UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	MDL No. 2:18-mn-2873-RMG This Document relates to: ALL CASES

PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM E. I. DUPONT DE NEMOURS AND COMPANY, THE CHEMOURS COMPANY, THE CHEMOURS COMPANY FC, LLC, CORTEVA, INC., AND DUPONT DE NEMOURS, INC.

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Pursuant to Rules 26, 30, and 37 of the Federal Rules of Civil Procedure and Local Civil Rules 7.04 and 37.01, the Plaintiffs' Executive Committee, on behalf of the Plaintiffs, respectfully move this Court for an Order compelling Defendants E. I. du Pont de Nemours and Company ("Old DuPont"), The Chemours Company ("Chemours"), the Chemours Company FC, LLC ("Chemours FC"), Corteva, Inc. ("Corteva"), and DuPont de Nemours, Inc. ("New DuPont", and together with Old DuPont, Chemours, Chemours FC, and Corteva, the "DuPont-Related Entities") to comply with the Notices of Rule 30(b)(6) Depositions served on February 10, 2020 and the document requests contained therein (the "AFFF Liability Notices").[1]

PRELIMINARY STATEMENT

Plaintiffs seek critical discovery from the DuPont-Related Entities to aid in Plaintiffs' determination of whether all parties currently holding assets or liabilities related to AFFF, PFAS, and/or Fluorosurfactants are already before the Court. This discovery is necessary because, as set forth below, Old DuPont, the company that originally manufactured PFAS and Fluorosurfactants, has engaged in a byzantine web of spinoffs, restructurings, internal reorganizations, asset transfers, and separations since 2015, the details of which are hidden from public view and unavailable to Plaintiffs.

On February 7, 2020, counsel for Old DuPont, New DuPont, and Corteva told the Court that they would be "happy" to engage in Rule 30(b)(6) discovery.[2] Yet, three months later, the DuPont-Related Entities have not fully complied with their obligations. Instead, they

[1] The AFFF Liability Notices are attached as Exhibit 2 to the accompanying Declaration of William J. Jackson (the "Jackson Decl.").

[2] Jackson Decl., Ex. 1, Feb. 7, 2020 Tr. at 47:16-48:6.

have turned what should have been a straightforward, targeted discovery process into a drawn out filibuster and have given Plaintiffs no choice but to seek Court intervention.

Plaintiffs served the AFFF Liability Notices on February 10, 2020. The Notices seek Rule 30(b)(6) depositions tailored to understand the exact issue discussed with the Court; *i.e.*, how were the assets and liabilities related to AFFF, PFAS, and Fluorosurfactants originally held by Old DuPont, to whom were these assets and liabilities transferred, and where do they currently lie? The Notices each included only five Requests for Documents that were tailored to track the deposition topics, so that Plaintiffs can be adequately prepared for and conduct the depositions efficiently.

The AFFF Liability Notices should have been uncontroversial. Instead, the DuPont-Related Entities' counsel at first stone-walled all discovery and simply referred Plaintiffs to a small handful of publicly available documents. In essence, they produced virtually nothing, and asked Plaintiffs to simply accept the DuPont-Related Entities' contention that New DuPont and Corteva are strangers to Old DuPont's AFFF liabilities and are not properly before this Court. After further guidance from the Court during the April 3, 2020 Case Management Conference, the DuPont-Related Entities appeared to become more cooperative and agreed, for the first time, to produce witnesses to testify. The DuPont-Related Entities even produced a smattering of documents on April 13. That production, however, does not contain all responsive documents, and Plaintiffs' repeated attempts to shake loose the remaining discovery have been unavailing. To date, the DuPont-Related Entities have not produced conveyance instruments that are plainly responsive to the AFFF Liability Notices, and which would show which entities held assets related to AFFF/PFAS/Fluorosurfactant products, how the assets were held, and to whom the assets were transferred. Nor have the DuPont-Related Entities produced organizational

charts showing the relationship between all entities that held, or are currently holding, assets related to AFFF, PFAS, and Fluorosurfactant products.

In addition, while certain, but not all, of the DuPont-Related Entities have provided deposition dates in June, they have taken the position that those depositions can only go forward if the applicable stay-at-home orders and COVID-19 related circumstances are modified such that the DuPont-Related Entities' counsel can meet with and prepare witnesses in person. While in-person preparation and depositions are obviously preferable, given the current circumstances, and the uncertainty of when that could occur, the resulting prejudice to Plaintiffs the delay would cause far outweighs the DuPont-Related Entities' wishes. Indeed, as each day passes, certain the DuPont-Related Entities continue to dissipate assets and Plaintiffs have real concern regarding their financial outlook. Plaintiffs need to know, now, whether the proper parties are before the Court, or whether additional parties should be named as defendants. These depositions should go forward remotely as there is no guarantee when the stay-at-home orders will be lifted, or in what manner. These issues are simply too important to wait.[3]

Accordingly, for the reasons set forth below, Plaintiffs request that the Court order the DuPont-Related Entities to (i) produce all remaining responsive documents to the AFFF Liability Notices immediately, and (ii) provide firm deposition dates to proceed in late June, and to be conducted remotely if necessary.

[3] To the extent some limited in-person presence is safe, permitted, and acceptable, then the parties may agree to proceed with either a one, or two person, in-person representative(s) per side in the room with the witness. However, the depositions must be ordered to go forward on a date certain, and proceed fully remotely if that is the only available method. As noted at length below, remote depositions are being routinely conducted now in cases and complex litigations across the country.

RELEVANT BACKGROUND

I. OLD DUPONT'S ROLE IN AFFF-RELATED MANUFACTURING

At least as of 2002, Old DuPont was clearly a major player in the AFFF market.[4] It supplied other companies with telomer intermediates, which are the building blocks needed to produce telomer-based fluorosurfactants. These telomer-based fluorosurfactants, which DuPont knew contained varying amounts of PFOA over time, are the key ingredients in telomer-based AFFF. Old DuPont was not only a supplier of these chemicals, but a strong advocate for the industry; in 2001, Old DuPont became a founding member of the Fire Fighting Foam Coalition (the "FFFC"), an extremely active trade group "whose members are manufacturers, distributors and users of [AFFF] fire fighting agents and their chemical components."[5]

In 2002, around the same time 3M exited the AFFF market, Old DuPont acquired the business assets of Atofina[6], which included the Forafac brand of telomer-based fluorosurfactants, resulting in Old DuPont's expanded market position. Forafac products, sold since the 1970s, include a line of telomer-based fluorosurfactants used to make AFFF and some "ready to use" AFFF products.[7] Old DuPont's press release announcing the acquisition claimed that it was now the "largest integrated fluorotelomer protectants producer in North America."[8] Old DuPont further stated that "[a]s a result of this acquisition, Old DuPont is now the largest

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4 Notably, the breadth of Old DuPont's pre-2002 liability, including the scope of fluorosurfactant assets historically held by Atofina, which, as noted below, DuPont acquired in 2002, is discovery intended to be sought in this MDL.

5 FFFC AFFF Update Newsletter, May 2002. (Jackson Decl., ¶62, Ex. 31).

6 Atofina was the chemicals division of French oil and energy conglomerate TotalFinaElf.

7 After acquiring Atofina, Old DuPont sold certain foam products and water mist sprays under the Forafac brand, which DuPont's own documents reference as "ready to use" AFFF finished products. (Jackson Decl., ¶59, Ex. 28). Despite these express statements and documents, Old DuPont now denies that it ever sold any "commercial" AFFF products or AFFF within the scope of this MDL. (Jackson Decl., ¶60, Ex. 29). Thus, further clarification will be sought during upcoming depositions.

