No. 19-4226

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re E. I. du Pont de Nemours and Company

Petition from the United States District Court
for the Southern District of Ohio, Eastern Division
No. 2:13-md-02433
Honorable Edmund A. Sargus, District Judge

RESPONDENT PLAINTFFS' STEERING COMMITTEE'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Robert A. Bilott
Aaron M. Herzig
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
Phone: (513) 381-2838
Fax: (513) 381-0205
bilott@taftlaw.com
aherzig@taftlaw.com

Co-Lead Counsel for Respondent Plaintiffs' Steering Committee

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INTRODUCTION

Petitioner DuPont seeks nothing more than a procedurally improper interlocutory appeal of a pretrial decision by the district court. DuPont, like at least one party in every lawsuit headed for trial, complains that the proceeding will be governed by rulings that it dislikes and that diminish its chances of success before a jury. Here, that ruling is Respondent Judge Sargus's Dispositive Motions Order No. 34 ("DMO 34," R. 5285 at PageID #128531). DuPont's remedy is the same as every other party in its position—appeal to this Court after the case below is final.

DuPont's main complaint is that Judge Sargus determined that he would continue to reach the same conclusions in the upcoming trials that he reached in prior trials in this same MDL. His interpretations of law and of the *Leach* Settlement Agreement would remain the same. He would be consistent. DuPont claims that Judge Sargus got there the wrong way—by deciding that he could not change his decisions. Judge Sargus ruled that DuPont's dismissal of its appeal in which all of these issues were pending means that his rulings in that case are the final word on those issues and preclude any contrary ruling. The same is true

of the three juries' consistent findings of duty and breach in three separate trials. Those decisions were appealed, and then dismissed, making the district court's ruling final. Respondent believes that the district court got that right, but if it didn't, this Court can say so on appeal after a final judgment.

DuPont also accuses the district court of going back on its word about the preclusive effect of the bellwether trials, and then argues that mandamus is necessary to correct this abuse of the bellwether procedure. DuPont's rhetoric is as inaccurate as it is overheated. While *Bartlett* and *Freeman* were bellwethers, *Vigneron*—the third jury verdict against DuPont—and *Moody*—which ended mid-trial due to settlement—were not bellwether cases.

Relatedly, even if DuPont were correct that the district court got it wrong (which it is not), the remedy it seeks in this extraordinary writ is not meaningful. The writ would prevent the district court from using nonmutual, offensive issue preclusion as a mechanism to apply its rulings across the upcoming trials. It does not (and could not) ask this

Court to require the district court to reach different conclusions from one trial to the next based on the same law, evidence, and arguments.[1]

DuPont's ultimate concern appears to be that DMO 34 affects whether it might settle the upcoming cases. But on the eve of the first such new trial, the parties are not engaged in settlement conversations. They are preparing for the first of 50 new trials, each of which the losing party will have the opportunity to appeal to this Court one day.

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[1] DuPont is on a forum-shopping spree. This is the second court that DuPont is asking improperly to second-guess Judge Sargus before the January 21 trial. DuPont filed a motion in November 2019 asking a West Virginia state trial court to sit as a court of appeals in judgment of Judge Sargus's interpretation of the *Leach* Settlement Agreement that is the subject of DMO 34 (and dozens of other rulings over the last many years). *See* Pls. Mem. in Opp. to DuPont's Mot. for Interpretation of the Class Action Settlement Agreement…, *Leach v. E. I. du Pont de Nemours and Company*, Wood County, West Virginia, Circuit Court No. 01-C-608 (Jan. 10, 2020).

And DuPont also is trying to take another C8 case away from Judge Sargus by moving it to an unrelated MDL only after Judge Sargus issued substantive rulings DuPont did not like, and after DuPont had been litigating the case before Judge Sargus for over one year. *See* Response in Opp. of Pl. Kevin Hardwick, *In re Aqueous Film-Forming Foams (AFFF) Prods. Liab. Litig.*, MDL No. 2873 (ECF 535) (Nov. 27, 2019).

Additionally, it is worth noting that the Sixth Circuit takes steps to prevent a party from avoiding a particular panel of judges with its rule that subsequent appeals may be returned to the original panel. 6th Cir. I.O.P. 34(b)(2).

Indeed, despite losing three jury trials, winning none, and then settling 3,500 cases, DuPont seems eager to fight, not settle. Its settlement concern is of no moment to this Court, and it is not a good reason for this Court to use its extraordinary power of writ of mandamus to disrupt the district court's proceedings.

The petition should be denied.

