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 MOTION FOR LEAVE TO FILE, *INSTANTER*, A SUR-REPLY IN OPPOSITION TO THE PLAINTIFF'S STEERING COMMITTEE'S RENEWED MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF ISSUE PRECLUSION/COLLATERAL ESTOPPEL

Defendant E. I. du Pont de Nemours ("DuPont") respectfully requests leave to file, *instanter*, a short sur-reply brief to respond to the six new arguments that the Plaintiff's Steering Committee ("PSC") made in its recently filed reply brief.

On April 19, 2019, PSC filed a motion for summary judgment to apply non-mutual offensive collateral estoppel to various issues in the MDL. [MDL ECF No. 5202.] DuPont responded on May 9, 2019 [MDL ECF No. 5208]. PSC withdrew their motion fourteen days later, claiming that the Court's issuance of PTO No. 51 addressed PSC's concerns. [MDL ECF No. 5220.]

On October 11, 2019, PSC filed a renewed, and almost identical, motion seeking application of non-mutual offensive collateral estoppel. [MDL ECF No. 5274.] Despite their undisputed awareness of the bases for DuPont's prior opposition, PSC's motion did not address the controlling case law cited by DuPont.

Indeed, PSC requested expedited briefing in view of the impending *Swartz* trial, which was set to start on November 4, 2019, and because PSC's "current brief is very similar to its May 2019 brief which Defendants have already prepared a reply to." [*Id.* at 2-3 (citations omitted).] The Court swiftly ordered expedited briefing. [MDL ECF No. 5275.] DuPont filed its opposition on October 17, 2019, as ordered. [MDL ECF No. 5278.]

PSC then filed a reply that makes at least the following six ***new*** arguments attempting to support the application of non-mutual offensive collateral estoppel to all remaining cases in this MDL. For the first time, PSC argued that:

1. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) does not govern the preclusive effect of judgments by a federal court sitting in diversity [MDL ECF No. 5274 at 3-4];

2. Even if *Semtek* potentially applied as a threshold matter, "federal interests" support circumventing Supreme Court precedent here [*id.* at 4-5];

3. Ohio law permits the application of non-mutual offensive collateral estoppel [*id.* at 5-8];

4. Removing all evidence related to foreseeability in support of Plaintiffs' negligence claims from the jury would somehow have no effect on the evidence Plaintiffs would provide to demonstrate foreseeability as to their punitive damages claims [*id.* at 10-11];

5. DuPont's settlement of prior cases in this MDL constituted a voluntary forfeiture of DuPont's appellate rights as to any issue raised in a prior appeal [*id.* at 15]; and

6. Non-mutual offensive collateral estoppel should apply to all cases in this mass tort MDL based on the Florida Supreme Court's application of *res judicata* to determinations reached

by a state trial court in a certified class action in *Engle v. Liggett Group*, 945 So.2d 1246 (Fla. 2006). [*Id*. at 12-13.]

Because PSC kept these arguments secreted in their hip pocket in connection with their renewed motion, DuPont respectfully requests an opportunity to briefly address them in a sur-reply. Pursuant to S.D. Ohio Local R. 7.2(a)(2), a party may seek leave of the Court to file a sur-reply in support of its opposition to a motion "for good cause shown." Good cause exists for a sur-reply where a party seeks to "respond to an argument raised by [a party] for the first time in its reply brief." *NetJets Large Aircraft, Inc. v. United States*, 2017 U.S. Dist. LEXIS 49232, at *12, (S.D. Ohio Mar. 21, 2017) (citing *Burlington Ins. Co. v. PMI Inc.*, 862 F. Supp. 2d 719, 726 (S.D. Ohio 2012)); *see also Lawroski v. Nationwide Mut. Ins. Co.*, 981 F. Supp. 2d 704, 708 (S.D. Ohio 2013) (granting leave to file a sur-reply where a party presented a new argument in a reply brief); *Kendall Holdings, Ltd. v. Eden Cryogenics LLC*, 846 F. Supp. 2d 805, 812-13 (S.D. Ohio 2012) (same).

Leave to file a sur-reply should be granted where the purpose of the sur-reply is to "address new arguments, cases, and factual assertions" contained in a reply memorandum. *Burlington Ins. Co.*, 862 F. Supp. 2d at 726. "Good cause for a sur-reply also exists where a party seeks to 'clarify misstatements' contained in the reply brief." *NCMIC Ins. Co. v. Smith*, 375 F. Supp. 3d 831, 836 (S.D. Ohio 2019) (citing *Guyton v. Exact Software N. Am.*, 2015 U.S. Dist. LEXIS 170241, 2015 WL 9268447, at *4 (S.D. Ohio Dec. 21, 2015)).