8 *See* Jackson Decl., ¶61, Ex. 30.

supplier of fluorosurfactants for fire fighting foams."[9] At the same time, the FFFC also released a newsletter, similarly proclaiming Old DuPont "the largest supplier of fluorosurfactants for fire fighting foams."[10]

Old DuPont sold its telomer-based products, which it knew contained PFOA, to many AFFF manufacturers to make AFFF. Old DuPont has repeatedly acknowledged that these products contain PFOA, even as it has tried to downplay any PFOA content by claiming it was an "unintended" byproduct of the telomer manufacturing process or present only at very "low" or "trace" amounts in those products. Old DuPont continued to sell these products, rolled out a new product line that it touted as safer due to the purported decreased content of PFOA (branded as Capstone), and then finally spun off its telomer-based fluorosurfactants business to Chemours, along with the other PFOA and PFAS related businesses and product lines. Chemours continues to manufacture and sell the Capstone line of PFAS-containing fluorosurfactants for use in fire-fighting foam today.

II. OLD DUPONT ENGAGED IN A 5-YEAR RESTRUCTURING PLAN THAT WAS DESIGNED TO DIVEST ITS PFAS-RELATED BUSINESSES, AND WHICH RESULTED IN THE CREATION OF SEVERAL NEW COMPANIES, INCLUDING "NEW DUPONT" AND CORTEVA

A. Old DuPont's Plan to Divest Billions of Dollars in PFAS Liabilities

In or about 2013, Old DuPont began hatching a plan to restructure the company in order to shield its valuable assets and avoid responsibility for the harm caused by its PFAS products and manufacturing processes. Old DuPont knew that it faced tens of billions of dollars in potential liability for PFOA. Old DuPont also knew it faced liability as a result of its

9 *Id.*

10 FFFC AFFF Update Newsletter, Dec. 2002. (Jackson Decl., ¶62, Ex. 31). *See also* FFFC Market Channel Chart, Aug. 2005, demonstrating Old DuPont's position in the market. (Jackson Decl., ¶63, Ex. 32).

manufacture of intermediates and fluorosurfactants used in in telomer-based AFFF. At the same time, Old DuPont knew that no rational merger partner would engage with Old DuPont given these liabilities. So, Old DuPont schemed to begin a years-long, three-part restructuring plan.

1. The Creation and Spinoff of Chemours

The first step in Old DuPont's plan was to "spinoff" its Performance Chemicals business (which included Teflon® and other products, the manufacture of which involved the use of PFAS, as well as Old DuPont's AFFF-related products) into Chemours,[11] and to saddle Chemours with the massive liabilities. Old DuPont first created Chemours as a wholly owned subsidiary. To effectuate the Chemours Spinoff, Old DuPont and Chemours entered into a June 26, 2015 Separation Agreement (the "Chemours Separation Agreement"). Pursuant to the Chemours Separation Agreement, Old DuPont agreed to transfer to Chemours all businesses and assets related to the Performance Chemicals Business, including 37 active chemical plants.[12]

Chemours also undertook a broad assumption of liabilities for Old DuPont's historical use, manufacture, and discharge of PFAS, although the specific details regarding the liabilities that Chemours assumed are hidden in non-public schedules. Chemours also agreed to indemnify Old DuPont against, and assume for itself, all liabilities related to Old DuPont's Performance Chemicals business. At the same time, Old DuPont extracted a $4 billion dividend from Chemours, and caused it to incur almost the same amount of debt in order to fund the dividend payment.

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[11] At the time of the spinoff, the Performance Chemicals business consisted of Old DuPont's Titanium Technologies, Chemical Solutions and Fluorochemicals segments

[12] The Chemours Separation Agreement is available at https://www.sec.gov/Archives/edgar/data/30554/000003055415000065/exhibit21separationagreeme.htm

Chemours was thinly capitalized following the spinoff. In fact, market analysts described Chemours as "a bankruptcy waiting to happen" and a company "purposely designed for bankruptcy."[13] Following the Chemours spinoff, Chemours issued a 10-K stating that, as of December 31, 2015, Chemours had assets totaling approximately $6.3 billion and total liabilities of $6.2 billion.[14] However, Chemours significantly underestimated its liabilities, including the liabilities that it had assumed from Old DuPont with respect to PFAS, which Old DuPont and Chemours knew or should have known would be tens of billions of dollars.

In fact, Chemours has sued Old DuPont in Delaware state court alleging, among other things, that if (i) the full value of Old DuPont's PFAS liabilities were properly estimated, and (ii) the Court does not limit Chemours's liability that the Chemours Separation Agreement imposes, then it would have been insolvent at the time it was spun off from Old DuPont.[15]

2. The "Merger" of Dow and DuPont

Once Old DuPont had attempted to isolate its PFAS liabilities onto Chemours, Old DuPont immediately moved to the next step in its scheme. On December 11, 2015, Old DuPont and The Dow Chemical Company ("Old Dow") announced an agreement "under which the companies [would] combine in an all-stock merger of equals" and that the combined company would be named DowDuPont, Inc. ("the Dow-DuPont Merger"). The companies disclosed that they intended to subsequently pursue a separation of DowDuPont into three

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13 *See* https://citronresearch.com/chemours-is-a-bankruptcy-waiting-to-happen-chemours-was-purposely-designed-for-bankruptcy/

14 *See* Chemours Form 10K for the fiscal year ended December 31, 2015, available at https://www.sec.gov/Archives/edgar/data/1627223/000162722316000066/cc-20151231x10k.htm#s7cee84dd21a34c17a165f84090d980e3 , at p. F-5.

15 On March 30, 2020, the Delaware Chancery Court issued a Memorandum Opinion granting DuPont's motion to dismiss in favor of arbitration. Chemours has appealed the decision.

publicly traded companies, which would occur within 18 to 24 months following the closing of the merger.[16]

To effectuate the transaction, Old DuPont and Old Dow entered into an Agreement and Plan of Merger (the "Dow-DuPont Merger Agreement") that provided for the formation of DowDuPont and the creation of two new merger subsidiaries into which Old Dow and Old DuPont and would each merge.[17] Thus, Old DuPont and Old Dow did not actually merge, but rather each became wholly owned subsidiaries of DowDuPont.[18] Plaintiffs believe that this structure was intentionally designed to protect Old Dow from becoming infected with Old DuPont's historic PFAS liabilities.

3. The Creation and Separation of Corteva and New Dow

Subsequent to the Dow-DuPont Merger, DowDuPont underwent a significant internal reorganization in preparation for the conglomerate being split into three separate, publicly traded companies. Old DuPont's assets and remaining business lines were transferred, either directly or indirectly to DowDuPont, which then reshuffled the assets and combined them with the assets of Old Dow and reorganized the combined assets as part of this process. Old DuPont appears to have transferred the vast majority of its valuable assets to DowDuPont.

Plaintiffs believe that Old DuPont received less than the assets were worth in connection with these transfers. Publicly available information regarding the particular assets that Old DuPont transferred to DowDuPont is very limited. Details regarding the full scope of

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16 *See* https://www.theatlantic.com/business/archive/2015/12/a-mega-merger-of-equals/420036/

17 *See* DowDuPont Inc. Form 10k for the fiscal year ended December 31, 2017, available at https://www.sec.gov/Archives/edgar/data/1666700/000166670018000009/a2017dwdp10-k.htm at p. 4.

