IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: E.I. DU PONT DE NEMOURS 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: ***Carla Marie Bartlett v. E.I. du Pont de Nemours and Company*, Case No. 2:13-cv-170.**

PLAINTIFF'S MOTION *IN LIMINE* NO. 2 TO PRECLUDE DUPONT FROM PRESENTING EVIDENCE DISPUTING DESTRUCTION OF C8 DOCUMENTS AND FOR AN ADVERSE JURY INSTRUCTION AND JUDICIAL NOTICE

I. INTRODUCTION

Plaintiff, Carla Marie Bartlett, through Co-Lead Counsel, pursuant to Federal Rules of Evidence 104(a) and CMO No. 9 [ECF 3549], moves the Court *in limine* to issue the following orders: (1) an order barring Defendant E. I. du Pont de Nemours and Company ("DuPont") from introducing any evidence disputing that it or the West Virginia Department of Environmental Protection ("WVDEP") destroyed evidence; (2) an order for an adverse inference instruction to the jury as a result of such spoliation of evidence; and (3) an order taking judicial notice of state court orders from prior C8 litigation. In support of this Motion, Plaintiff states as follows:

II. FACTUAL BACKGROUND

Plaintiff's motion seeks relief for DuPont's destruction of evidence relating to the work of the C8 Assessment of Toxicity Team ("CAT Team"). Plaintiff alleges that "[b]etween late 2001 and 2003, Defendant orchestrated, coordinated, and participated in creative, misleading

efforts designed and intended by Defendant to generate a new federal- and/or state-"approved" "screening level" for C-8 in drinking water supplies through creation of a [CAT Team]. That "screening level" would be significantly higher than Defendant's own 1 ppb [level] and would be held out by Defendant to the public, including Plaintiff, as proving the lack of any health risk or safety concerns with respect to the level of C-8 in drinking water supplies near the Plant."[1]

In March 2001, five months before the *Leach*[2] class action was filed, attorneys for a family whose cattle were dying from exposure to C8 sent a letter to the United States Environmental Protection Agency ("EPA") and WVDEP requesting immediate governmental action relating to DuPont's C8 releases.[3] As a result of this letter, DuPont entered into a consent order with WVDEP on November 14, 2001, whereby DuPont agreed to study the impacts of C8 on human health and the environment through, among other things, the establishment of a C8 Assessment of Toxicity Team ("CAT Team"), *funded by DuPont*, whose purpose was to "issue a final report setting forth findings of fact and conclusions as to what extent there may be health risks associated with C8 . . . ."[4] The CAT team was chaired by Dee Ann Staats ("Staats"), a new WVDEP Science Advisor whose position was funded by DuPont.[5] As chair of the CAT Team, Staats was tasked with distributing all information generated by DuPont to other CAT Team members.[6] As such, DuPont was to send all information to Staats in *triplicate*, which she then was to distribute to the other team members. *Id.*

Three DuPont representatives were included on the CAT Team, including DuPont employee, Gerald Kennedy ("Kennedy"). Kennedy was DuPont's in-house toxicologist who had

[1] Aff. of Rob Bilott in Support ("Bilott Aff.") Ex. A (*Bartlett* Compl. at 19, ¶ 88)).
[2] *Leach v. E.I. du Pont de Nemours & Co.*, No. 01-C-698 (Wood Cty. W. Va. Cir. Ct.).
[3] Bilott Aff. Ex. B (Letter from R. Bilott to EPA (Mar. 6, 2001)).
[4] *Id.* Ex. C at 8, ¶ C(5) (Consent Order between DuPont and WVDEP (Nov. 14, 2001)).
[5] *Id.* Ex. C at C-1.
[6] *Id.* Ex. C at 6, C1-3.

led DuPont's efforts to investigate the toxicology of C-8 for decades and had led DuPont's in-house committee that established and repeatedly reaffirmed DuPont's internal 1 ppb standard for C-8 in drinking water,[7] a number that was technically feasible according to DuPont, WVDEP and EPA[8] ***and*** which was included as a temporary screening level in early drafts of the consent order but was subsequently removed.[9] At the suggestion of DuPont, TERA Environmental Consulting ("TERA") also was included on the CAT Team.[10] TERA is comprised mostly of ex-EPA employees that were involved in the establishment of drinking water guidelines while at EPA.[11] DuPont wanted TERA involved because, according to DuPont, "they enjoy[ ] a very good reputation among the folks that are still in the business of "blessing criteria" . . . [and] can sell this to EPA, or whomever we desired."[12] A request by plaintiffs, who had developed significant scientific expertise on the health effects of C8, to have a representative of their choice included on the CAT Team was denied.[13]