STANDARD OF REVIEW

A writ of mandamus under 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21 is an "extraordinary remedy" that requires "compelling justification." *In re Prof'ls Direct Ins. Co.*, 578 F.3d 432, 437 (6th Cir. 2009). Mandamus is reserved for "exceptional circumstances" such as a "judicial usurpation of power." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)). In contrast, the Supreme Court has held that where, as here, a litigant is merely disappointed by a ruling in the district court, mandamus is not an appropriate remedy. *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). "The writ of mandamus is not to be used when the most that could be claimed is

that the district courts have erred in ruling on matters within their jurisdiction." *Id.*

Because mandamus is "one of the most potent weapons in the judicial arsenal," issuance of the writ requires the petitioner to establish that there is no other adequate means, such as a direct appeal, to attain the desired relief, and that its right to issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 380-81 (internal quotation marks and citation omitted). Still, even if the petitioner can satisfy those conditions, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 381.

ARGUMENT

I. Mandamus is inappropriate here because DuPont can seek relief through the normal appellate process.

A petitioner must establish that it has no other adequate means to attain relief before mandamus is possible. This requirement, which sets a high bar for DuPont, is "designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.*; *see also Ex parte Fahey*, 332 U.S. 258, 259 (1947) ("[Mandamus] should be resorted

to only where appeal is a clearly inadequate remedy."). This Court has repeatedly emphasized the importance of this requirement. *See, e.g.*, *In re Prof'ls Direct Ins. Co.*, 578 F.3d at 437 (explaining that "a court may only exercise its mandamus jurisdiction when a party is in danger of harm that cannot be adequately corrected on appeal"); *In re Life Investors Ins. Co. of Am.*, 589 F.3d 319, 323-24 (6th Cir. 2009) (denying mandamus petition where "the relief sought by the [petitioner] is clearly available on direct appeal"); *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 444 F.2d 651, 654-55 (6th Cir. 1971) ("[M]andamus may not be substituted for appeal."); *Hoffa v. Gray*, 323 F.2d 178, 179 (6th Cir. 1963) (denying mandamus because district court's order "limiting the proof and denying the motion to dismiss may be reviewed by [this Court] on appeal after a final order has been entered in the case"). Because mandamus may not be used as an "end-run around the final judgment rule," the availability of other means of relief is a threshold issue that must be addressed before "the merits of the errors alleged in the petition." *In re Prof'ls Direct Ins. Co.*, 578 F.3d at 437-48.

DuPont cannot satisfy this threshold requirement. Its petition does not explain why the relief it seeks would not be available through the ordinary appellate process after final judgment is entered. Instead, DuPont makes the generic claim that the district court's order will impair its "constitutional rights to due process and trial by jury." (Pet. at 28-29.) But a ruling that just limits the issues that DuPont can litigate at trial does not impair DuPont's constitutional rights. And it certainly does not do so in a manner that cannot be remedied through an ordinary appeal. There is no support, either in DuPont's petition or any case law, for the contention that a party's disagreement with a ruling on summary judgment presents the sort of "extraordinary circumstance" that demands mandamus relief.

The cases DuPont relies on demonstrate that its argument is hollow. DuPont grounds its argument that the district court's order "strips DuPont of its right to have a jury apply the law to the plaintiff-specific facts that determine negligence duty and breach" in two cases. (*Id.* at 29.) But both cases were decided through the normal appellate process ***after trial***. (*See id.* (relying on *Pittington v. Great Smoky Mountain Lumberjack Feud, LLC*, 880 F.3d 791 (6th Cir. 2018)

(reversing district court's decision to prevent jury from deciding "factual issue of damages" and remanding for *new trial*); and *Loughride v. Chiles Power Supply Co.*, 431 F.3d 1268, 1287-88 (10th Cir. 2005) (reversing and remanding for *new trial* on certain claims based on court's "speculation as to what the jury actually determined")).) Those cases stand in stark contrast to DuPont's extraordinary request that mandamus is necessary here to correct the district court's alleged erroneous rulings *before* conducting a trial in which those rulings will be applied.

Just as in *Pittington* and *Loughride* (and myriad other cases), errors below might cause the parties to retry a case. But the prospect of a do-over has never been grounds to ignore common finality rules or cause for a court of appeals to reach down and usurp the district court's role and responsibility.

In a similar vein, the amicus party argues that DMO 34 will strip MDL defendants, including DuPont, of their constitutional rights to due process and trial by jury. (*See* Amicus Br., Doc. 10, at 4-8.) The procedural posture and history of this case belie both of those hyperbolic contentions. DuPont already had every opportunity to challenge the

previous verdicts, and it maintains its right to challenge DMO 34 on direct appeal after final judgment in the upcoming trials. There is also no merit to the notion that DuPont's right to a jury trial is impaired by the Order. Indeed, the parties are preparing for a jury trial that will begin in six days.

