issue preclusion to issues arising from a singular, one-time event must be denied, the same should be said about the multi-faceted context and timeframes of this MDL. Here, the conduct at issue is alleged to have taken place over decades, involving a matrix of complex operations, a depth of ongoing environmental testing and assessment, evolving industrial hygiene, and other conduct that dramatically changed over time. Each trial may involve processes at the Washington Works facility, supply inputs, production volumes, emissions and emission controls, various regulatory contexts and interchanges with regulators, and water testing and treatment—all of which dynamically changed over time as the state of science and technology evolved.

Moreover, DuPont retains a contractual right to assert all defenses not barred by the *Leach* Agreement, including a lack of specific causation for every Plaintiff's alleged injury. And certain post-settlement cases, for the first time, name Chemours as an additional defendant. Chemours' defenses in each of these new cases will be matters of first impression in this MDL. *See also Deviner v. Electrolux Motor, AB*, 844 F.2d 769, 774 (11th Cir. 1988) (holding that collateral

estoppel "should not be extended indiscriminately to tort cases where the factual circumstances in each case differ"). In short, PSC's renewed motion ignores not only the governing authority of *Bendectin*, but also the widespread view that offensive non-mutual collateral estoppel is *not* available in mass tort litigation, and on that basis as well should be denied.

D. The Prior Trials Were Not All "The Same" As The Upcoming Trials of the Current Plaintiffs

PSC seeks to portray the duty and breach determinations made in the first three trials as having arisen from "the *same conduct*" and improperly jumps to a conclusion that the jury's factual determinations about the issues of duty and breach (and thus foreseeability) were therefore also the same for each of the current Plaintiffs. (Renewed Mot. at 3.) These notions are wrong, and without legal foundation. Whatever the similarities between Ohio and West Virginia negligence law or portions of the testimony of prior Plaintiffs' retained expert witnesses, the jurors' assessments of duty and breach are inherently Plaintiff-specific, and *not* susceptible to issue preclusion in a mass tort MDL like this one.

For example, jurors in the first three trials that went to verdict (which involved three disparate individual Plaintiffs treated for their respective and varying cancer conditions *before* the *Leach* Settlement in 2004) did not hear the specific context, facts, and evidence that are highly material to the respective issues of negligence and punitive damages for the current Plaintiffs, (virtually) each of whom[12] claims his or her first injury long after DuPont began providing clean drinking water for class members. Among other things, earlier jurors did not hear the details about how DuPont—long before the current Plaintiffs ever contracted their claimed diseases—entered

[12] To DuPont's knowledge, Travis Abbott is the only post-GSA Plaintiff who claims injury before DuPont installed water filtration systems and who also claims, despite having participated in the C-8 Health Project in 2006, that he never heard about C-8 and any Probable Link disease until November 2017.

into the *Leach* Settlement Agreement in 2004 and agreed to immediately start filtering the water for public water districts and certain residences while it funded a Science Panel to study whether an association even exists between C-8 and any human disease. *See Leach* Agreement § 11 (describing DuPont's extensive water treatment and filtration obligations); §§ 12.2.3 (a) and (b) (defining phases of Science Panel's work)).

Similarly, these jurors did not consider the current fact patterns where there was wide publicity about C-8 prior to any injury or in which the Plaintiffs were informed about potential risks but elected to continue drinking water that contained traces of C-8. Nor did the jurors consider fact patterns involving water districts such as Pomeroy and Mason County, where the levels of C-8 were always a small fraction of the DuPont Community Exposure Guideline.

These are just a few of the many individualized and fact-intensive aspects material to any juror's assessment of whether in any particular case one could conclude that DuPont knew or should have known that community levels of exposure to C-8 were likely to cause harm to someone in the position of a particular Plaintiff, or that DuPont was "conscious" of a "great probability" of substantial harm. It would be fundamentally unfair to preclude DuPont from introducing—and jurors from considering—such evidence in the forthcoming trials when prior verdicts issued by juries in the face of factually distinct controversies involving different Plaintiffs did not consider such information.