A district court abuses its discretion in denying a sur-reply where new submissions or arguments are made in conjunction with a reply brief, and the non-moving party is not afforded notice and a reasonable opportunity to respond. *Eng'g & Mfg. Servs., LLC v. Ashton*, 387 F. App'x

575, 583 (6th Cir. 2010) (non-moving party should have been permitted to respond in sur-reply); *Seay v. Tennessee Valley Auth.*, 339 F.3d 454, 481-82 (6th Cir. 2003) (same).

Here, good cause exists to permit DuPont to file a sur-reply to address the new arguments identified above, especially considering that PSC withheld these new arguments despite knowing the arguments that would be presented in DuPont's opposition from briefing five months ago. DuPont, furthermore, has complied with the expedited briefing schedule demanded by PSC and deserves a reasonable opportunity to present its response to PSC's new arguments for this Court's consideration.

A party may also be "granted leave to file [a] sur-reply in the absence of good cause where the non-moving party 'will suffer no prejudice by the filing of the sur-reply.'" *NCMIC Ins. Co.*, 375 F. Supp. 3d at 836; *see also National City Bank v. Aronson*, 474 F. Supp. 2d 925, 930 (S.D. Ohio 2007); *Burt v. Life Insurance Co. of North America*, 2006 U.S. Dist. LEXIS 54630, at *9 (S.D. Ohio Aug. 7, 2006). If anyone has been prejudiced by the sequence and timeline of briefing on this issue, it is DuPont. In contrast, no prejudice is caused by DuPont's tendered sur-reply, particularly where the sur-reply is being submitted promptly after the PSC's reply brief, and the purpose of the sur-reply is to squarely address new arguments that should have been presented in the PSC's initial motion. *See NCMIC Ins. Co.*, 375 F. Supp. 3d at 836 (holding that no prejudice exists where a sur-reply is already filed and no additional fees will be incurred or delay will accrue as a result). As well, the Court adjourned the *Swartz* trial (which was the basis for the expedited briefing request) and consolidated it with the *Abbott* trial, which is set to begin on January 21, 2020. [PTO 51-A, MDL ECF No. 5279].

The proposed sur-reply is attached as Exhibit A.

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 29th day of October 2019, and was thus served automatically upon all counsel of record for this matter.

/s/ Damond R. Mace
Damond R. Mace (0017102)

EXHIBIT A

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 SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR THE APPLICATION OF OFFENSIVE, NON-MUTUAL COLLATERAL ESTOPPEL

Plaintiff Steering Committee's ("PSC") Reply to DuPont's Opposition to the Plaintiffs' Steering Committee's Renewed Motion for Summary Judgment on the Grounds of Issue Preclusion/Collateral Estoppel ("Reply") [MDL ECF No. 5280] raises new arguments that misstate the governing law, disregard the critical, plaintiff-specific issues that are pivotal to the duty and breach elements of Plaintiffs' negligence claims, and seek to deprive DuPont's fundamental right to defend itself against the individual personal injury actions pending in this MDL.

Having already filed (and withdrawn) a virtually identical motion five months prior, PSC knew (from DuPont's prior Opposition) the proper analytical framework for determining whether non-mutual offensive collateral estoppel should apply here. PSC withheld addressing this framework, which is essential to any reasoned assessment of the merits of their motion. PSC did so both to persuade the Court that the Motion should be decided on an expedited basis, and to prevent DuPont from having an opportunity to meaningfully address PSC's actual arguments on the core principles that dictate the outcome of their Motion. PSC's new arguments in the Reply

are not only fundamentally flawed, failing to cure the fatal defects in PSC's Renewed Motion for Summary Judgment on the Grounds of Issue Preclusion/Collateral Estoppel [MDL ECF No. 5274] (the "Motion"), they were withheld from the Motion out of pure gamesmanship. PSC's Motion should be denied.

ARGUMENT

A. *Semtek* Requires the Application of Ohio Law to PSC's Motion.

PSC now attempts to avoid application of Ohio issue preclusion law through a new argument that *Semtek* was a "narrow ruling" with "limited application to issue preclusion cases." *See* Reply at 3. PSC's new argument ignores the Supreme Court's subsequent explanation in *Taylor v. Sturgell*, 553 U.S. 880 (2008) that ***"[f]or judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits***." *Id.* at 891 n.4 (citing *Semtek*, 531 U.S. at 508) (emphasis supplied); *Wayne Cty. Hosp., Inc. v. Jakobson*, 567 F. App'x 314, 317 (6th Cir. 2014) (same); *Cudd Pressure Control, Inc. v. N.H. Ins. Co.*, 645 F. App'x 733, 738 n.2 (10th Cir. 2016) (noting same); *see also Hately v. Watts*, 917 F.3d 770, 777 (4th Cir. 2019) (holding that *Semtek* requires the application of state collateral estoppel law for federal court judgments based on supplemental jurisdiction).[1]