18 Notably, Old Dow and Old DuPont did not actually merge because doing so could have exposed Old Dow to Old DuPont's massive PFAS liabilities. Instead, Old Dow and Old DuPont became affiliated sister companies both owned by DowDuPont.

transferred assets, including how the assets were held, and precisely which assets were transferred and to whom, is not available without the benefit of discovery. Thus, although Old DuPont had transferred PFAS-related assets to Chemours prior to the Dow-DuPont Merger, it is unclear whether Old DuPont held those assets directly, or through subsidiaries, whether it transferred all such assets to Chemours, or whether it retained any such PFAS-related assets and transferred them to DowDuPont.

After Old DuPont transferred assets to DowDuPont, DowDuPont then reorganized the combined assets of Old DuPont and Old Dow into three distinct business lines: (i) Agriculture; (ii) Specialty Products; and (iii) Material Sciences. Once the business lines were segregated, DowDuPont incorporated two new companies to hold two of the three newly formed business lines: (i) defendant Corteva, which would hold the Agriculture business, and (ii) Dow, Inc. ("New Dow"), which would hold the Materials Science business. DowDuPont retained the Specialty Products business and prepared to spinoff Corteva and New Dow into new, separate, publicly traded companies. The April 1, 2019 Separation and Distribution Agreement among Corteva, New Dow and DowDuPont (the "DowDuPont Separation Agreement") governs the separations of Corteva and New Dow. It allocates the assets primarily related to the respective business segments to Corteva (Agriculture), New Dow (Materials Science) and New DuPont (Specialty Products), respectively.[19]

The separation of New Dow was completed on April 1, 2019, when DowDuPont distributed all of New Dow's common stock to DowDuPont stockholders as a pro rata

[19] The DowDuPont Separation Agreement is available at https://www.sec.gov/Archives/edgar/data/1751788/000119312519069293/d502004dex21.htm

dividend.[20] On May 2, 2019, DowDuPont conveyed the Agricultural business line to Old DuPont, and then, on or about May 31, 2019, it "contributed" Old DuPont to Corteva. The following day, on June 1, 2019, DowDuPont spun off Corteva as an independent public company. Corteva now holds 100% of the outstanding common stock of Old DuPont. The separation of Corteva was then completed on or about June 1, 2019, when DowDuPont distributed all of Corteva's common stock to DowDuPont stockholders as a pro rata dividend.[21] At the same time, DowDuPont changed its registered name to Du Pont de Nemours Inc. (*i.e.*, "New DuPont").

4. The End Result of DuPont's Scheme

Through the web of restructurings and spinoffs described above, Old DuPont was able to achieve its goal of stripping away valuable assets from Old DuPont, which are now in the hands of New DuPont, Corteva, and New Dow. Again, while the details of the asset transfers are not available publicly, it appears that: (i) Corteva holds the agricultural business; (ii) New Dow holds Old DuPont's performance materials segment and Old Dow's performance plastics, performance materials and chemicals, infrastructure solutions and consumer solutions segments; and (iii) New DuPont holds specialty products assets, including Old DuPont's nutrition and health, industrial biosciences, safety and protection, and electronics and communications segments and Old Dow's electronic materials business. Again, because details relating to the full scope of assets that Old DuPont transferred to what is now New DuPont, it is presently unclear whether New DuPont or Corteva hold any PFAS-related assets.

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20 *See* DowDuPont Completes Spinoff of Dow, Inc., April 1, 2019, available at https://www.dupont.com/news/dowdupont-completes-spin-off-of-dowinc.html

21 *See* Corteva Separates from DowDuPont to Form Leading Pure-Play Agriculture Company, June 3, 2019, available at https://www.corteva.com/resources/media-center/corteva-separates-from-dowdupont-to-form-leading-independent-global-pure-play-agriculture-company.html

What is clear, however, is that Old DuPont's remaining assets are dwindling, and its financial condition is precarious at best. Old DuPont estimated that the Dow-DuPont Merger created "goodwill" worth billions of dollars. When the Corteva separation was complete, a portion of this "goodwill" was assigned to Old DuPont in order to prop up its balance sheet. But, in reality, Old DuPont was left with substantially fewer *tangible* assets than it had prior to the restructuring. In addition, Old DuPont owes a debt to Corteva of approximately $4 billion. Recent SEC filings demonstrate the substantial deterioration of Old DuPont's finances and the drastic change in its financial condition before and after the above transactions.

For example, for the fiscal year ended 2014, prior to the Chemours Spinoff, Old DuPont reported $3.6 billion in net income and $3.7 billion in cash provided by operating activities.[22] For the fiscal year ended 2019, however, just months after the Corteva separation, Old DuPont reported a net loss of *negative* $1 billion and only $996 million in cash provided by operating activities.[23] That is a decrease of 128% in net income and a decrease of 73% in annual operating cash flow.

The value of Old DuPont's tangible assets further underscores the magnitude of Old DuPont's weakening financial situation. For the fiscal year ended 2014, prior to the Chemours Spinoff, Old DuPont owned nearly $41 billion in tangible assets.[24] For the fiscal year ended 2019, Old DuPont owned just under $21 billion in tangible assets.[25] That means in the five-year period over which the restructuring occurred, when Old DuPont knew that it faced tens

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22 *See* Old DuPont Form 10K for the fiscal year ended December 31, 2014, available at https://www.sec.gov/Archives/edgar/data/30554/000003055415000004/dd-12312014x10k.htm ("Old DuPont 2014 10K") at p. 18.

23 *See* Corteva and Old DuPont Form 10K for the fiscal year ended December 31, 2019 available at https://sec.report/Document/0001755672-20-000006/ ("Old DuPont 2019 10K") at pp. F-101, F-103.

24 Old DuPont 2014 10K, *supra* note 22, at p. 18.

25 *See* Old DuPont 2019 10-K, *supra* note 23, at p. F-102.

of billions of dollars in PFAS liabilities, Old DuPont transferred or divested approximately half of its tangible assets—totaling $20 billion.

As of September 2019, just after the Corteva spinoff, Old DuPont reported $43.251 billion in assets. But almost $21.835 billion of these assets were comprised of intangible assets, including "goodwill" from its successive restructuring activities. At the same time, Old DuPont reported liabilities totaling $22.060 billion.[26] Thus, when the Corteva spinoff was complete, Old DuPont's tangible net worth (excluding its intangible assets) was *negative* $644 million.

Old DuPont's financial condition has continued to deteriorate. By fiscal year ended 2019, Old DuPont reported $42.397 billion in total assets, half of which (or $21.653 billion) are intangible assets. Old DuPont's reported liabilities for the same period totaled $21.869 billion. Old DuPont's tangible net worth between September 30, 2019 and December 31, 2019 declined even further, whereby Old DuPont ended fiscal year 2019 with tangible net worth of *negative* $1.125 billion.[27]

B. The Assumption of PFAS Liabilities

New DuPont and Corteva told Plaintiffs and this Court that they should not be named as the DuPont-Related Entities, and should not be subject to discovery, because they did not assume any PFAS or AFFF fluorosurfactant-related liabilities through the above transactions.[28]

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[26] *See* Corteva and Old DuPont Form 10Q for the quarterly period ended September 31, 2019, available at https://sec.report/Document/0001755672-19-000028/corteva-930201910xq.htm at p. 98.

[27] *See* Old DuPont 2019 10-K, *supra* note 23, at p. F-102.