DuPont also claims that mandamus is necessary because any attempt at interlocutory appeal under 28 U.S.C. § 1292 would be "futile" given the district court's reasoning and rulings to date. (*See* Pet. at 31-33.) Of course, DuPont is not entitled to interlocutory review in any form because it cannot satisfy 28 U.S.C. § 1292(b). Still, the futility of an interlocutory appeal does not help DuPont's petition. DuPont retains adequate means to attain relief through the normal appellate process once a judgment is final. The bottom line is this: in the event of an unfavorable verdict at trial, DuPont has every right to challenge the district court's issue preclusion ruling on direct appeal. And this Court will have a full opportunity to address the merits of the district court's decision.

DuPont's next argument is that the normal appellate process would be "lengthy and costly." (*See* Pet. at 31.) If that were enough,

every party losing a pretrial ruling in any district court could immediately obtain appellate review through mandamus. That is why inconvenience to a party does not qualify as the type of "extraordinary circumstance" to support mandamus. "It is, of course, well settled that the writ [of mandamus] is not to be used as a substitute for appeal, . . . even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (internal quotation marks and citations omitted). In other words, mandamus cannot be used as a form of interlocutory appeal simply because it has the potential to save time and resources. "Nor is the 'hardship [that] may result from delay'—such as the risk of substantial settlement pressure—grounds for granting a mandamus petition." *In re DePuy Orthopaedics, Inc.*, 870 F.3d 345 (5th Cir. 2017) (quoting *Schlagenhauf*, 379 U.S. at 110).

Again, there is nothing to prevent DuPont from challenging DMO 34 on direct appeal if it is unhappy with the results of the upcoming trials. This Court has made clear that where the relief sought "is clearly available on direct appeal," mandamus is not warranted. *In re Life Investors Ins. Co. of Am.*, 589 F.3d at 326. DuPont's petition is premised

entirely on its contention that the district court misapplied the law regarding collateral estoppel and issue preclusion. Thus, "the most that could be claimed is that the district court erred on a matter within its jurisdiction, . . . which is not a sufficient predicate for mandamus relief." *Id.* (internal quotation marks and citation omitted). DuPont is not entitled to a writ of mandamus because there are other adequate means—namely an appeal after final judgment—by which it can obtain the relief it desires. *See id.* at 323 ("With narrow exceptions, a party has no right of appeal until after a final judgment on the merits, and mandamus is not intended to substitute for appeal after judgment."). The Court should deny the petition.

II. The district court did not clearly err in its application of offensive issue preclusion.

If this Court (incorrectly) does not deny the petition for the reasons described in Part I, the Court should deny the petition because the district court correctly applied the doctrine of issue preclusion. Offensive issue preclusion "forecloses a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *United States v. Guy*, 257

Fed. Appx. 965, 967 (6th Cir. 2007). The Supreme Court emphasizes the benefits of issue preclusion, explaining that its application "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

A prior decision has preclusive effect on an issue raised in a subsequent proceeding when four requirements are satisfied:

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

Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 908 (6th Cir. 2001) (quoting *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir. 1997) (en banc)).

A plaintiff can use issue preclusion offensively (*i.e.*, prevent a defendant from relitigating issues the defendant previously tried and

lost) even if the plaintiff was not a party to the earlier suit. This is true as long as it is fair to the defendant.

The Supreme Court in *Parklane* set forth broad guidelines for district courts to consider when making that determination. *See* 439 U.S. at 329-31. Courts should hesitate to apply offensive issue preclusion where a plaintiff could have easily joined the earlier action, where a defendant did not have the incentive or full opportunity to defend itself in the earlier action, or where there have been inconsistent judgments in the proceedings leading up to the present action. *Id.* However, the *Parklane* Court explained that district courts have "broad discretion" to consider these factors and "to determine when [offensive issue preclusion] should be applied." *Id.*

Here, the district court correctly exercised its discretion to determine that all of the requirements for issue preclusion were satisfied. In fact, the district court's 52-page decision explains in great detail why it is not unfair to preclude DuPont from relitigating the issues of duty and breach after three separate juries made uniform findings in three consecutive trials. DuPont's petition fails to establish that the district court committed a clear error of law, and therefore,

fails to establish that DuPont is "clearly and indisputably entitled" to mandamus relief. *See In re Life Investors Ins. Co. of Am.*, 589 F.3d at 443 (denying mandamus petition where district court's order did "not contain a clear error" or "show a persistent disregard of the federal rules").