1. Similarities In Legal Standards Do Not Establish The Identity Of Critical Facts Underlying The Issues Of Duty And Breach For Each Plaintiff

Under applicable Ohio law, a party invoking issue preclusion must show that the "precise factual issue" was decided in the previous action. *Fort Frye Teachers Ass'n v. State Emp't Rels. Bd.*, 81 Ohio St. 3d 392, 401 (1998). PSC does ***not*** argue that any of the precise factual issues at issue in the upcoming trials were actually decided in the first three trials. Instead, PSC only vaguely

contends that a "finding of negligence was necessary to support each verdict." (Renewed Mot. at 7.) PSC then cites DuPont's prior arguments about the similarities of Ohio and West Virginia *law* governing negligence to advance an unsupported notion that the *facts* underlying all Plaintiffs' negligence claims are identical. This sleight-of-hand should not mislead the Court. Similarities between states' substantive laws fail to demonstrate that the factual issues decided in previous cases are identical to those anticipated in the upcoming trials.

To the contrary, highly significant factual differences reveal why offensive non-mutual collateral estoppel would be so unfair and deprive DuPont of due process. For example, Mrs. Swartz premises her negligence claim on levels and types of periodic *non-residential* exposure, during time periods, and in a new, different water district (a water district that had extremely low C-8 levels—significantly below DuPont's CEG) that was *not* at issue in any of the first three trials. In addition, and starkly different from the last two trials, Mrs. Swartz's own expert concedes that the water she claims she occasionally drank had amounts of C-8 that were always below DuPont's CEG. Mrs. Swartz's husband also asserts a derivative loss of consortium claim, unlike any claim pursued in the first three trials.

As this Court knows, different water districts had dramatically different levels of C-8 in their water supplies, and the levels varied within each water district, at different times. Moreover, what DuPont knew or should have known about different water districts at different time periods, and the foreseeability of a likelihood of harm under those vastly different circumstances, are all disputed facts that have a material effect on the many findings of fact that the jurors will have to make. A jury finding that DuPont was negligent with regard to a particular residential water user in Little Hocking who claims use in a certain time period is therefore *not* identical to the assertion that DuPont was negligent with respect to another Little Hocking user in a different time period,

much less with regard to a transient water user in Pomeroy in 1992, or in other water districts in other time periods.

In sum, among other reasons, offensive non-mutual collateral estoppel is not available because the relevant water districts and time periods at issue in prior trials were different. The constantly changing state of the science, the changing knowledge over time, and the specific risks to any Plaintiff at the specifically relevant time and in a specific area are fundamental to the duty issues. *See, e.g.*, *Vigneron* ECF 195 at 24 ("To prove the existence of a duty, Mr. Vigneron must show by a preponderance of the evidence that a reasonably prudent corporation would have foreseen at the relevant time that injury was likely to result *to someone in Mr. Vigneron's position* from DuPont's conduct.") (emphasis added).

These and other key fact differences bear significantly on the question of foreseeability that underlies the issues of duty and breach, the ultimate determination of negligence, and the availability and scope of punitive damages. *Dopson-Troutt v. Novartis Pharm. Corp*., 2013 U.S. Dist. LEXIS 134904, at *5-6 (M.D. Fla. Sept. 20, 2013); *see also Dodge v. Cotter Corp*., 203 F.3d 1190, 1198-99 (10th Cir. 2000) (holding that issues in two cases were not identical because the time frames relevant to each of the cases were different). Issue preclusion does not apply unless—at a minimum—the plaintiff can show that all of the factual differences "are of no legal significance whatever in resolving the issue presented." *United States v. Stauffer Chem. Co*., 464 U.S. 165, 172 (1984). Despite another opportunity through its renewed motion, PSC does not try to meet this high standard.

The loss of consortium claim in *Swartz* also distinguishes that case from the first three trials. "[A] claim for loss of consortium is derivative in that *the claim is dependent upon the defendant's having committed a legally cognizable tort upon the spouse* who suffers bodily

injury." *Bowen v. Kil-Kare, Inc.*, 63 Ohio St. 3d 84, 93 (1992) (emphasis added). Mr. Swartz cannot establish his claim by pointing to jury verdicts that DuPont acted negligently toward persons other than his spouse. "[A]bsent a legally cognizable tort upon [a spouse], plaintiff's loss of consortium claims cannot lie." *McClary v. M/I Schottenstein Homes, Inc.*, 2004-Ohio-7047, ¶ 63 (Ct. App.). There is no valid basis for Mr. Swartz to rely on the claimed preclusive effect of a determination regarding DuPont's duty and breach of that duty to anyone other than his spouse.