[28] Both New DuPont and Corteva are named as defendants in this MDL. In fact, New DuPont and Corteva are named defendants in hundreds of member cases brought by all genres of plaintiffs: medical monitoring class action (*e.g., Bell v. The 3M Company et al.*, No. 2:18-cv-03366-RMG); water districts (*e.g., Suffolk County Water Authority v. The 3M Company et al.*, No. 2:18-cv-3337-RMG); and state sovereigns (*e.g., State of Vermont v. The 3M Company et al.*, No. 2:19-cv-2281). Both entities face claims for direct liability

But the DuPont-Related Entities' representations about the scope of their liability appears to conflict with even the limited information that is publicly available. While the details are buried and hidden from public view in confidential, non-public schedules to the DowDuPont Separation Agreement, Plaintiffs believe that Corteva and New DuPont also assumed liability of Old DuPont that was *not* related to the Agriculture, Material Science or Specialty Products Businesses, including the PFAS liabilities. As set forth in New DuPont's public SEC filings, PFAS liabilities are "allocated" on a pro rata basis between Corteva and New DuPont pursuant to the DowDuPont Separation Agreement, such that, after both companies have satisfied certain conditions, future liabilities are allocated 71% to NewDuPont and 29% to Corteva.[29]

This "allocation" applies to Old DuPont's legacy liabilities for PFAS contamination and its former Performance Chemicals business, and may include, for example liabilities related to telomer intermediates and fluorosurfactants used in AFFF, legacy liability for punitive damages based on Old DuPont's egregious conduct in hiding the risks of PFAS exposure, and environmental liabilities for massive PFAS contamination at several facilities across the United States and the world.

III. THE DISCOVERY AT ISSUE AND DEFENDANTS' FAILURE TO COMPLY

A. The DuPont-Related Entities' Representations to the Court and Counsel

Counsel for New DuPont and Corteva have repeatedly made statements to the Court and counsel for Plaintiffs that are inconsistent with even the limited information that is

for AFFF-related injuries, including claims for products liability, negligence, trespass, and public and private nuisance. They also face claims of fraudulent conveyance as a result of restructuring and spin-offs discussed above.

[29] *See, e.g.* New DuPont Form 10Q for the quarterly period ended March 31, 2020, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/1666700/000166670020000017/dupont1q2033120.htm at p. 26.

publicly available regarding where the liabilities for AFFF lie following the web of restructurings and spinoffs discussed above.

Indeed, public filings make clear that: (i) both New DuPont and Corteva assumed liabilities for certain of Old DuPont's business lines; and (ii) historical PFAS liabilities are "allocated" among New DuPont and Corteva. Yet, counsel appeared before this Court at the February 7, 2020 Case Management Conference, arguing that New DuPont and Corteva are not proper the DuPont-Related Entities to this litigation, and that at least New DuPont did not accept any liabilities. (Jackson Decl., ¶¶ 4, 5, Ex. 1 at 46:2-17). In response, the PEC recommended that the Court permit Plaintiffs to take discovery of these entities, to ensure that "the companies that have assets are properly here," and counsel for New DuPont and Corteva agreed:

> THE COURT: And, obviously, you have no interest in chasing entities that have nothing to do with the case either. Nobody has an interest in doing that.
>
> MR. LONDON: We don't. But we need to make sure that these spinoffs were properly done. And the companies that have liabilities, the companies that have assets are properly here, and that counsel's representing what's accurate. ***And I do think through some discovery and some 30(b)(6) depositions, and I don't hear any objection to that, we can probably get counsel – they'll stay in the case or they'll be out of the case.***
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> MS. HACKER: ***We're happy to do that, Your Honor.*** And we've had some good conversations with some plaintiffs and provided stipulations. We've provided affidavits, attesting to all of this information. We're happy to do what we need to to do that.

(*Id.* at 47:16-48:6) (emphasis added). Incredibly, Old DuPont's counsel also tried to suggest that DowDuPont was formed only as a holding company for the merger and no longer exists, telling the Court that "there's no longer any company even named DowDuPont." (*Id.* at 46:16-17). Yet, DowDuPont unquestionably exists – it simply renamed itself to DuPont de Nemours, Inc., *i.e.* "New DuPont". During the February 7 conference, the Court appeared to recognize this

"name game" for what it is, and questioned New DuPont's statements, when it stated: "They're dancing. They don't even know each other, never heard of each other. How did they get the same name?" (*Id.*at 47:3-5).[30]

B. Plaintiffs' Rule 30(b)(6) Notices and Document Requests

On February 10, 2020, the PEC served the AFFF Liability Notices on the DuPont-Related Entities. (Jackson Decl., ¶6, Ex. 2). Through the AFFF Liability Notices, the PEC seeks Rule 30(b)(6) depositions of each entity along with limited document discovery in order to understand the universe of transactions and agreements concerning the transfer of PFAS and AFFF assets, and the assumption and allocation of PFAS and AFFF liabilities. The deposition topics are carefully and narrowly tailored to inquire about the DuPont-Related Entities' interests in businesses that held assets or could be responsible for liabilities related to AFFF or PFAS products. As explained during a March 3, 2020 meet and confer with Chemours and Chemours FC that took place before the AFFF Liability Notices were served, the Notices were not intended to seek broad discovery regarding certain Plaintiffs' fraudulent transfer claims, but instead were intended to obtain limited discovery regarding the specific entities holding PFAS-related assets and liabilities.

Specifically, the AFFF Liability Notices seek testimony regarding: (i) the corporate structure of each Defendant; (ii) the identity and relationship of the DuPont-Related Entities' parent companies, subsidiaries, and other parties with any interest in AFFF or PFAS; (iii) changes in ownership or control of the DuPont-Related Entities or any of their businesses, affiliates, or subsidiaries engaged in any business or scientific or market research related to

[30] Counsel also told the Court that these the DuPont-Related Entities had provided "affidavits" on these issues. No such affidavits have been provided. (Jackson Decl., ¶ 5).

AFFF or PFAS; (iv) agreements or transactions related to the DuPont-Related Entities' transfer of assets or subsidiaries engaged in business or scientific or market research related to AFFF or PFAS; and (v) agreements or transactions between or among the DuPont-Related Entities or their subsidiaries related to their transfer of assets or subsidiaries engaged in business or scientific or market research related to AFFF or PFAS. (Jackson Decl., ¶¶ 6, 7, 8, Ex. 2).

The AFFF Liability Notices also seek corporate representative testimony regarding the assumption and allocation of PFAS or AFFF liabilities. In particular, the AFFF Liability Notices sought testimony concerning agreements or arrangements allocating or indemnifying against costs or liabilities related to AFFF or PFAS between or among the DuPont-Related Entities and all their related entities, as well as between or among the DuPont-Related Entities themselves. (Jackson Decl., ¶¶ 6, 7, 8, Ex. 2). The AFFF Liability Notice directed to Old DuPont also sought testimony regarding the acquisition of Atofina, any related transactions and agreements with TotalFinaElf, and any subsequent transfer or assumption of assets or liabilities related to AFFF or PFAS. (Jackson Decl., ¶¶ 6, 7, 8, Ex. 2).

In connection with the Rule 30(b)(6) depositions, the AFFF Liability Notices also seek a narrow set of patently relevant documents from each Defendant. Generally, the document requests seek the following categories of documents:

i. corporate organizational charts from the DuPont-Related Entities and related entities demonstrating their corporate structure and any changes to corporate structure (Request No. 1); and

ii. (ii) agreements and corresponding amendments or schedules related to changes in ownership or control of the DuPont-Related Entities or their subsidiaries engaged in any business or scientific or market research related to AFFF or PFAS (Request No. 2);

iii. agreements related to the DuPont-Related Entities' transfer of assets or businesses that were engaged in any business or scientific research related to AFFF or PFAS, and agreements related to the assumption, allocation, or indemnification against liabilities or losses related to AFFF or PFAS

between or among the DuPont-Related Entities and related entities. (Jackson Decl., ¶¶ 6, 7, 8, Ex. 2).

