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July 27, 2020

The Honorable Lawrence E. Kahn  
U.S. Federal Courthouse  
445 Broadway  
Albany, New York 12207

Re: *Baker et al v. Saint-Gobain Performance Plastics Corp et al.* (1:16-cv-917)

Your Honor:

This office represents Defendant E. I. du Pont de Nemours and Company ("DuPont") in the above referenced action. In Your Honor's text order earlier today [Dckt No. 290], DuPont was asked to inform the Court by August 6, 2021, whether it wished to continue opposing Plaintiffs' Motion for Class Certification and whether it wished to submit additional materials related to this matter. The undersigned informed the Court's chambers immediately after receipt of the text order to confirm that DuPont did intend to submit an additional filing on the class certification issue and would do so no later than August 6. Several hours later, DuPont received notice of entry of the Preliminary Approval Order.

DuPont has not yet agreed to a settlement of the claims against it and continues, at this point, to oppose Plaintiffs' Motion for Class Certification (Dkt. No. 145). Moreover, in light of Plaintiffs' Motion for Preliminary Approval of Class Settlement, DuPont intends to submit an additional filing related to these pending motions. DuPont believes that the Preliminary approval of this proposed settlement implicates important issues under Rule 23 that bear on DuPont's rights going forward and the most efficient way to consider the interests of all the parties. Specifically, DuPont will file a motion that will raise at least the following issues:

1. DuPont will request a hearing on the merits of the proposed class as currently described. The settlement class proposed is different than the class described in prior pleadings. If this class is preliminarily approved, it could require at least 3 separate class certification hearings. Other courts have rejected this as contrary to judicial efficiency and consistency. See, *Schoenbaum v. E.I. DuPont De Nemours and Co., et. al.*, No. 4:05-cv-01108, 2009 WL 4782082 (E.D. Mo. Dec. 8, 2009)
2. The order as entered affects the rights of DuPont moving forward in the case and DuPont's interests should be considered. For example, it grants a stay of discovery as to all parties other than DuPont and DuPont would be limited in its ability to defend the case.



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3. The plaintiffs' motion seeks to bypass a contested hearing on whether the record to date would support a ruling on the merits of whether the requirements of Rule 23 are satisfied. DuPont will request an opportunity to be heard on those issues.
4. In addition to the procedural pitfalls of certifying a class on the record before the Court, there are substantive issues concerning how the class and class relief is structured that could affect DuPont's rights and DuPont requests an opportunity to be heard on these. These include, but are not limited to:
  - a. So-called "side agreements" that are not part of the record before the Court even though they are incorporated as a substantive part of the settlement agreement.
  - b. The settlement agreement contains a "most favored nation clause" that guarantees that if another party settles on more favorable terms, the settlement agreement will be adjusted. This is unusual in a class setting and could certainly affect DuPont's ability to consider a settlement in the future.
  - c. The settlement agreement keeps confidential the contributions made by each of the settling defendants. DuPont does not believe that this sort of confidentiality is appropriate in a class settlement, and it certainly implicates whether or not the most favored nation clause would have an impact on any future negotiation with DuPont.

For these reasons and others that will be addressed in DuPont's filing, we ask the Court to hold the operation of its order of this date in abeyance until these matters can be addressed.

Please do not hesitate to contact me should you have any questions or concerns.

Respectfully submitted,

**CAPEZZA HILL, LLP**

By:   
Benjamin W. Hill