Additional facts at issue in other cases also warrant swift denial of the issue preclusion that PSC seeks. PSC asserts that "[i]n 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." (Renewed Mot. at 13.) But this is not accurate. As the Court is aware, a number of Plaintiffs in the post-global settlement cases have sued an additional defendant, Chemours—an independent company that never used C-8 at the Washington Works facility or elsewhere and was not a defendant in the pre-GSA cases. It would be fundamentally unfair, inefficient, and confusing for jurors to be told in trial where both DuPont and Chemours are defendants that DuPont is negligent, but they will still have to decide the negligence issue as to Chemours.

In short, offensive non-mutual collateral estoppel cannot be applied to the upcoming MDL trials where there are significant factual differences material to the jurors' determinations on duty and breach between each case. PSC cannot establish that the precise factual issues decided in the first three trials are identical in the upcoming trials. For this additional reason, PSC's renewed motion should be denied.

2. Plaintiffs' Experts' Prior Testimony Is Not A Determination Of An Issue By The Court Or A Jury

PSC argues that "[t]he 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." (Renewed Mot. at 8). But PSC fails to cite any authority that the small snippets of experts' cited testimony provided the basis for the jurors' determinations of negligence. In addition, PSC rips from context the quotes presented on pages 8 and 9 of its brief. This testimony related to opinions about the public health duty of care, *not* the controlling *legal* standard governing whether DuPont's conduct may be adjudged negligent.

Moreover, PSC ignores the role of the jury instructions and jury forms that define the conclusions that were made by the jury, and properly involve determinations only about duties and potential breach as to individual Plaintiffs. In the *Vigneron* trial, for example, the jury was instructed that the Plaintiff would establish negligence if "DuPont owed *Mr. Vigneron* a duty of care" and "breached its duty of care *to Mr. Vigneron*." *Vigneron* No. 195 at 23 (emphases added); *see also id*. at 24-25. The jury verdict form similarly asked only if the jury found "in favor of *Mr. Vigneron* on *his negligence claim*," not some vague, ill-defined claim of negligence to the entire community. *Vigneron* ECF No. 195 at 42 (emphases added).

PSC's cherry-picked citations to scattered references made to "communities" in the trial testimony of certain witnesses cannot serve to modify or even augment what the jury actually found. PSC cannot speculate about the deliberative process of a jury, and certainly not for purposes of making assumptions about what issues are conclusively resolved before the upcoming trials even commence. *See, e.g., Black v. Ryder/P.I.E. Nationwide*, 15 F.3d 573, 581-82 (6th Cir. 1994) (deeming district court to have committed clear error where its determination "required it to engage

in pure speculation regarding the basis for the general verdict in the earlier case"); *United States v. Vassar*, No. 2:05-CR-75, 2006 U.S. Dist. LEXIS 62330, at *5 (E.D. Tenn. Aug. 30, 2006) (denying requested relief where doing so would "require this Court to speculate as to the basis of the jury's verdict").

E. The Seventh Amendment And Due Process Also Render Offensive Non-Mutual Collateral Estoppel Unavailable Here

Improperly applying issue preclusion here would violate important Seventh Amendment and Due Process rights. The Seventh Amendment protects the right of civil litigants "to have a jury resolve factual issues." *Pittington v. Great Smoky Mt. Lumberjack Feud, LLC*, 880 F.3d 791, 806 (6th Cir. 2018); Fed. R. Civ. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate."). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment* of the right to a jury trial should be *scrutinized with the utmost care*." *Dimick*, 293 U.S. at 486 (emphasis added).

The precise issues in each case are not the same, and the distinct issues presented in pending cases were not decided in prior cases. *See supra* 13-17. Applying offensive collateral estoppel to decide these unresolved issues would therefore deprive DuPont of its right to a jury trial in pending cases. *See, e.g.*, *Pittington*, 880 F.3d at 806 (explaining that "allowing a district court to 'bald[ly] add[] something which in no sense can be said to be included in the verdict' would unduly impinge on the plaintiff's right to have a jury decide the factual issue of damages"); *cf. Parklane*, 439 U.S. at 336 (no Seventh Amendment problem where there is "*no further factfinding* function for the jury to perform, since *the common factual issues* have been resolved in the previous action") (emphasis added).