In addition, through the AFFF Liability Notices the PEC also seeks any agreements between or among the DuPont-Related Entities concerning the transfer of assets or subsidiaries engaged in any business or scientific or market research related to AFFF or PFAS, which encompassed transaction documents related to several transactions clearly identified in the AFFF Liability Notices (and discussed above). Such transactions included the creation of Chemours, the internal allocation or assumption of liabilities or assets that resulted in Old DuPont's "Performance Chemicals" segment being held by Chemours, the assignment or transfer of assets or liabilities related to AFFF or PFAS between or among Old DuPont, DowDuPont, Dow, The Dow Chemical Company or Corteva during the 2017 to 2019 time period, the assumption or allocation of" Stray Liabilities" and any "PFAS Stray Liabilities" between or among DuPont, Corteva, Dow, and DuPont pursuant to the DowDuPont Separation Agreement, the 2019 spin-off and separation of Dow from DuPont, and the 2019 spin-off and separation of Corteva from DuPont. (Jackson Decl., ¶¶ 6, 7, 8, Ex. 2).

C. The DuPont-Related Entities' Boilerplate Objections to the AFFF Liability Notices

The DuPont-Related Entities served their responses and objections to the AFFF Liability Notices on March 11, 2020. (Jackson Decl., ¶ 13, Ex. 4). Each response consisted of approximately ***thirty-five pages of boilerplate objections***. The DuPont-Related Entities also ***refused to produce any witness*** and objected to every single one of Plaintiffs' witness topics and document requests with generalized, meritless objections, representing a wholesale failure to engage with the substance of the AFFF Liability Notices.

Indeed, the DuPont-Related Entities propounded a litany of general objections based on relevance, proportionality, burden, ambiguity, overbreadth, and privilege, among

others. They also falsely claimed that substantial information on their corporate structure has already been produced or is the process of being produced in response to earlier 30(b)(6) requests, and that those documents somehow eliminate the need for the depositions sought by the AFFF Liability Notices.

The DuPont-Related Entities also made specific objections to Plaintiffs' requests based on ambiguity, overbreadth, proportionality, relevance and privilege. However, the DuPont-Related Entities' objections did not specify how the requests are deficient, specifically identify any burden the DuPont-Related Entities face in complying with the AFFF Liability Notices, or explain why the information sought is not actually relevant. Moreover, the few substantive responses that the DuPont-Related Entities do provide are plainly inadequate, as the DuPont-Related Entities simply refer Plaintiffs to public documents that do not contain the detail Plaintiffs are seeking.

Specifically, in their responses and objections, Corteva and New DuPont directed Plaintiffs to each companies' 2019 10-K, the Chemours Separation Agreement and the August 2017 Amendment thereto, and certain other publicly available agreements. Furthermore, these two entities represented that neither company assumed direct liabilities related to PFAS, AFFF or PFOA, but that the "2019 Corteva spin-off transaction did, however, create a "cost-sharing arrangement" with respect to these PFAS liabilities. Generally, Corteva and New DuPont, which is responsible for managing such liabilities, will each bear 50 percent of the first $300 million (up to $150 million each) of E.I. du Pont's PFAS-related liabilities, and PFAS liabilities in excess of $300 million generally will be borne 71 percent by New DuPont and 29 percent by Corteva. See 2019 10-K at supra Note 18." (Jackson Decl., ¶ 15, Ex. 4). Both entities also contend that "such a cost-sharing arrangement on the back end has no bearing on which entity

Plaintiffs can recover any potential judgement from; that remains E.I. du Pont." (Jackson Decl., ¶ 15, Ex. 4).

Additionally, Old DuPont, Chemours and Chemours FC all objected to producing any witness on the grounds that the AFFF Liability Notices are allegedly vague and ambiguous, disproportionate to the needs of the case, overbroad in scope, and not reasonably calculated to lead to the discovery of admissible information. Chemours also objected to the requests to the extent they called for documents prior to July 1, 2015—on the basis that Chemours did not exist as an independent company prior to that date—and objected to the extent that the requests sought information in the possession of DuPont or other parties. Like Corteva and New DuPont, these the DuPont-Related Entities directed the PEC to certain public SEC filings, which included the June 26, 2015 Separation Agreement, the amendments thereto, both companies' various 10-Ks, and with respect to Old DuPont, its December 11, 2015 Agreement and Plan of Merger.[31] But they produced no other documents responsive to the Plaintiffs' requests at that time, such as the schedules and exhibits to the various agreement (which would reveal critical information about the "allocated" liabilities), the requested organizational charts, or any conveyance instruments that would reveal precisely which entity held assets related to AFFF/PFAS, and to whom such assets were transferred. (Jackson Decl., ¶ 16, Ex. 4).

[31] Moreover, Chemours FC's responses were solely limited to objections both with respect to producing witnesses and producing documents; that is, it did not point to a single document that it agreed to produce.

D. Plaintiffs' Six-Week Long Attempt to Negotiate with the DuPont-Related Entities[32]

As detailed in the Jackson Declaration, throughout March and April, Plaintiffs participated in numerous telephonic meet-and-confers with the DuPont-Related Entities counsel and exchanged several written communications, all in an attempt to get the discovery to which Plaintiffs are entitled.

In the beginning of this process, negotiations were hampered by the fact that Plaintiffs could not even be sure which counsel firms to speak with. Old DuPont and Chemours have separate conflicts counsel for fraudulent transfer issues, and the early discussions were less than productive because it became clear that Plaintiffs could get no assurance as to which counsel was speaking for the DuPont-Related Entities with regard to the AFFF Liability Notices. (Jackson Decl., ¶ 9).

Despite Plaintiffs' best efforts, little progress was made between March 11, when the DuPont-Related Entities served their boilerplate objections, and April 3, when the Court held a Case Management Conference. The DuPont-Related Entities continued to refer Plaintiffs to publicly available documents that do not contain the information Plaintiffs need, and continued to expect Plaintiffs to simply accept as true the DuPont-Related Entities' pronouncements regarding the allocation of liabilities related to PFAS and AFFF. (Jackson Decl., ¶¶ 14, 15). The DuPont-Related Entities also stated that there were delays in collecting schedules to the DowDuPont Separation Agreement due to COVID-19 and related stay-at-home orders, which is curious given that those documents are undeniably stored electronically. (Jackson Decl., ¶ 24, Ex. 8).

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[32] As the Court is well aware, prolonged meet-and-confers with the DuPont-Related Entities is nothing new. By way of example, finalizing the electronic search terms alone took approximately five months of meet and confers to finalize.

During the April 3 Case Management Conference, Plaintiffs' counsel explained to the Court the factual background regarding the Chemours Spinoff and Old DuPont's multi-step restructuring, which necessitates the discovery here. (Jackson Decl., ¶¶ 25, 26, Ex. 9, at pp. 11-20). Counsel also explained that the DuPont-Related Entities were not being forthcoming with discovery and had not agreed to comply with the Rule 30(b)(6) notices by designating representatives for depositions. (*Id.* at pp. 21-23). The Court made clear that it expected the DuPont-Related Entities to cooperate with discovery and that Rule 30(b)(6) depositions are "certainly appropriate" if there are still questions after documents are produced. (*Id.* at 33). The Court asked the parties to continue working together for 10 days, and then if any impasse remained, Plaintiffs should bring a motion to compel. (*Id.* at 32).