After a six-month study period, during a May 6-7, 2002 meeting, the CAT Team selected a 150 ppb "screening level" for C-8 in drinking water,[14] which was *150 times higher* than DuPont's internal 1ppb standard. In an attempt to understand how the CAT Team arrived at 150 ppb, plaintiffs attempted to locate the CAT Team files of Kennedy that should have been produced in discovery. After plaintiffs were unable to locate any relevant files, plaintiffs' class counsel requested all such documents from Kennedy's files during a telephone conversation with DuPont's counsel on May 24, 2002. On May 30, 2002, DuPont's counsel sent a letter to

[7] DuPont established the 1 ppb standard because DuPont thought it was safe and would eliminate risk. (Bilott Aff. Ex. D at 62:25-63:21 (*Leach* Hr'g Tr., July 16, 2002).) At this same hearing, DuPont also stated that "We have no evidence [that C8 is dangerous] at any level." (*Id.* Ex. D at 64:9-11).
[8] *Id.* Ex. E at 93 (Staats Dep., vol. 1, June 6, 2002).
[9] *Id.* Ex. E at 118.
[10] *Id.* Ex. F at 261:17-21 (Kennedy Dep., July 31, 2002).
[11] *Id.* Ex. F at 211:19-212:1.
[12] *Id.* Ex. G (Email from T. Bingham to R. Rickard, Aug. 21, 2000.)
[13] *Id.* Ex. E at 227:14-229:22.
[14] *Id.* Ex. E at 253:20.

plaintiffs' class counsel confirming that DuPont had "made inquiries and understand that Gerald Kennedy has no notes associated with the May 2002 CAT Team meetings."[15] Having failed to locate documents within DuPont's files reflecting what transpired during the May 2002 CAT Team meeting that generated the public announcement of an allegedly "safe" level of C-8 in drinking water 150 times higher than the 1 ppb number that had been developed through the work of Kennedy at DuPont, plaintiffs scheduled the deposition of Staats. During her deposition, Staats confirmed that members of the CAT Team, including Kennedy, should have received certain drafts and e-mails in connection with the CAT Team work.[16] Staats also stated that she *was destroying* all draft documents of the CAT Team's work.[17] The day after Staats' deposition, plaintiffs' class counsel filed a motion for an injunction to prevent WVDEP's on-going, intentional destruction and/or deletion of documents relating to WVDEP 's work on C-8.[18]

During a June 12, 2002 emergency hearing, "counsel for Staats and WVDEP conceded that Staats and the WVDEP have destroyed and otherwise failed to save and preserve . . . documents . . . relating to the WVDEP's investigation of C-8" and that the destruction "was the result of Staats and the WVDEP's standard practice and policy of destroying documents they anticipate might be the subject of a subpoena in this litigation."[19] At the hearing, Staats argued that she was "not required by law to produce her records of this litigation, notwithstanding the service of the Subpoena, and that in the absence of an injunction she intends to continue her routine practice of destroying documents and email correspondence relating to the WVDEP's

[15] *Id.* Ex. H (Letter from D. Simmons to R. Bilott (May 30, 2002)).
[16] *See, e.g., id.* Ex. E1 at 295-96, 304:16; 305:22, 306:1, 311:21 (Staats Dep., vol. 2, June 7, 2002).
[17] *Id.* Ex. E at 30:23-31:5. Staats also stated that it was her understanding that TERA was destroying documents related to its work on the CAT Team. *Id.* Ex. E at 33:14-18.
[18] *Id.* Ex. I (*Leach*, Mot. to Enjoin WVDEP & Staats From Destroying Records Relevant to the C8 Investigation (June 11, 2002)).
[19] *Id.* Ex. J at 2-3 (*Leach*, Inj. Order Directed to Dee Ann Staats, Ph.D. and the WVDEP (June 25, 2002)).

investigation of C-8."[20] In response, the court stated that "[t]he idea that a toxicologist or anybody who has been subpoenaed to testify in a civil case would destroy documents because of the fact that she knows it is going to be subpoenaed, whether it is ongoing litigation or this particular litigation or everything in her lifetime, it doesn't make it right. It is a crime and I think it should be enjoined."[21]

On June 25, 2002, the *Leach* court entered an injunction order finding that the "admitted practice of Staats and the WVDEP of destroying documents which she anticipated would be subpoenaed . . . constitutes obstruction of justice" and that their arguments were "irrelevant and without any basis in fact or law."[22] The court then enjoined Staats from destroying any additional information and authorized plaintiffs to engage computer experts to examine all computers used by Staats "in order to retrieve any and all information pertaining to C-8 that ha[d] been deleted" or attempted to be deleted.[23] A forensic review of Staat's computer[24] revealed that it would not be possible to recover 100 percent of the deleted information.