Likewise, as discussed above, PSC's motion uses their own experts' testimony to distort what the juries in prior cases actually found. *See supra* 17-18. But a trial court may not engage in "speculation" about what issues a jury deliberated and determined. *Carr v. Wal-Mart Stores*, 312 F.3d 667, 675 (5th Cir. 2002). When the court strays beyond the issues actually decided by the jury, it effectively decides those issues itself, which "is tantamount to a bench trial in violation of [the] right under the Seventh Amendment to a trial by jury." *Id.* (finding Seventh Amendment violation where court improperly reconciled answers to interrogatories); *see Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1287 (10th Cir. 2005) (same where court improperly reconciled jury verdicts and "stepped . . . into the impermissible realm of speculation as to what the jury actually determined in violation of [the] Seventh Amendment right to a jury trial").

The Seventh Amendment also requires that issues bearing upon an assessment of punitive damages are within the sole province of the jury, not the Court. *Dimick*, 293 U.S. at 486; *see also, e.g., Jones v. UPS*, 674 F.3d 1187, 1205 (10th Cir. 2012). This constitutional right inures to the benefit of both plaintiffs and defendants. *See O'Neal v. Wackenhut Servs.*, No. 3:03-cv-397, 2006 U.S. Dist. LEXIS 34634, at *65-66 (E.D. Tenn. May 25, 2006) (noting that the preclusive effect of class certification determination applied to punitive damages claims "would violate defendant's rights to due process"). PSC's demand for offensive non-mutual collateral estoppel subverts the jury's constitutional role in determining the propriety of punitive damages, by seeking to predetermine issues critical to the determination of punitive damages without a jury.

Aside from the Seventh Amendment's jury right, "the Constitution's Due Process Clause *forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties* or those whom they directly represent, i.e., injury that it inflicts upon those who

are, essentially, strangers to the litigation." *Philip Morris USA*, 549 U.S. at 353 (emphases added). As one federal court has explained in following *Phillip Morris* and denying issue preclusion:

> [I]f this Court were to grant Plaintiff's request for issue preclusion, Defendants' underlying liability would be established in part based on actions that inflicted injuries upon nonparties. In light of the Supreme Court's decision in *Philip Morris*, the jury would have to be admonished to compartmentalize certain factual findings when determining liability and punitive damages. The jury could very well be confused about what facts may or may not be considered when determining punitive damages.

Grisham v. Philip Morris, Inc., 670 F. Supp. 2d 1014, 1037 (C.D. Cal. 2009).

Indeed, within the Sixth Circuit, the Eastern District of Tennessee has explained:

> [A] determination of punitive damages would require each plaintiff to demonstrate how the [harm] affected him or her individually. As defendant points out, proof of damages must be related to the harm to the plaintiff. To hold otherwise would violate defendant's rights to due process and would improperly eliminate the jury's discretion to assess punitive damages under the Seventh Amendment.

O'Neal, 2006 U.S. Dist. LEXIS 34634, at *65. Similarly, this District has recognized that "whether an individual plaintiff is entitled to an award of compensatory and/or punitive damages depends on whether defendant's unlawful actions caused emotional distress to that particular plaintiff and whether that plaintiff suffered mental or physical symptoms as a result of the harassment to which she was subjected." *Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414, 427 (S.D. Ohio 2002). Based on this reasoning, the Court further concluded that punitive damages "are not in the nature of a group remedy but are dependent on individual circumstances." *Id*.