During a meet-and-confer on April 9, 2020, which was the first such conversation following the April 3 conference, the DuPont-Related Entities appeared to have made an about-face, and agreed to produce responsive documents. (Jackson Decl., ¶ 27). Each of the DuPont-Related Entities also agreed in principle to produce witnesses and assured Plaintiffs that dates would be forthcoming.

However, it became clear soon after the April 9 meet-and-confer that, while the DuPont-Related Entities may have (and continue to) represent that they are cooperating and searching for responsive documents, they had no intention of doing so in earnest. On April 13, the DuPont-Related Entities each made small document productions. Chemours produced a total of 9 documents, Old DuPont produced 38 documents, Corteva produced 28 documents, and New DuPont produced 14 documents. Corteva produced a single additional document the following day. Some of these documents are public filings with the SEC that were already available to Plaintiffs.

After the April 13 production, Plaintiffs reiterated multiple times the various categories of documents and specific responsive documents that the DuPont-Related Entities still need to produce. For example, by letter dated April 18, 2020, Plaintiffs itemized the following missing documents: (i) corporate organizational charts as requested in Request for Production No. 1; (ii) conveyance instruments in connection with Old DuPont's reorganization of assets and liabilities in advance of the Chemours spinoff in 2015, including conveyance instruments from Old DuPont to Chemours; (iii) conveyance instruments showing the transfer of assets and liabilities related to the Performance Chemicals business or AFFF/PFAS/ Fluorosurfactants; (iv) ancillary agreements to the Chemours Separation Agreement; (v) ancillary agreements to the Corteva Separation Agreement; and (iv) any agreements related to any allocation, assignment, or assumption of any liability related to AFFF, AFFF Products, Fluorosurfactant Products or PFAS to Dow Inc. (Jackson Decl., ¶¶ 28, 29, 30, 31, Exs. 10, 11, and 12).

On April 24, 2020, the parties had a meet-and-confer in which each item in the April 18 letter was discussed in detail. (Jackson Decl., ¶¶ 37, 38, 39). Plaintiffs sent another detailed email on April 27, 2020. (Jackson Decl., ¶¶ 43, 44, Ex. 20). Despite Plaintiffs' best efforts, no further documents have been produced by any Defendant. (Jackson Decl., ¶¶ 47, 54).

On the eve of the Case Management Conference, April 30, 2020, counsel for New DuPont and Old DuPont finally offered deposition dates between June 1 and June 5, 2020, but even then insisted that those depositions should only go forward if counsel is able to prepare their witnesses in person. Corteva has not provided any dates. Chemours and Chemours FC have informed Plaintiffs that they are working on dates in June, but also with the same caveat that they will insist on being able to prepare their witnesses in person. (Jackson Decl., ¶¶ 45, 46, Exs. 21 and 22).

During the Case Management Conference on May 1, 2020, Plaintiffs' counsel informed the Court that issues remain in dispute regarding the AFFF Liability Notices, and that Plaintiffs intended to file this motion to compel as to those issues. (Jackson Decl., ¶50, Ex. 23).

Following the Conference, counsel for the DuPont-Related Entities continued to profess ignorance that there would be any remaining issues in dispute, despite Plaintiffs numerous discussions and email correspondence regarding those issues. On May 4, 2020, counsel for Plaintiffs again emailed the DuPont-Related Entities in response to their professed confusion about what issues would be subject to the motion to compel. (Jackson Decl., ¶ 52, Ex. 24). Plaintiffs highlighted the following issues:

- The organizational charts requested in RFP No. 1 in the AFFF Liability Notices;
- Any agreements to convey, and conveyance instruments reflecting the transfer of assets, business lines, subsidiaries, etc. related to AFFF, AFFF Products, Fluorosurfactant Products, or PFAS;
- Unredacted versions of the three Schedules to the Chemours Separation Agreement that were already produced, plus 11 additional Schedules that appear to bear on relevant liabilities;
- Ancillary Agreements to the DowDuPont Separation Agreement;
- Confirmation regarding whether there are any agreements regarding how or whether any Dow entity would be exposed to liabilities related to AFFF, Fluourosurfactant Products, or PFAS.
- Confirmation that the DuPont-Related Entities are not withholding any responsive documents to the AFFF Liability Notices.

Plaintiffs informed the DuPont-Related Entities that they would be filing a motion to compel on Wednesday, May 6, unless the DuPont-Related Entities would agree to produce all the documents and provide all requested confirmations by May 15. Plaintiffs also asked that, by May 15, each Defendant provide two deposition dates for depositions to go forward by June 30,

regardless of whether those depositions need to be remote or if the DuPont-Related Entities' counsel will be able to prepare witnesses in person. (Jackson Decl., ¶53, Ex. 24).

Counsel for the DuPont-Related Entities responded by email dated May 5, 2020. (Jackson Decl., ¶¶ 55, 56, 57, Exs. 25 and 26). Counsel for Chemours and Chemours FC agreed to produce an organizational chart, with no further assurance that it would be the type of chart Plaintiffs are seeking. Counsel for the remaining DuPont-Related Entities represented that no responsive charts exist, but agreed to produce a high-level organizational charts. The DuPont-Related Entities also agreed to produce unredacted versions of the Schedules to the Chemours Separation Agreement that Plaintiffs requested. Counsel also provided the two confirmations listed above.

Notably, the DuPont-Related Entities have taken the position that there are no additional conveyance instruments or responsive documents reflecting the transfer of assets, business lines, subsidiaries, etc. related to AFFF, AFFF Products, Fluorosurfactant Products, or PFAS. (Jackson Decl., ¶¶ 55, 56, 57, Exs. 25 and 26). This simply cannot be true, and is inconsistent with the plain terms of the Chemours Separation Agreement, which specifically contemplates the existence of additional conveyance instruments. The Chemours Separation Agreement provides for an "Internal Reorganization" to take place before the Spinoff, which would include "the allocation and transfer or assignment of assets and liabilities, including by means of the Conveyance and Assumption Instruments, resulting in (i) the Chemours Group owning and operating the Chemours Business, and (ii) the DuPont Group continuing to own and operate the DuPont Business, as described in the Steps Plan provided to Chemours by DuPont prior to the date hereof, as updated from time to time by DuPont at its sole discretion prior to the

Distribution."[33] Neither Chemours nor Old DuPont have produced the "Conveyance" or "Assumption Instruments" or the "Steps Plan." Likewise, the Information Statement that Chemours filed with the SEC prior to the Spinoff specifically provides that:

> DuPont will transfer the entities and related assets and liabilities that are necessary in advance of the distribution so that Chemours is transferred the entities, assets and liabilities associated with DuPont's Performance Chemicals segment, which includes its titanium technologies, fluoroproducts and chemical solutions businesses, and certain additional assets and liabilities associated with the DuPont Business. We are currently a wholly owned subsidiary of DuPont. In connection with the distribution, DuPont will undertake a series of internal reorganization transactions to facilitate the transfers of entities and the related assets and liabilities described above.[34]

Chemours and Old DuPont cannot credibly claim that they do not have responsive documents in light of these public statements.

With regard to depositions, Old DuPont, New DuPont, and Corteva have agreed, as of May 5, to provide deposition dates by May 15, for depositions to occur before June 30, 2020 and have agreed that such depositions can go forward remotely. Chemours and Chemours FC agreed to provide deposition dates, but have not agreed to proceed remotely.