A. The district court committed no error, much less clear error, by precluding DuPont from relitigating the court's interpretations of the *Leach* Settlement Agreement and Ohio's Tort Reform Act.

DuPont exposes the weakness of its petition when it argues that the district court cannot apply its own prior rulings on the *Leach* Settlement Agreement and Ohio's Tort Reform Act to the upcoming cases. (Pet. at 5, 13, 27-28.)

There is no doubt that the traditional issue preclusion factors are met for these contract and statutory interpretation issues. As the district court explained, "DuPont brought the contract interpretation issue to this Court on numerous occasions and before the Sixth Circuit as its main assignment of error." And it "litigated the application of the Ohio Tort Reform Act before this Court on numerous occasions and also before the Sixth Circuit." (R. 5258 at PageID #128569.) There is no

serious argument that these interpretations of the contract and the law were not central to the dispute, or that the issues were not raised and fully litigated. The only legitimate question that DuPont could ask is whether the *Bartlett* jury verdict and subsequent voluntary dismissal of its appeal made those decisions by the trial court final.

As explained below, the trial court ruled correctly that its decisions were final, such that the parties are precluded from relitigating them. But even if the trial court were incorrect, its error has little practical consequence. All DuPont would get from its writ is another round of briefing and argument before the same judge who repeatedly overruled DuPont's views of the *Leach* Settlement Agreement and Ohio law. Does it suggest that this time the outcome would be different? It does not. (DuPont's suggestion that it will lose its appellate rights is likewise unsupportable. After trial, DuPont can appeal whether preclusion was applied properly. If it wasn't, then the trial court will have to start over, which is one of the potential results of any trial.)

B. The district court committed no error, much less clear error, by precluding DuPont from relitigating the juries' uniform findings on the issues of duty and breach in future trials involving *Leach* class members in the MDL.

The district court correctly held that the traditional issue preclusion requirements are satisfied regarding the issues of duty and breach. They were necessary to the outcomes in each of the three trials. DuPont had a full and fair opportunity to litigate those issues. And all three trials resulted in final judgments against DuPont. DuPont does not (and cannot) seriously contest those points.

Instead, DuPont claims that Judge Sargus misled them by giving the two bellwether cases preclusive effect when he said he would not. (*See* Pet. at 10-11.) But even if that were true (it isn't), as the district court explained, *Vigneron* was not a bellwether case. (R. 5285 at PageID #128544-45.) The *Vigneron* jury received the same instructions as the *Bartlett* and *Freeman* juries, and the *Vigneron* jury found that DuPont was negligent. (*Id.* at PageID #128545-46.) DuPont had a duty and it breached that duty. So even if the bellwether trials could not have preclusive effect (they can, as discussed below), that notion does not apply to non-bellwether *Vigneron*.

DuPont then devotes much of its petition to arguing that the duty and breach findings in the first three trials are not the same issues that the parties will litigate in the upcoming trials. This is just not true. Still, a review of the testimony, the jury instructions, and the verdicts in each of the first cases establishes that the application of issue preclusion here was not clearly erroneous.

In each of the three trials, the jury found that DuPont breached its duty to the entire communities surrounding its Washington Works plant, and *not* just its duty to certain customers of individual water districts. The expert testimony at each trial established that DuPont's duty extended to all of the surrounding communities. For example, in the *Bartlett* trial, Mrs. Bartlett's expert, Dr. Siegel, provided the following testimony:

> Q: From a public health standpoint, sir, from just pure, basic standards for public health, is there anything wrong with that?
>
> A: Well, absolutely. I think that, given the knowledge that the company had that there was contamination of the water in Little Hocking and in Lubeck, and also given the fact that the C-8 emissions were going to increase over time, and also given the increasing evidence, over time, of the hazards of this substance and, finally given the levels at which the substance was found in Lubeck and Little Hocking, I think the company

> had a responsibility of public health duty and care to monitor the water in ***all of the surrounding areas*** to make sure that it wasn't reaching those areas in detectable levels.

(R. 155, *Bartlett*, Sept. 16, 2015 Trial Tr., vol. 3 at PageID #7543:3-15

(emphasis added).)

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

(R. 156, *Bartlett*, Sept. 17, 2015 Trial Tr., vol. 4 at PageID #7743:7-16

(emphasis added).)

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

> contamination in the environment and the potential for human exposure.

(*Id.* at PageID #7743:23-26 (emphasis added).)