Furthermore, PSC fails to offer any reasoned explanation why claim preclusion should be governed by state law but issue preclusion should be governed by federal law—such a nonsensical division would lead to confusion and contradiction. It would also violate *Setmek*'s objectives of promoting substantive uniformity and deterring forum-shopping between state and federal courts. *See Semtek*, 531 U.S. at 508 ("[N]ationwide uniformity in the substance of the matter is better

[1] The Supreme Court has spoken in the broadest possible terms with respect to state principles of preclusion, and has never provided a reason to treat issue and claim preclusion doctrines differently.

served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court.").

Hoping to ignore binding Supreme Court precedent, PSC mischaracterizes an Eleventh Circuit case that adopted the precise rule set forth in *Semtek* as re-confirmed in *Taylor,* and two out-of-circuit cases that predate *Taylor*. Specifically, PSC distorts *CSX Transp., Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333, 1338 (11th Cir. 2017) by citing it for a premise that it does not support: that *Semtek* has limited application in collateral estoppel cases. *See* Reply at 3. *CSX* actually explained that "[t]he doctrines of collateral estoppel and res judicata are insufficiently distinct to warrant different treatment under the rationale of *Semtek*." *Id*. In *CSX*, the Eleventh Circuit addressed a confusing trail of post-*Semtek* precedent regarding whether federal common law incorporated collateral estoppel as defined by state law. *Id*. at 1338-40. Ultimately, the Eleventh Circuit, in line with *Semtek* and *Taylor*, held that "**federal common law borrows the state rule of collateral estoppel to determine the preclusive effect of a federal judgment where the court exercised diversity jurisdiction**." *Id*. at 1340 (emphasis added). The court then determined that Georgia's collateral estoppel law should apply to a prior federal court diversity judgment, and remanded to the district court to determine whether the requirements of the state collateral estoppel law had been met. *Id*.

PSC also is wrong in claiming that *In re Univ. Serv. Fund Tel. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1134 (D. Kan. 2003) and *Matosantos Comm. Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1207 (10th Cir. 2001) held that *Semtek* does not address issue preclusion. *See* Reply at 3. Both decisions determined that *Semtek* "[did] not definitively resolve the issue," and declined to decide whether *Semtek* actually addressed issue preclusion. *In re Univ. Serv.*, 300 F. Supp. 2d at 1134; *Matosantos*, 245 F.3d at 1207. Furthermore, after these two lower court decisions, the

Supreme Court clarified whatever ambiguity arguably lurked in *Semtek*, stating that ***all*** state rules of preclusion apply to federal court judgments in diversity cases. *Taylor*, 553 U.S. at 891 n.4; *Smith*, 64 U.S. at 307 n.6.

PSC's other cited cases are likewise unavailing to its Supreme Court-defying argument that Ohio law does not control here. *GE Med. Sys. Eur. v. Prometheus Health*, 394 F. App'x 280 (6th Cir. 2010) involved Ohio state-law claims against two defendants, adjudicated in separate summary judgment motions. *Id.* at 281-82. Summary judgment was entered as a sanction against one defendant based on his "continued discovery violations." *Id.* at 282. The district court then applied collateral estoppel to bind a second defendant, as the prior judgment addressed the same issues. *Id.* In dicta, the court indicated that federal issue preclusion law applied to a prior federal judgment, but, in doing so, it relied on *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto Aerospace and Agric. Implement Workers, UAW*, 97 F.3d 155, 161 (6th Cir. 1996), a pre-*Semtek* and pre-*Taylor* case. *Wayne Cty. Hosp., Inc. v. Jakobson*, 567 F. App'x 314, 317 (6th Cir. 2014), in contrast, is a more recently decided Sixth Circuit decision that abides by the binding holdings of *Semtek* and *Taylor*. Further, the *GE* decision fits squarely within the precise, narrow exception set forth in *Semtek* for the application of federal collateral estoppel law: a prior judgment entered with respect to a state law claim as a sanction for "willful violation of discovery orders." *Semtek*, 531 U.S. at 509.