Accordingly, any invocation of offensive non-mutual collateral estoppel to preclude the individualized litigation of the issues of duty and breach in support of Plaintiffs' negligence claims and the availability of punitive damages would violate the Seventh Amendment and DuPont's due process rights. Even PSC concedes that these issues are intertwined with the assessment of punitive damages. (*See* Renewed Mot. at 17-18.) But it is also apparent in the concept of foreseeability,

which underlies the questions of duty and breach for negligence, and for punitive damages, depending upon the clarity or degree of that foreseeability. *See, e.g., Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St. 3d 257, 263 (2015) ("The concept of foreseeability is an important part of all negligence claims, because the existence of a duty depends on the foreseeability of the injury.") (internal quote marks omitted); *Menifee v. Ohio Welding Prod., Inc.*, 15 Ohio St. 3d 75, 77 (1984) (explaining that the issue of breach is inherently tied to the existence of a duty and thus the foreseeability of the likelihood of injury); *Howard v. Columbus Prods. Co.*, 82 Ohio App. 3d 129, 134 (1992) (observing that the availability and extent of punitive damages "depends on the foreseeability or probability of harm in the eyes of a reasonable person").

For all these reasons, the application of offensive non-mutual collateral estoppel in this MDL would improperly strip DuPont of its Seventh Amendment and due process rights to have a jury make individualized determinations about questions of foreseeability central to the duty and breach issues that are fundamental to determinations of negligence and punitive damages. This conclusion is reinforced by the observation that each Plaintiff's case "requires Plaintiff to introduce *voluminous evidence* regarding the *specific harms* that Defendants' wrongful actions caused *her*." *Grisham*, 670 F. Supp. 2d at 1037 (emphases added). And it is patently unfair given the inconsistency in punitive damages determinations already rendered in just the first three trials, revealing indisputable variability in the assessment of evidence relating to foreseeability, duty, breach, and punitive damages in these cases. Indeed, this observation alone exposes why offensive non-mutual collateral estoppel is unavailable in these cases as a matter of law.

F. There Is No Basis To Apply Non-Mutual Offensive Collateral Estoppel On Issues Relating To Leach Class Membership And Tort Reform.

PSC smuggles into a single paragraph the basis for its argument that interpretation and application of the *Leach* Agreement and the applicability of Ohio Tort Reform are likewise

appropriate for non-mutual offensive collateral estoppel. ECF 5274 at 11. But this Court has not yet ever decided a contested issue of whether a particular Plaintiff is a *Leach* class member. Similarly, because class membership was not an issue in *Bartlett*, *Freeman*, or *Vigneron*, no jury has decided the issue either. And in the *Swartz* case, the parties have stipulated (for purposes of *Swartz* only) that Mrs. Swartz is a class member. The subject is therefore totally inappropriate for the invocation of issue preclusion.

Moreover, whether an individual is a *Leach* class member obviously raises many different, individualized inquiries. PSC has made no showing how non-mutual offensive collateral estoppel can be applied to allow every plaintiff who files an action to be deemed a *Leach* class member.

The application of Tort Reform likewise presents different, individualized inquiries, rendering Tort Reform inappropriate for non-mutual offensive collateral estoppel. Indeed, in DMO 30 [ECF 5231], the Court denied PSC's motion to clarify its Tort Reform rulings, holding that "a decision indicating anything other than the Court intends to stay consistent with its prior decisions on this issue is premature….Thus, the Court declines at this time to opine on any additional clarifications." *Id.* at 5. These subjects—class membership and Tort Reform—simply require more than a single paragraph untethered to any prior rulings about contested factual issues before the doctrine of issue preclusion should even be considered, much less be invoked or applied.

G. Application Of Offensive Non-Mutual Collateral Estoppel Would Be Inefficient And Fundamentally Unfairly Prejudicial To DuPont

The policies behind issue preclusion involve concerns of judicial efficiency, but they must be viewed in context, and not allowed to override fundamental notions of due process. *See*, *Dolce v. Lawrence*, 1999 Ohio App. LEXIS 4650, at *9 (Ct. App. Sep. 30, 1999) (citing *Goodson*, *supra*). "Where even one issue of liability must be made available to defendants in the second trial, granting preclusive effect to the other issues may not result in efficiency gains because litigation

of the 'live' issue may require introduction of some of the same evidence pertinent to the estopped issues." *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 577 (1st Cir. 2003). As shown above, the evidence related to duty and breach ***must*** be introduced to establish liability for negligence on DuPont's part to a specific Plaintiff based on the distinct facts at issue with respect to that specific Plaintiff, as well as the "great probability" of substantial harm inquiry on which any punitive damages award must be predicated.[13]