None of that testimony suggests that the issues of DuPont's duty (and breach of that duty) were limited to Mrs. Bartlett's specific exposure—or limited to the contamination of the specific water district that supplied Mrs. Bartlett's water.

Likewise, the expert testimony in the *Freeman* and *Vigneron* trials established the same thing: DuPont owed and breached a duty to the surrounding communities—not just to the individuals whose water came from the Little Hocking water district. (*See, e.g.*, R. 108, *Freeman*, June 2, 2016 Trial Tr., vol. 3 at PageID #1711:14-17; PageID #1782:24-1783:2; PageID #1799:24-1800:4; PageID #1812:24-1813:5; PageID #1814:20-1815:12; PageID #1816:8-12; PageID #1842:8-1843:4); (R. 109, *Freeman*, June 3, 2016 Trial Tr., vol. 4 at PageID #1964:17-1965:2; PageID #1966:16-1967:3; PageID #1969:16-1970:5; PageID #1976:21-1977:8; PageID #1977:21-1978:11; PageID #2057:24-2058:5; PageID #2063:18-19; PageID #2076:7-14; PageID #2078:25-2079:4); (R. 142, *Vigneron*, Nov. 16, 2016 Trial Tr., vol. 3 at PageID #2277:3-19; PageID

#2278:19-25; PageID #2306:1-6; PageID #2325:1-15; PageID #2399:11-14; PageID #2413:6-16; PageID #2416:5-12; PageID #2417:20-23; PageID #2418:15-2419:6; PageID #2421:17-2422:6).)

DuPont contends that "[t]he jurors' assessments of duty and breach in this MDL are necessarily plaintiff-specific." (Pet. at 21.) But that argument ignores a critical fact. Every plaintiff in the MDL, including those with upcoming trial dates, is a member of the *Leach* Class. As a result, each plaintiff is bound by, and entitled to the benefits of, the *Leach* Settlement Agreement. Based on the district court's interpretation of that agreement, the issues of DuPont's duty (and breach of that duty) are necessarily common among all *Leach* Class members. Put differently, these issues *are* the same for all *Leach* Class members.

For example, the juries' findings of negligence in each of the three trials were premised on the same evidence of DuPont's conduct—its release of C8 from the Washington Works plant. (*See* Pet. at A-45 (citing R. 4624, CMO 20 at PageID #100970).) And, as the district court noted multiple times, that evidence is "the same evidence that will be utilized in every single trial held in this MDL." (*Id.*) So the verdict in

each case was based on the same evidence, and there is simply no reason that the parties should waste additional time and resources presenting identical evidence to new juries when every jury to examine that evidence has decided consistently and definitively against DuPont.

In addition to hearing the same evidence, each of the first three juries received identical instructions and made identical findings on the issues of duty and breach. To make a finding that DuPont owed the plaintiffs a duty, each jury was required by the jury instructions to find that "under the circumstances a reasonably prudent corporation would have anticipated that an act or failure to act would likely cause injuries." (*See* Pet. at A-43.) To find a breach, the jury instructions required a jury determination that DuPont failed to exercise "ordinary care," which was defined as "the care that a reasonably careful corporation would use under the circumstances." (*Id.*) Finally, each jury also found that "DuPont should have foreseen or reasonably anticipated that injury would result from the negligent act." (*Id.* at A-44.) And despite DuPont's arguments to the contrary, the jury instructions on foreseeability made it clear that the jury's finding of foreseeability was based on whether DuPont should have foreseen injuries to those who

were in similar positions, such as each Plaintiff in the *Leach* Class. (*See id.* (explaining that the juries were instructed that "[t]he test for foreseeability is not whether DuPont should have foreseen the injury exactly as it happened to [the Plaintiff]. Instead, the test is whether under the circumstances, a reasonably careful person would have anticipated that an act or failure to act would likely result in or cause injuries.").) In short, the proper test for foreseeability is not plaintiff-specific.

DuPont also argues that a number of "critical" factual differences between the post-settlement plaintiffs and those in the three trials prevent the application of offensive issue preclusion. (*See* Pet. at 22-24.) None of those differences, to the extent they event exist, have any legal significance to the settled issues of duty and breach. For example, DuPont points to potential differences in the time periods and locations of the plaintiffs' C8 exposure. Both of those factual categories, however, go to the issue of specific causation, not the duty DuPont owed each plaintiff, or DuPont's breach of that duty. Indeed, the issue of specific causation is a live controversy that will be litigated at the upcoming trials.