J.Z.G. Res. v. Shelby Ins. Co., 84 F.3d 211, 214 (6th Cir. 1996), a case involving claim preclusion, was issued five years before *Semtek*. *Gonzalez v. Moffitt*, 252 B.R. 916, 918 (B.A.P. 6th Cir. 2000) was also a pre-*Semtek* case. Subsequent decisions from the Sixth Circuit and the district courts embrace *Semtek*'s incorporation of state collateral estoppel principles to judgments by federal courts sitting in diversity. *See Wayne Cty. Hosp., Inc.*, 567 F. App'x at 317; *see also In*

re Berge, 2018 Bankr. LEXIS 1975, at *4 (Bankr. M.D. Tenn. June 28, 2018) (interpreting *Semtek* to state "that federal court judgments based on state law claims in diversity actions rely on state issue preclusion standards"); *KeyBank, N.A. v. Hartmann*, 2013 U.S. Dist. LEXIS 42974, at *6 (E.D. Ky. Mar. 27, 2013) (citing *Semtek* to apply state collateral estoppel law to a prior judgment by a federal court sitting in diversity, and determining collateral estoppel could not apply under state law); *Everest Stables, Inc. v. Rambicure*, No. 3:15-CV-00576-GNS-CHL, 2018 U.S. Dist. LEXIS 95108, at *13 (W.D. Ky. June 6, 2018) (same).

In sum, Ohio's law of issue preclusion governs, and it dictates that no preclusive effect should be given in the current trials to the prior plaintiff-specific jury verdicts, each unique unto itself and based on plaintiff-specific facts that are unique from the facts of the individual cases currently pending in this MDL. *See* DuPont's Opposition to the Plaintiff's Steering Committee's Renewed Motion for Summary Judgment on the Grounds of Issue Preclusion/Collateral Estoppel [MDL ECF No. 5278] at 7-8.

B. There Is No Federal Interest That Distinguishes *Semtek* and *Taylor* In Order To Allow the Application of Offensive Non-Mutual Collateral Estoppel.

PSC reveals another new argument for the first time in its Reply: a claim that this Court has a "compelling and overriding federal interest" that overcomes the Supreme Court's *Semtek* rule. *See* Reply at 4-5. As an initial matter, far from incompatible with federal interests, Ohio preclusion law would lead to the same results here as federal law. [*See* MDL ECF No. 5278 at 13-20.] It is instead the application of offensive issue preclusion to bar litigation of central undecided plaintiff-specific issues in future trials that would erode federal interests, including basic fairness and efficiency. *See Richards v. Jefferson Cty.*, 517 U.S. 793, 797 & n.4 (1996) (guarding against application of res judicata that is "inconsistent with a federal right that is 'fundamental in character' [such as] due process").

Moreover, there is no federal interest that warrants setting aside state preclusion principles here. *See, e.g., In re Mirena IUD Prods. Liab. Litig.*, 2015 U.S. Dist. LEXIS 113588, at *8-18 (S.D.N.Y. Aug. 26, 2015) (determining that state preclusion principles should apply to earlier decisions of an MDL court sitting in diversity); *see also In re Bendectin*, 749 F.2d 300, 306 n.11 (noting in federal context that "offensive collateral estoppel could not be used in mass tort litigation").

The alleged interests PSC identifies include "streamlining litigation proceedings [and] conserving judicial resources."[2] However, these interests militate against the application of issue preclusion here. First, "offensive use of issue preclusion does not promote judicial economy" because it has the ability to "increase rather than decrease the total amount of litigation." 18 Moore's Federal Practice § 132.04[2][c], 132-166; *see also S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 1011 (D.C. Cir. 1984) (offensive use of issue preclusion could be employed in a manner that promotes "judicial diseconomy."). Offensive issue preclusion gives Plaintiffs "every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." 18 Moore's Federal Practice § 132.04[2][c][iii]. The imposition of offensive non-mutual collateral estoppel in this litigation is highly likely to increase, rather than decrease, the total amount of litigation. This is particularly so where additional Plaintiffs with claims based on ever more attenuated claims of exposure seek to benefit from determinations reached in earlier trials relying on different plaintiff-specific facts.[3]

[2] PSC also argues that district courts can ignore *Semtek* to prevent "panel shopping", effectively arguing that a district court may ignore Supreme Court authority to ensure that a preferred panel of appellate judges hears a dispute. Of course, this is not one of the defined "federal interests" in *Semtek*, nor could it be, considering it is the sole province of the Circuit Court of Appeals to determine what panel should be assigned to a case.

[3] It would also unjustifiably reward gamesmanship in the MDL context where, like here, PSC chose their best plaintiff-specific facts out of the more than 3,500 then-pending cases for the third trial.

Second, PSC's stated interests in judicial economy are present in ***every*** case in which collateral estoppel might apply. The Supreme Court squarely addressed these interests when it determined that state collateral estoppel law should apply to the judgment of a federal court sitting in diversity, absent specific federal interests that are plainly not present here.