ARGUMENT

Rule 26 of the Federal Rules of Civil Procedure provides that a party may "obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case…." Fed. R. Civ. P. 26(b)(1). "[T]he discovery rules are given 'a broad and liberal treatment.'" *Harry v. Pilgrim's Pride Corp.*, 2013 U.S. Dist. LEXIS 22700, at *2 (D.S.C. Feb. 20, 2013) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh,*

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[33] Chemours Separation Agreement, *supra* note 12, Sections 1.1(104); 2.2(a).

[34] *See* Chemours Information Statement, available at https://www.sec.gov/Archives/edgar/data/1627223/000119312515215110/d832629dex991.htm

P.A. v. Murray Sheet Metal Co. Inc., 967 F.2d 980, 983 (4th Cir. 1992). The scope of discovery permitted by Rule 26 is designed to provide a party with information reasonably necessary to afford a fair opportunity to develop its case. *Nat'l Union*, 967 F.2d 980; *Ashmore v. Owens*, 2017 U.S. Dist. LEXIS 105543, at *2-3 (D.S.C. June 2, 2017). the DuPont-Related Entities, as the parties resisting discovery "bear[] the burden of persuading the court that the requested information is outside the scope of discovery." *Ashmore*, 2017 U.S. Dist. LEXIS 105543, at *3. They cannot meet this burden.

As this Court has previously recognized, the Rule 26 standard "shifts heavily toward production" in this MDL, where there are more than 100 consolidated cases, important claims, and significant amounts in controversy. (Jackson Decl., ¶ 58, Ex. 27 at pp. 6-7). As recently as April 3, 2020, in connection with this very discovery dispute, the Court reiterated that "discovery in an MDL is robust" and "thorough"; that "it's very probably that the plaintiffs are going to have the opportunity to explore and understand the nature of this corporate structure"; and that the DuPont-Related Entities should "appreciate that limiting discovery on an issue like this is not going to occur." (Jackson Decl., ¶ 25, Ex. 9 at pp. 32-33).

In light of these standards, and the Court's guidance, the DuPont-Related Entities refusal to comply entirely with the AFFF Liability Notices is inexplicable. As set forth below, the Court should order the DuPont-Related Entities to comply in full and address these remaining items in dispute.

I. DEFENDANTS SHOULD BE COMPELLED TO PRODUCE THE DOCUMENTS REQUESTED IN THE AFFF LIABILITY NOTICES

A. Documents Related to the DuPont-Related Entities' Ownership, Conveyance, and Transfer of Assets Related to AFFF, PFAS, or Fluorosurfactants

The DuPont-Related Entities have stone-walled Plaintiffs with regard to several of the Requests for Production concerning the transfer of assets related PFAS, AFFF, and/or

Fluorosurfactants. (Jackson Decl., ¶¶ 7, 8, 30, 31, Ex. 2). Plaintiffs are seeking agreements and conveyance instruments in connection with Old DuPont's reorganization of assets and liabilities in advance of the Chemours Spinoff in 2015, including conveyance instruments from Old DuPont to Chemours, as well as agreements or conveyance instruments showing the transfer of assets and liabilities related to AFFF/PFAS/ Fluorosurfactants by Old DuPont or other the DuPont-Related Entities in subsequent years, including New DuPont and Corteva.

Plaintiffs also seek corporate organization charts showing exactly which entities actually held these assets, which entities are currently holding such assets, and changes in ownership over time. While Chemours and Old DuPont claim to have produced organizational charts already, the charts they have produced reflect organization at the employee level, not the corporate level, and are therefore not responsive to Plaintiffs' requests. Old DuPont, New DuPont, and Corteva have now represented, on the eve of this Motion being filed, that responsive documents do not exist. Chemours has agreed to produce an additional chart, but has not told Plaintiffs what this chart will contain.

The conveyance instruments and corporate organization charts are necessary because they will help Plaintiffs understand exactly which entity transferred exactly which asset to which company, and will reveal how the assets were held and how they are currently held. Plaintiffs currently do not know: (i) whether Old DuPont held the AFFF/PFAS/Fluorosurfactant products and related businesses directly, or through subsidiaries and related entities; (ii) if the assets were held by subsidiaries and related entities of Old DuPont, whether Old DuPont transferred the underlying assets themselves, or whether it transferred ownership of the subsidiaries and related entities; (iii) whether all of the AFFF/PFAS/Fluorosurfactant products and related businesses, including businesses engaged in marketing and testing such products,

were all transferred to Chemours, or whether any such assets were transferred to other the DuPont-Related Entities including New DuPont and Corteva, and if so, whether those companies own the assets directly, or whether the assets are held by subsidiaries and related companies.

The documents requested by the PEC may answer all of these questions. Plaintiffs have repeatedly asked for these documents, which are necessary to help Plaintiffs evaluate whether all necessary and proper parties are before this Court. (Jackson Decl., ¶¶ 33, 38, 39, 43, 52, 53, Exs. 13, 20 and 24). But the DuPont-Related Entities have stonewalled Plaintiffs at every step. And although certain the DuPont-Related Entities represented that they had not withheld any responsive documents, they have each totally ignored Plaintiffs' requests for these materials, and simply refused to produce them.[35] Even worse, as set forth above, Old DuPont and Chemours are claiming that these documents do not exist despite the fact that the Chemours Separation Agreement and other publicly filed documents *specifically reference* "Conveyance Instruments" in connection with an "Internal Reorganization" of assets related to the Performance Chemicals business before the Chemours Spinoff.

Accordingly, the Court should: (i) overrule the DuPont-Related Entities' Objections to the AFFF Liability Notices, or order that they withdraw all such objections if no documents are being withheld based upon those boilerplate objections; (ii) order the DuPont-Related Entities to produce any responsive documents to Request for Production No. 1; (iii) order the DuPont-Related Entities to produce all conveyance instruments and other agreements reflecting the transfer of each asset related to AFFF/PFAS/Flourosurfactant products, and (iv) order that Defendants confirm that they are not withholding any responsive documents to

[35] While Old DuPont produced some documents relating to its 2002 acquisition of Atofina and the Forafac brand, it is far from clear whether and to what extent Old DuPont held and later transferred assets related to AFFF following the 2015 Chemours Spinoff.

Requests for Production Nos. 2, 3 and 5 dealing with AFFF, PFAS, and Fluorsurfactant assets or to produce any remaining documents within 10 days of such order.

B. Documents Concerning the Assumption and Allocation of Liabilities Related to AFFF, PFAS, or Fluorosurfactants

Old DuPont has undertaken a series of restructurings, mergers and spinoffs, all designed to shield its assets from any judgment in this case, as well as other cases throughout the country. It appears that certain entities, including Old DuPont's new parent company, Corteva, and New DuPont, may have agreed to accept at least some financial responsibility for DuPont's historical conduct. But the details of those agreements are not publicly available.