Still, in an effort to convince this Court that the extraordinary remedy of mandamus is necessary, DuPont mischaracterizes and hyperbolizes the effect of the district court's Order. The district court's Order explicitly allows DuPont to present evidence of what it calls the "critical" factual differences. But in doing so, the district court correctly explains that it will be done during the specific causation phase of the trials. The alleged differences in the plaintiffs' locations and the time periods of their C8 exposure, for example, are related only to whether that exposure specifically caused their diseases. These specific facts do not relate to the more general question of whether DuPont owed plaintiffs a duty or whether DuPont breached that duty by contaminating the communities' water supplies with C8.

In sum, the district court specifically held that "[t]he factual differences highlighted by DuPont (*i.e.*, water districts, diseases, and the timing and duration of C8 exposure) go to specific causation, which is a live controversy that will be vigorously litigated in the upcoming trials." (Pet. at A-45.) The alleged factual differences are of no legal significance to the findings on duty and breach, and therefore, do not bar the preclusion of those issues. *See United States v. Stauffer Chem.*

Co., 464 U.S. 165, 172 (1984) (issue preclusion applies where "[a]ny factual differences between the two cases . . . are of no legal significance whatever in resolving the issue presented in both cases").

C. Application of offensive issue preclusion on the issues of duty and breach is not unfair to DuPont.

Having established that the requirements of traditional issue preclusion were satisfied, DMO 34 appropriately focused on whether application of offensive issue preclusion would be unfair to DuPont under the particular circumstances of this case. *See Parklane*, 439 U.S. at 331; *see also Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S 313, 334 (1971) ("In the end, [the issue preclusion] decision will necessarily rest on the trial courts' sense of justice and equity."); *In re Air Crash at Detroit Metro. Airport, Detroit, Mich. on Aug. 16, 1987*, 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. . . . The teaching of *Parklane* is that the issue is delicate and must be handled in this manner.").

Applying the *Parklane* factors here, nothing is unfair to DuPont. DuPont had every incentive to vigorously defend itself against the negligence claims in the first three trials, and after three trials, there have been no inconsistent judgments. None of the MDL Plaintiffs had joinder options in the previous trials. And there are no procedural opportunities that would be available in the upcoming trials that were not available to DuPont leading up to or during the first three trials. Thus, none of the factors that cut against application of offensive issue preclusion are present here. *See Parklane*, 439 U.S. at 329-331.

Perhaps recognizing this reality, DuPont avoids the *Parklane* factors altogether. Instead, DuPont argues that applying issue preclusion would be unfair because "[t]here was neither notice nor consent that Plaintiffs would be able to employ non-mutual, offensive issue preclusion using early trial results." (Pet. at 17.) DuPont does not provide any support explaining why consent is required before offensive issue preclusion can apply. Indeed, the very nature of *offensive* issue preclusion inherently suggests that one party does *not* consent to its application. It is no surprise that DuPont cites no case law indicating that both parties must consent before offensive issue preclusion applies.

DuPont also offers no support for its argument that advance notice of offensive issue preclusion is a prerequisite to its application. But even if notice were somehow required, the extensive record in this case establishes that DuPont should have foreseen that the first three trials could have preclusive effect over later trials. In fact, DuPont made this very argument when it asked for this MDL. When DuPont initiated the MDL proceedings, it argued that all of the cases had common claims, common plaintiffs, and would be litigated in the same manner. (*See* R. No. 1-1, DuPont's Mem. in Support of Mot. for Coordination & Consolidation & Transfer, at 1 (acknowledging that "the complaints each involve the same core factual allegations regarding DuPont's conduct, and also raise the same theories of legal liability").) In other words, DuPont's request for an MDL, which occurred more than six years ago, was an effort to streamline and efficiently manage the more than 3,500 cases brought by commonly exposed and commonly defined class members. It is, at best, disingenuous for DuPont to now claim that it did not have sufficient notice of the impact early trials may have on later cases (when it admitted that the cases included the same

underlying claims and defenses). The Court should reject this argument out of hand.

Even worse, DuPont acknowledged to this Court that the rulings and results of the earlier proceedings would impact the remainder of the MDL cases. In its appeal of the *Bartlett* jury verdict, DuPont argued that the district court erred in its interpretation of the *Leach* Settlement Agreement in a way that would impact "the heart of a critical defense for DuPont in *each of the 3,500 cases in this MDL*." *Bartlett v. E. I. du Pont de Nemours and Company,* 6th Cir. No. 16-3310, Appellant's Br. at 1. DuPont knew that the issues decided before (and during) those three trials could have preclusive effect on the other cases in the MDL. It told this Court exactly that. And before this Court could issue a decision on that appeal, DuPont chose to withdraw it and settle the case, thereby forfeiting is assignments of error and accepting the results of the *Bartlett* trial.