Third, PSC concedes that collateral estoppel cannot apply to Plaintiffs' punitive damage claims, and each Plaintiff must still adduce largely the same evidence he or she uses to attempt to prove negligence claims in order to prove entitlement to punitive damages—thus eliminating any claimed trial efficiencies from issue preclusion.

PSC now springs the new argument that its evidence for the "actual malice" punitive damage determination is distinct from its evidence for the duty and breach elements of the negligence claims. At best, this argument is disingenuous. PSC's own Mr. Bilott has unequivocally emphasized that evidence related to both negligence and punitive damages "goes to notice and foreseeability, and so there's no way to separate the two." MDL ECF No. 4209; Mot. *in Limine* Hrg., Aug. 24, 2015 at 231:21-22 (emphasis supplied). That punitive damages require a conscious disregard of a "great probability" of substantial harm as opposed to a "likelihood" of harm is inconsequential for purposes of collateral estoppel and DuPont's basic Seventh Amendment guarantees. What matters is that **each Plaintiff will use much of the same Plaintiff-specific evidence regarding DuPont's conduct to try to prove both his or her claims of negligence and his or her claim of actual malice**. No efficiencies would be gained through application of collateral estoppel in these cases. Further, PSC, having clearly reserved for its Reply a rebuttal to arguments DuPont made five months ago, does not dispute that DuPont's fundamental rights would be violated if the application of collateral estoppel to all Plaintiffs' negligence claims removed the determination of foreseeability from the jury in the punitive damages phase.

Fourth, DuPont has a fundamental due process right to tell its side of the story in these cases, which includes evidence related to notice, foreseeability, and state of the science, and how each of those and other facts changed over time and with respect to someone in the position of the specific plaintiff. *See Old Chief v. United States*, 519 U.S. 172, 187 (1997) (quoting *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958)) (a party has the right to "present to the jury a picture of the events relied upon").

PSC's reliance on *In re Leonard*, 2014 Bankr. LEXIS 1001 (Bankr. E.D. Tenn. Mar. 14, 2014) is misplaced. *Leonard* concerned the inapposite issue of the preclusive effect of a default judgment entered by a federal court sitting in diversity against a party that had substantially participated in the prior litigation, but had ignored the court's discovery orders. The *Leonard* court emphasized the "federal courts' interest in the integrity of their own processes," specifically the entry of default judgment against a party for failure to comply with discovery orders. *Id*. at *49 (citing *Semtek* at 509). Applying this narrow principle, the *Leonard* court determined that North Carolina law and federal law were in conflict—North Carolina courts would not give collateral estoppel effect to a default judgment entered as a penalty for a party's failure to comply with a discovery order, while federal courts would. *Id*. at *47-48. The court then held that federal law governing the effect of a default judgment entered in a federal court sitting in diversity should control, as the federal courts' need to ensure that default judgments were binding on parties who had actually participated in litigation outweighed North Carolina's interests in avoiding collateral estoppel. *Id*. at *49-51. The *Leonard* court, faithful to *Semtek* and diametrically opposite to PSC's contention, held that *Semtek* applied to collateral estoppel, and only adopted federal law based on the exact scenario described in that opinion—which is not present here.

C. Ohio Law Forbids The Use of Offensive Non-Mutual Collateral Estoppel in this MDL.

It is not surprising that PSC did not raise the application of Ohio issue preclusion law in its Motion, considering that 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 (Ohio Ct. App.).

Given PSC's failure to address *Semtek* and its progeny in its Motion, PSC mistakenly claims for the first time in its Reply that Ohio issue preclusion law is satisfied on the facts of this MDL. This argument also suffers from at least three major flaws. First, PSC ignores cases like *State ex rel. Davis v. Pub. Emples. Ret. Bd.*, 174 Ohio App. 3d 135, 147 (2007), where an Ohio Court of Appeals determined that collateral estoppel does *not* apply to cases that are "individually tailored." *Id*. at 148. Here, each plaintiff must prove that DuPont knew, or should have known, that harm was likely to occur to "***someone in the plaintiff's position***." *See* Final Jury Instructions in *Kenneth Vigneron v. E. I. du Pont de Nemours and Company*, 2:13-cv-136 (S.D. Ohio 2013) [*Vigneron* ECF No. 195] at Instruction No. 19. And, if such a duty existed, that DuPont breached that duty *to that plaintiff*. *Id.* at No. 18.