While the DuPont-Related Entities have produced certain documents concerning liabilities related to the assumption, transfer, and allocation of liabilities related to PFAS, AFFF, AFFF Products, or Fluorosurfactants, it is plain that certain documents have been withheld. Namely, the DuPont-Related Entities have refused to produce certain Ancillary Agreements to the DowDuPont Separation Agreement. Instead, they offered to provide "samples" of the various types of Ancillary Agreements in exchange for Plaintiffs abandoning this request altogether. (Jackson Decl., ¶56, Ex. 25). That is not acceptable. Plaintiffs have made a good-faith effort to seek only those Ancillary Agreements that may be responsive to its Requests; *i.e.*, that may relate to PFAS, AFFF, or Fluorosurfactant liabilities or assets. These include, for example, Transition Services Agreements, Site Services Agreements, and Real Estate Agreements. (Jackson Decl., ¶56, Ex. 25). The DuPont-Related Entities cannot legitimately represent that none of these Agreements are responsive, because, by their own admission, they have not collected or reviewed them.[36]

[36] Until May 4, Chemours and Old DuPont refused to produced unredacted versions of the three Schedules to the Chemours Separation Agreement that are directly responsive as they deal with liabilities stemming

The AFFF Liability Notices represent Plaintiffs' attempt to understand which parties are responsible for the liabilities at issue in this case. This discovery is necessitated in large part by the DuPont-Related Entities' decision to hide the details of their years-long, complex web of spinoffs, mergers, internal reorganizations, and separations. The DuPont-Related Entities have already conceded the relevancy of, and produced, the Chemours Separation Agreement and the DowDuPont Separation Agreement, and cannot justify their refusal to provide the accompanying Ancillary Agreements to aid Plaintiffs in understanding the mechanics of those complex agreements. Moreover, Plaintiffs should not be required to take the word of the DuPont-Related Entities' counsel as to which of these auxiliary documents are responsive, particularly where it is unclear whether counsel has even asked their clients for, let alone reviewed, these documents.

Accordingly, the DuPont-Related Entities should be ordered to produce all requested Ancillary Agreements to the DowDuPont Separation Agreement. In sum, the Court should: (i) overrule the DuPont-Related Entities' Objections to the Requests for Production or order that they withdraw all such objections if no documents are being withheld based upon those boilerplate objections; (ii) order the DuPont-Related Entities to produce any responsive documents to Request for Production No. 1; (iii) order the DuPont-Related Entities to produce all conveyance instruments and other agreements reflecting the transfer of each asset related to AFFF/PFAS/Fluorosurfactant products, and (iv) order that Defendants confirm that they are not withholding any responsive documents to Requests for Production Nos. 2, 3 and 5 dealing with

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from the Performance Chemicals business. They have now agreed to produce those Schedules. (Jackson Decl., ¶57, Ex. 26).

AFFF, PFAS, and Fluorosurfactant assets or to produce any remaining documents within 10 days of such order.

II. DEFENDANTS SHOULD BE ORDERED TO PROVIDE DEPOSITION DATES AND HOLD DEPOSITIONS REMOTELY IF CIRCUMSTANCES REQUIRE

Rule 30(b)(6) requires that a corporation receiving a Notice "*must* then designate" persons to testify on its behalf. Fed. R. Civ. P. 30(b)(6) (emphasis added); *see also EEOC v. Thurston Motor Lines Inc.*, 124 F.R.D. 110, 114-15 (4th Cir. 1989) (noting that defendant corporation "has absolutely no right under the rules to refuse to designate a witness" and defendant should have sought a protective order for any objections it had to requested discovery).

Here, for several weeks, the DuPont-Related Entities refused to comply with this obligation without any good-faith basis to do so. Following guidance from the Court during the April 3 Case Management Conference, the DuPont-Related Entities did an about-face and agreed to comply with their obligation to produce corporate representatives in response to the AFFF Liability Notices, but even then, they delayed offering these depositions, choosing instead to waiting until the day before the May 1 Case Management Conference. (*See* Jackson Decl., ¶¶45, 46, Exs. 21 and 22).

Nevertheless, this dispute is not yet resolved due to Chemours's ongoing refusal to commit to remote depositions, which is not tenable in light of the circumstances in which the Parties are all now operating.[37] The Federal Rules of Civil Procedure plainly provide that the court may order "that a deposition be taken by telephone or other remote means." Fed. R. Civ. P. 30(b)(4). As the Court itself recognized during the May 1, Case Management Conference,

[37] On May 5, counsel for Old DuPont, New DuPont, and Corteva finally agreed that depositions could go forward before June 30 even if they cannot prepare their witnesses in person, and even if the depositions need to be fully remote. (See Jackson Decl., ¶55, Ex. 25).

lawyers and judges alike are operating remotely and are doing so effectively. Indeed, federal and state courts across the country are issuing both court-wide and case-specific orders allowing for remote depositions and providing guidance to allow for proper oath-taking in remote depositions.[38]

Notably, during the May 1, Case Management Conference counsel for Old DuPont, New DuPont and Corteva misrepresented the Temporary Order Regarding Civil Litigation and Rules of Civil Procedure in Circuit Court issued by the Supreme Court of Appeals of West Virginia on April 24, 2020. While counsel suggested that the Order somehow carved out Rule 30(b)6) depositions from going forward remotely, that is not true. The Order provides that corporate representative depositions under W. Va. R. Civ. Pro. 30(b)(7) are permitted by agreement or court order upon good cause shown.[39]

Accordingly, each of the DuPont-Related Entities should be ordered to: (i) provide two mutually convenient dates for each witness such that all depositions can take place before June 30; and (ii) agree that the depositions will go forward on those dates regardless of whether the depositions need to be conducted partially or fully remotely.

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[38] *See, e.g.*, Supreme Court of New Jersey Omnibus Order on COVID-19 Issues (March 27, 2020) (ordering that "depositions should be conducted remotely using necessary and available video technology"), available at https://www.njcourts.gov/notices/2020/n200327a.pdf .; Massachusetts Supreme Judicial Court Order for the Administering of Oaths at Depositions via Remote Audio-Video Communication Equipment (Mar. 20, 2020), available at https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-for-the-administering-of-oaths-at. ; Supreme Court of Florida Order for COVID-19 Emergency Procedures for the Administering of Oaths Via Remote Audio-Video Communication Equipment (Mar. 18, 2020), available at https://www.floridasupremecourt.org/content/download/632105/7182680/AOSC20-16.pdf ; Hon. Lewis J. Liman, COVID-19 Emergency Individual Practices in Civil and Criminal Cases (S.D.N.Y. Mar. 19, 2020), available at https://nysd.uscourts.gov/sites/default/files/practice_documents/LJL%20Liman%20COVID-19%20Emergency%20Individual%20Practices%20in%20Civil%20and%20Criminal%20Cases_FINAL_3.19.2020.pdf. *See also Grano v. Sodexo Mgmt.*, 2020 U.S. Dist. LEXIS 72862, at *10-11 (S.D. Calif. Apr. 24, 2020) ("Attorneys and litigants all over the country are adapting to a new way of practicing law, including conducting depositions and deposition preparation remotely.") (citing *De Lench v. Archie*, 2020 U.S. Dist. LEXIS 58049, at *2 (D. Mass. Apr. 2, 2020).

[39] The West Virginia Order is available at http://www.courtswv.gov/covid19/COVID19.html

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court grant its Motion to Compel and grant such other and further relief as the Court may deem proper and necessary.

Dated: May 6, 2020

/s/ Fred Thompson, III
Motley Rice LLC
28 Bridgeside Boulevard
Mt. Pleasant, SC 29464
P: (843) 216-9000
Fax: 843-216-9440
fthompson@motleyrice.com

Plaintiffs' Liaison Counsel

-and-

/s/ *Michael A. London*

Michael A London
Douglas and London PC
59 Maiden Lane
6th Floor
New York, NY 10038
P: (212)-566-7500
F: (212)-566-7501
mlondon@douglasandlondon.com

Paul J. Napoli
Napoli Shkolnik PLLC
1301 Avenue Of The Americas
10th Floor
New York, NY 10019
P: (212)-397-1000
F: (646)-843-7603
pnapoli@napolilaw.com

Scott Summy
Baron & Budd, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219

P: (214)-521-3605
ssummy@baronbudd.com

Co-lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with this Court's CM/ECF on this 6th day May, 2020 and was thus served electronically upon counsel of record.

/s/ Fred Thompson, III