The district court did not clearly err in finding that preclusion of the issues of duty and breach—based on the results of the first three trials—would not be unfair to DuPont. DuPont had a full and fair opportunity to litigate these issues, it did so vigorously in three trials

(not to mention a fourth trial that settled before a verdict), and during an appeal that was fully briefed and argued before this Court. The issues of duty and breach were decided consistently by three juries, and the district court and the parties should not be required to waste the extraordinary time and resources presenting the same evidence to new juries on those issues.

D. There is no categorical bar to the application of offensive issue preclusion in mass tort multidistrict litigation actions.

DuPont asks the Court to apply a categorical rule against the application of offensive issue preclusion in mass tort multidistrict litigation. (*See* Pet. at 14-15; 18-20.) Similarly, the amicus argues that offensive collateral estoppel is "foreclosed altogether" in mass tort litigation. (*See* Amicus Br. at 6-7.) That argument is without merit because it disregards the Supreme Court's holding in *Parklane* that district courts are afforded "broad discretion" to determine when offensive issue preclusion should be applied. 439 U.S. at 331.

Both DuPont and the amicus rely primarily on this Court's decision in *In re Bendectin Prods. Liab. Litig.*, 749 F.3d 300 (6th Cir. 1984), to support the argument that offensive issue preclusion is

inappropriate in the mass tort context. The *Bendectin* court stated in dicta, in a footnote, that the *Parklane* Court "explicitly stated that offensive collateral estoppel could not be used in mass tort litigation." 749 F.3d at 306 n.11 (citing *Parklane*, 439 U.S. at 330 n.14). That statement, however, does not exist in the *Parklane* decision, and it is inconsistent with *Parklane*'s holdings and rationale.

The *Parklane* Court explicitly rejected absolutes and categorical rules requiring or prohibiting offensive issue preclusion in any particular circumstances. 439 U.S. at 331. The Court instead set forth broad guidelines for determining whether application of the doctrine would be unfair to a defendant and granted district courts "broad discretion to determine when it should be applied." *Id.*

The *Bendectin* court's statement was premised on *Parklane*'s reference to a hypothetical mass tort case in which offensive issue preclusion would be unfair to a defendant. *See Bendectin*, 749 F.3d at 306 n.11 (citing *Parklane*, 439 U.S. at 330 n.14). In that hypothetical, "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 suit 26." *Parklane*, 439 U.S. at 330 n.14. Clearly, it would

be unfair to the defendant in that case to apply offensive issue preclusion to allow the remaining 24 plaintiffs to recover.

And just as clearly, that situation is in no way analogous to this case. Here, there have been three trials, all of which resulted in findings of negligence against DuPont based on the same evidence of the same conduct. There is not the threat of inconsistent verdicts, which is the reason that offensive issue preclusion should not apply in *Parklane*'s hypothetical. *See id.* at 330 ("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."). "A close reading of *Parklane* reveals that the Court (1) authorized the use of offensive collateral estoppel, and (2) *only mentioned, but did not broadly accept, the arguments that have been advanced against the wholesale application of offensive collateral estoppel.*" *In re Air Crash*, 776 F. Supp. at 325.

Contrary to *Bendectin*'s interpretation, the *Parklane* Court did not create a categorical rule against offensive issue preclusion in mass tort cases. Instead, it provided district courts with examples and guidelines for determining, on a case-by-case basis, whether application of the

doctrine would be unfair to a defendant in a particular context. *See Parklane*, 439 U.S. at 331. As one court explained, "[t]he contours of when offensive collateral estoppel would be unfair—even in mass tort litigation—should be developed on a case-by-case basis. . . . The teaching of *Parklane* is that the issue is delicate and must be handled in this manner." *In re Air Crash*, 776 F. Supp. at 325. Moreover, the *Parklane* hypothetical does not apply here because all of the remaining cases are still going to trial on a host of issues that were not implicated, and explicitly excluded, by DMO 34. Thus, the automatic future victories envisioned in *Parklane*'s hypothetical do not exist here due to the limited manner in which the district court applied collateral estoppel.