By definition, the evidence needed to prove the elements of each Plaintiff's negligence claim is unique to that Plaintiff, including when that Plaintiff claims exposure to drinking water that allegedly caused their claimed disease, where that Plaintiff claims exposure, how much exposure that Plaintiff claims during those years, what that Plaintiff knew about C-8 and when, and a myriad of other Plaintiff-specific factors. These **critical Plaintiff-specific facts bear directly on the foreseeability of harm to someone in the position of the Plaintiff**, and are highly material to evaluation of the Plaintiff-specific burdens of proving duty and breach, not just specific causation, and are unique to each plaintiff. *See, e.g., Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000) ("[W]e cannot transpose a general finding that substances were released … to bar

[the defendant] from contesting the range of its conduct and duties as alleged in a second action to determine its liability"); *Richards v. Katz*, 2013 U.S. Dist. LEXIS 107905 (D.V.I. Aug. 1, 2013) (general finding of negligence by jury for first plaintiff cannot be given issue preclusive effect on negligence claims of subsequent plaintiffs because the first jury "made no specific finding with respect to [those plaintiffs]" and verdict form did not specifically identify what acts constituted negligence); *Coburn v. Smithkline Beecham Corp.*, 174 F. Supp. 2d 1235, 1238 (D. Utah 2001) (holding that where plaintiffs offered several theories as to the cause of injury but the jury did not specify on which theory its decision was based, collateral estoppel was inappropriate); *AIG Ret. Servs. v. Altus Fin*. 2011 U.S. Dist. LEXIS 162991, at *17-18 (C.D. Cal. July 21, 2011) (same).

Here, **the earlier verdict forms were expressly plaintiff-specific**, and required the jury to evaluate what DuPont knew or should have known about the likelihood of harm to each specific plaintiff based on their specific location and their dates of claimed causative exposure, among many other highly plaintiff-specific facts. The three disparate earlier trial plaintiffs in this MDL did not seek, and were not awarded, a "general, blanket determination" as to negligence, nor did they receive jury verdict forms specifically detailing which of many different claimed negligent acts or omissions the jury relied on for their plaintiff-specific verdicts. On these facts, collateral estoppel cannot apply.

Second, PSC conflates cases applying Ohio law with cases applying pre-*Semtek* federal common law, *see* Reply at 7-8, and cites no case that overturns or even questions *Goodson*'s general bar on the type of collateral estoppel PSC seeks to have applied here. For instance, PSC relies on *Kirkhart v. Keiper*, 805 N.E.2d 1089 (Ohio 2004) and *Brown v. City of Dayton*, 89 Ohio St. 245 (2000), but both of those cases involved res judicata/claim preclusion, not collateral estoppel.

Third, PSC invokes cases involving defensive, not offensive, non-mutual collateral estoppel. *See State ex rel. Bradford v. Ohio Dep't of Rehab. & Corr.*, 2017 Ohio App. LEXIS 3597 (Ohio Ct. App. Aug. 22, 2017) (applying defensive non-mutual collateral estoppel where a state agency was sued to correct a record received from a state court); *Kiara Lake Estates, LLC v. Bd. of Park Comm'rs*, 2014 U.S. Dist. LEXIS 23603, at *14 (S.D. Ohio Feb. 24, 2014) (holding that the strict mutuality required in *Goodson* could only be relaxed where the proposed use of collateral estoppel was defensive); *Scherer v. Wiles*, 2015 U.S. Dist. LEXIS 96892, at *60 (S.D. Ohio July 24, 2015) (holding that the mutuality requirement is relaxed only in certain instances of "non-mutual defensive collateral estoppel"); *Dudee v. Philpot*, 2019-Ohio-3939, ¶¶ 29-30 (Ohio Ct. App.) (applying non-mutual defensive collateral estoppel). PSC mischaracterizes each of these cases to create the impression that *Goodson*'s holding with respect to ***offensive*** non-mutual collateral estoppel has been altered or somehow questioned—which it has not.

D. DuPont Has Not Waived Its Appellate Rights With Respect To Future Trials.

PSC for the first time also mistakenly argues in its Reply that DuPont has waived its appellate rights as to all issues decided in *Bartlett*, in perpetuity, by virtue of a settlement agreement. As DuPont has explained above, the *Bartlett* rulings have no preclusive effect on future trials because offensive issue preclusion does not apply here. [*See* Sections A-C *supra*; *see also generally* MDL ECF No. 5278].