Further, binding DuPont to the results of two bellwether trials and one non-bellwether trial would be fundamentally unfair. "[B]ellwether trials must bind only those persons who take part in the trial in order to assure that each Plaintiff is afforded his or her constitutional rights." *Auchard v. TVA*, No. 3:09-CV-54, 2011 U.S. Dist. LEXIS 14771, at *11 (E.D. Tenn. Feb. 2, 2011). Parties, whether plaintiffs or defendants, must agree that jury verdicts will be binding in future litigation against them before preclusive effect can be afforded to those verdicts. *See, e.g., Dodge,* 203 F.3d at 1199 (finding that even if the issues were identical, a prior verdict was not binding because the parties had not agreed to be bound by the bellwether trial results prior to the trial); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-303 (7th Cir. 1995) (noting unfairness in involuntarily binding parties to a bellwether verdict, because a risk-averse defendant may opt to settle the entire litigation to avoid the chance of enterprise-ending liability, regardless of the suit's actual merits). "[A] bellwether trial is not, without more, a joint trial" sufficient to bind all parties to the judgment in that trial. *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1050 (9th Cir. 2015).[14]

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[13] PSC cites *Liang v. AWG Remarketing, Inc.*, 2015 U.S. Dist. LEXIS 168139, at *27 (S.D. Ohio Dec. 15, 2015), to showcase the purported benefit applying issue preclusion would have with regard to the conservation of judicial and party resources. (Renewed Mot. at 4, 11). *Liang*, which involved the application of California preclusion law to a California state court judgment, *denied* counterclaimants' request to apply issue preclusion because they could not show that the same issue was before both courts. *Id*. at *31-33.

[14] It is patently unfair to impose issue preclusion when Plaintiffs tactically "adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." *Parklane Hosiery*, 439 U.S. at 330; *see also Liberty Life*, 1990 U.S. Dist. LEXIS 20203, at *8 (observing that "the

This prohibition is particularly significant to this MDL, in which the initial six bellwether trials were chosen from a discovery pool of just 20 cases that had been selected from the approximately 80 cases then pending. Afterwards, thousands of new cases were filed, changing the intended representativeness of the initial bellwether cases, and four bellwether cases were settled and dismissed. In short, the two bellwether trials were not representative of the then-existing plaintiff pool, much less the current Plaintiffs. Moreover, the third trial was a case picked by PSC out of a group of cases that PSC was permitted to self-select for pre-trial work-up.

It is the normal practice that "[t]he results of [bellwether] trials are not binding on the other litigants in the group. The outcomes can be used by the parties to assist in settlement, but the parties can also ignore these results and insist on an individual trial." Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 580-81 (2008); *see also In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008 (9th Cir. 2008) ("We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs."). PSC is arguing that the results of three trials (which had inconsistent results on punitive damages) involving different facts and different application of the facts to the law should bind all future trials for any C-8 MDL Plaintiff. This is unprecedented and there is no valid basis for applying offensive non-mutual collateral estoppel in subsequent litigation involving *different facts, different injuries, different claims, and a different defendant*.

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use of offensive collateral estoppel in mass tort cases . . . could well foster behind-the-scenes posturing by both plaintiffs and defendants to advance their "best" cases to trial first, so as to gain (or avoid) the benefit of issue preclusion as to liability in subsequent cases."). In addition, while PSC repeatedly mentions the due process consideration that the defendant must have a "full and fair opportunity to litigate" (*see, e.g.* Renewed Mot. at 2, 10, 11, 13), PSC ignores that there has been no appellate ruling on several fundamental legal issues that can have a dramatic effect on the trials and resulting verdicts. The express terms of the GSA, moreover, indicate that it was reached as a compromise without any admission of liability. The GSA does not waive or limit DuPont's appellate rights in any way.

III. CONCLUSION

PSC's motion ignores the widely disparate facts critical to determinations of duty, breach, *Leach* class membership, and the applicability of Tort Reform that apply to individual Plaintiffs. PSC also disregards or misapplies governing law to each of its arguments. At bottom, binding precedent applied to the facts of this MDL requires the denial of PSC's motion. As explained in this opposition, and in the interests of justice, the Court should deny PSC's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was electronically filed with this Court's CM/ECF system on this 17th day of October 2019, and was thus served automatically upon all counsel of record for this matter.

/s/ Damond R. Mace
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