Indeed, there are numerous cases in which district courts have employed the broad discretion afforded to them by *Parklane* to apply offensive issue preclusion in mass tort actions. *See, e.g.*, *In re Chinese-Manufactured Drywall Liab. Litig.*, MDL No. 2407, 2014 WL 4809520, *12 (E.D. La. Sept. 26, 2014) (applying offensive issue preclusion in mass tort MDL action); *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242, 248 (E.D. Tex. 1980) (prior jury verdicts, "coupled with considerations of

judicial economy in deciding mass torts, persuade this Court to rule in favor of the offensive use of collateral estoppel"); *see also Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W.V. 2015) (acknowledging in widespread water contamination case that if defendant "lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent [defendant] from litigating the issue") (quoting *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 427 (4th Cir. 2003)).

The district court did not clearly err in following those decisions and the decision of its sister court in *In re Air Crash*. The Supreme Court granted district courts broad discretion to determine whether to apply offensive issue preclusion. The district court here—after six years of managing a voluminous docket, analyzing a multitude of dispositive motions, and presiding over four trials—is in the best position to determine, in its discretion, that application of offensive issue preclusion is appropriate and not unfair to DuPont under the present circumstances. That holding is not clearly erroneous.

III. A writ of mandamus is not appropriate under the circumstances.

As explained above, mandamus relief is not warranted here because DuPont has other means through which it can achieve its desired relief. DuPont has also failed to demonstrate that it is indisputably entitled to relief on the merits. Nor has it shown that DMO 34 presents a clear error of law. Still, even if this Court were to find that DuPont has cleared those initial hurtles, this Court must also find, in its discretion, that mandamus relief is "appropriate under the circumstances." *See Cheney*, 542 U.S. at 381. It is not appropriate in this case.

Throughout its petition, DuPont resorts to hyperbole about the drastic effects and "unprecedented" nature of the district court's Order. The simple truth, however, is that the district court's ruling is by no means unprecedented. DuPont admits as much when it relies on cases where other courts' application of offensive collateral estoppel has been reversed, *after a trial*, through the normal appellate process. (*See* Pet. at 29 (citing *Pittington*, 880 F.3d 791 (reversing district court's decision to prevent jury from deciding "factual issue of damages" and remanding for *new trial*), and *Loughride*, 431 F.3d at 1287-88 (reversing and

remanding for *new trial* on certain claims based on court's "speculation as to what the jury actually determined").) Contrary to DuPont's overstatement, there is precedent for such rulings in the district court, and precedent for challenging those rulings through the normal appeals process.

DuPont also makes sweeping claims that DMO 34 will "transform" all other MDL cases and have a "wide-ranging impact." (Pet. at 30-31.) The amicus party similarly contends that DMO 34 "threatens the bellwether system" and the future of MDL litigation as a whole. (*See* Amicus Br. at 9-12.) Those arguments ignore the fact that one of the jury verdicts (*Vigneron*) was not a bellwether. They also grossly overstate the impact of the district court's Order and fail to recognize that decisions on the application of offensive issue preclusion must be made on a case-by-case basis, looking only at the specific facts and circumstances presented by each case. *See Parklane*, 439 U.S. at 331; *see also In re Air Crash*, 776 F. Supp. at 325 ("The contours of when offensive collateral estoppel would be unfair—even in mass tort litigation—should be developed on a case-by-case basis."). The broad discretion afforded to the district courts by *Parklane* to evaluate each

case on its own facts diminishes any precedential value in the district court's Order. And it certainly undercuts any argument that the Order will "transform" all MDL cases.

At bottom, DuPont's petition for a writ of mandamus is premised on its disagreement with the district court's ruling on a motion for summary judgment. The writ is an extraordinary remedy that is reserved for "exceptional circumstances" such as a "judicial usurpation of power." *Cheney*, 542 U.S. at 380 (internal quotation marks and citation omitted). DuPont has fallen woefully short of establishing that DMO 34 amounted to a "judicial usurpation of power."

The district court ruled on issues directly within its jurisdiction, and if DuPont is unhappy with those rulings, its recourse is through the normal appellate process. The Supreme Court has repeatedly characterized mandamus as an "extraordinary remedy" precisely to caution against its issuance in a routine situation where a litigant is disappointed with a pretrial ruling. Under the circumstances of this case, a writ of mandamus is not an appropriate remedy for the relief DuPont seeks, and its petition should be denied accordingly.

CONCLUSION

For all of the foregoing reasons, the petition for writ of mandamus should be denied.

Respectfully submitted,

/s/ Robert A. Bilott
Robert A. Bilott
Aaron M. Herzig
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202
Phone: (513) 381-2838
Fax: (513) 381-0205
bilott@taftlaw.com
aherzig@taftlaw.com

Co-Lead Counsel for Respondent Plaintiffs' Steering Committee

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I hereby certify that on January 15, 2020, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert A. Bilott