To prop up this false assertion, PSC tortures the language of *Remus Joint Venture v. McAnally*, 116 F.3d 180 (6th Cir. 1997). In *Remus*, the Sixth Circuit addressed a particularly convoluted scenario: the plaintiff filed a § 1983 action, which the district court dismissed on a variety of grounds, including various abstention doctrines, qualified immunity, and ripeness. *Id.* at 182-83. The plaintiff appealed, but also filed a complaint in state court asserting each of the

claims contained in the federal complaint. *Id*. at 183. On appeal, the plaintiff did not seek review of the abstention and ripeness decisions, but only sought review of the remaining grounds for dismissal. *Id*. As the *Remus* court noted, "appellants no longer seek review of the district court's decision to dismiss this action; they only seek review of some of the alternative *reasons* used by the district court for dismissal" of that action. *Id*. at 185 (emphasis in original). Because plaintiff had opted to proceed in state court on the same claims, and was not contesting a dispositive ground for dismissal, there was no longer a live controversy for the court to consider, and the case was therefore moot. *Id*. at 185-86. In short, plaintiff sought to appeal a portion of a judgment it had mooted through its acceptance of certain grounds for dismissal. *Remus* had nothing to do with *settlement* of an appeal; rather, it had to do with a party ***failing to properly appeal the dismissal of its complaint and thereby mooting the appeal in that specific case***. Further, *Remus* did not involve the appeal of a different judgment in a different case involving a different party. *Remus* is far afield of the issues here, and PSC's reliance on it demonstrates it has no actual support for this argument.[4]

In effect, PSC is trying to improperly convert the undecided *Bartlett* appeal into the law-of-the-case for all subsequent individual cases, despite the fact that the Sixth Circuit has expressly rejected applying law of the case across different cases. As noted above, PSC ignores that the currently pending individual cases in this MDL involve different plaintiff-specific facts that materially affect evaluation of DuPont's conduct and the foreseeability of harm to someone in the position of the plaintiff. Moreover, even if the same fact issues were involved, "[u]nlike claim or issue preclusion . . . the law-of-the-case doctrine is not used to prevent relitigation of the same

[4] DuPont recognizes that this Court intends to stay consistent with its prior contract interpretation and evidentiary rulings. There is a significant difference, however, between the Court following its prior precedent versus mandating offensive non-mutual issue preclusion with no right of appeal in new and different cases with different plaintiffs.

issues across different cases." *GMAC Mortg., LLC v. McKeever*, 651 F. App'x 332, 339 (6th Cir. 2016). "Law-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They do not apply between separate actions." 8B Charles Alan Wright et al., *Fed. Pract. & Proc.: Jurisdiction & Related Matters* § 4478. The law-of-the-case doctrine only applies to "subsequent stages of *th[e] same litigation*," not different litigation brought by a different party. *Dixie Fuel Co., LLC v. Dir., Office of Workers' Comp. Progs.*, 820 F.3d 833, 843 (6th Cir. 2016) (emphasis added); *see Arizona v. California*, 460 U.S. 605, 618 (1983) (holding same).

Although individual cases are consolidated for certain purposes in the MDL, each is "formally a separate case," and accordingly, "the law of the case doctrine does not apply" across the separate cases. *In re Interest Rate Swaps Antitrust Litig.*, 351 F. Supp. 3d 698, 703 (S.D.N.Y. 2018) (ruling that, in a later case in an MDL, "the doctrine does not apply in this separate action"). In addition, the Sixth Circuit has not made any rulings in *Bartlett* or in any other cases within the MDL that bind this court. *See Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016) (emphasis added) ("Application of the doctrine is limited to those questions 'necessarily decided in the earlier appeal.'").

Likewise, the other cases PSC relied on in its Motion fail to support their new argument with respect to claimed waiver of appellate rights. Instead, PSC relies on cases that stand for a different (and irrelevant) proposition altogether: that a losing party voluntarily mooting an appeal does not generally permit a court to vacate ***the case-specific judgment that was being appealed***. *See United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 19 (1994) (holding that mooting appeal through settlement generally bars extraordinary remedy of vacating prior judgment); *Coal. for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 484-85 (6th Cir.

2004) (noting same and remanding case to have judgment vacated based on unilateral mooting by prevailing party, per *Bancorp*); *ACLU v. Masto*, 670 F.3d 1046, 1065-66 (9th Cir. 2012) (remanding to district court to determine whether party's voluntary mooting of appeal warranted vacating prior judgment). The other cases PSC relies on have no relevance to the application of collateral estoppel to Ohio state law claims decided in earlier cases by a federal court sitting in diversity. *See Kimball v. Orlans Assocs.*, 651 F. App'x 477, 481 (6th Cir. 2016) (applying federal rules of claim preclusion to settled federal class action claims); *Liang v. AWG Remarketing, Inc.*, No. 2:14-cv-0099, 2015 U.S. Dist. LEXIS 168139, at *33 (S.D. Ohio Dec. 15, 2015) (declining to apply California collateral estoppel law to a prior judgment where doing so would violate due process). PSC ultimately relies on a fundamentally misleading and legally unsupportable strawman: that consideration of new claims by new Plaintiffs would somehow serve to vacate prior trial verdicts with respect to prior Plaintiffs. This scaremongering has no basis in law or fact.[5]

E. Neither the *Engle* Cases, Nor the *Leach* Agreement, Support Applying Issue Preclusion in this MDL.

PSC's effort to shoehorn the individual cases in this MDL into the highly unusual framework established by many years of trials and appeals in the Florida courts—and applying unique Florida law—in the so-called "*Engle* progeny" cases is totally misplaced. DuPont will not burden this Court with an exhaustive discussion of Florida tobacco litigation and the *Engle*

[5] Moreover, "settlements are inherently voluntary agreements between the parties." In re Certainteed Fiber Cement Siding Litig., 303 F.R.D. 199, 218 (E.D. Pa. 2014). "[P]ublic policy generally supports a presumption in favor of voluntary settlement of litigation." United States v. Lexington-Fayette Urban Cty. Gov't, 591 F.3d 484, 490 (6th Cir. 2010). It makes no sense—legally or as a matter of policy—to punish a party for voluntarily settling litigation. Both parties jointly decided to settle the *Bartlett* case before the Court of Appeals ruled on the case. Each party decided to avoid any risk of whatever the appellate decision might have eventually been in the *Bartlett* case. The *Bartlett* trial verdict did not bind any future case, and there was likewise no appellate decision that could possibly have bound any future case.

decision, as Your Honor has first-hand experience with the so-called "*Engle* progeny" cases. However, a brief summary highlighting some of the key distinctions is warranted.

The Florida Supreme Court's decision in *Engle v. Ligget Group, Inc.* 945 So. 2d 1246 (Fla. 2006) arose from a class action of smokers and their survivors in Florida state court. The class action was certified in 1994, and eventually was defined to include "all Florida citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions *caused by their addiction to cigarettes that contain nicotine*." *Engle*, 945 So. 2d at 1256 (emphasis supplied). The defendants were various domestic cigarette manufacturers and industry organizations.

In 1998, the trial court established a trial plan that divided the proceedings into three "phases." The first phase, "Phase I," consisted of *a year-long trial for a jury to consider and make findings* ***on the issues of liability*** *and punitive damages* ***for the class as a whole***, requiring the jury to consider "common issues relating exclusively to the defendants' conduct and the general health effects of smoking." *Id.* Phase II involved trials of three individual class representatives, their entitlement to compensatory damages, and a "lump sum" punitive damages award to the entire class. Part III was to involve trials for individual class members, estimated to number 700,000.

Of key relevance here, in 2006, the Supreme Court of Florida considered whether Phase III of the trial plan was feasible. Holding that Phase III was not feasible "because individualized issues such as legal causation, comparative fault, and damages predominate," the Court decertified the class. However, in so holding, *the Florida Supreme Court crafted a unique compromise whereby class members who initiated individual damages actions within a year of the order would be entitled to "res judicata effect" for certain "Phase I" liability findings* drawn from the jury verdict forms following the year-long jury trial. *Id.* at 1269. Notably, the Court characterized this

compromise as a "pragmatic solution" and expressly stated "the procedural posture of this case is ***unique and unlikely to be repeated***." *Id.* at 1269-70 n. 12 (emphasis supplied).

The procedural posture of *Engle* certainly has ***not*** been repeated here, most obviously because the first three trials were ***not*** part of a class-action trial on liability issues that was to be binding on all class members.[6] The *Leach* Agreement set up a different process than the one crafted in *Engle*. Under the *Leach* Agreement, the current cases are separate, individual cases—there has been ***no*** joint determination of any liability issue for all cases. Put differently, PSC's reference to *Engle* would only potentially have relevance here if the Court considered the three prior MDL trials to be something they were not: a certified class action in which the Court expressly rendered class-wide determinations as to particular liability issues.[7] Further, relying on *Engle* and its progeny would directly violate the Supreme Court's *Semtek* precedent; Ohio law must apply here.

[6] As noted by the Joint Panel on Multidistrict Litigation, the MDL plaintiffs' claims are ***not*** part of a single class action, and are instead individual, separate "personal injury or wrongful death actions." *In re: E. I. du Pont de Nemours and Co. C-8 Personal Injury Litig.*, MDL No. 2433, Doc. 26 at 1.

[7] Nothing about the *Leach* Agreement makes this analysis more favorable for PSC. The *Leach* Agreement did ***not*** establish DuPont's "common liability" as to purported negligence claims in any subsequent action, and it cannot now be unilaterally rewritten by PSC to do so.

CONCLUSION

For the reasons set forth in this Sur-Reply and in DuPont's 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 29th 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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