Prior to the court's injunction order, on June 21, 2002, plaintiffs' class counsel informed DuPont that a May 30, 2002, DuPont letter indicating that Kennedy did ***not*** possess certain documents relating to the CAT Team's May 2002 meeting, appeared to be inconsistent with the deposition testimony of Staats, who testified that at least one draft report should have been sent

[20] *Id.* Ex. J at 3; *Id.* Ex. K at 11:4-8 (*Leach* Hr'g Tr. (June 12, 2002)).
[21] *Id.* Ex. K at 14:12-18.
[22] *Id.* Ex. J at 3-4.
[23] *Id.* Ex. J at 4.
[24] An attorney representing DuPont, Joseph Dawley from the law firm of Spillman, Thomas & Battle, was allowed to sit in on at least one meeting between WVDEP and plaintiffs' computer experts. *Id.* Ex. U (Letter from E. Hill to P. McDaniel (July 9, 2002)). Mr. Dawley subsequently became General Counsel for WVDEP. Two other Spillman attorneys who had worked on C8 issues for DuPont while at Spillman also took positions at WVDEP - one (Stephanie Timmermeyer) came in as the head of Air Quality and then became the Director of the entire Agency and another headed the Division of Water Resources. *Id.* Ex V (Ken Ward, Jr., *DuPont Lawyer Edited DEP's C8 Media Releases*, The Charleston Gazette, July 3, 2005); *Id.* Ex. W (Editorial, *Our Opinion: C8 Issue is No Place for Meddling With Government*, Marietta Times, July 7, 2005); *Id.* Ex. L (Ken Ward, Jr., *Group Calls for Timmermeyer to Quit Over C8*, The Charleston Gazette, July 7, 2005).

to Kennedy by e-mail.[25] Plaintiffs, therefore, specifically requested that DuPont promptly produce all documents possessed by DuPont relating to the CAT Team meeting, including any draft reports or other documents relating to the CAT Team meeting.[26]

On June 27, 2002, plaintiffs sent another letter to DuPont asking for prompt access to Kennedy's original files, because they were unable to locate any documents relating to the CAT Team in any documents produced as of that date.[27] Plaintiffs received no response to their request to review Kennedy's files until July 2, 2002 - the same day the West Virginia Supreme Court of Appeals released its decision refusing to review the Court's June 25, 2002 obstruction of justice order. On that day, DuPont's counsel disclosed that documents generated by Kennedy during the course of the litigation relating to C-8 no longer existed, and advised the Court that "Mr. Kennedy did not retain all e-mail files that may have been responsive to Plaintiffs' document requests."[28] Although DuPont did not confirm the number of documents or the nature of the specific documents that had been destroyed, DuPont's counsel confirmed, at a minimum, that at least two pages of Kennedy's own handwritten notes from the May 6-7, 2002 CAT Team were thrown out or otherwise destroyed.[29] During a July 16, 2002 hearing on potential sanctions relating to discovery abuses, the trial court stated that "the only reason for not producing is the fact that they are damaging or they may be damaging or could be thought to be or held to be"[30] and that a negative inference instruction was appropriate.[31] The court also ordered that Kennedy's deposition should be taken as soon as possible.[32] At his deposition, Kennedy admitted that he had been instructed by DuPont's counsel that he was to retain all documents

[25] *Id.* Ex. M (Letter from R. Bilott to H. Jones at 5 (June 21, 2002)).
[26] *Id.* Ex. M.
[27] *Id.* Ex. N (Letter from R. Bilott to H. Jones (June 27, 2002)).
[28] *Id.* Ex. O (Letter from S. Fennell to R. Bilott (July 2, 2002)).
[29] *Id.* Ex. O.
[30] *Id.* Ex. P (*Leach* Hr'g Tr. 49:6-9 (July 16, 2002)).
[31] *Id.* Ex. P at 57:9-11, 58:9-22, 70:20-21.
[32] *See id.* Ex. Q at 2 (*Leach*, Order on Pls.' Second Mot. for Sanctions Against DuPont (Aug. 8, 2002)).

relating to C8 and the CAT Team,[33] but that he nevertheless threw away documents he generated in connection with the CAT Team's analysis of key issues relating to the toxicology of C8[34] and, as confirmed by DuPont's counsel at the time during a deposition just last month, the full extent of Kennedy's destruction remains unknown.[35]

As a result of discovery violations, on May 1, 2003, the trial court entered an order finding that DuPont had "engaged in spoliation of evidence through Mr. Kennedy's destruction of written and electronic documents" and awarded plaintiffs monetary sanctions and a negative inference jury instruction.[36] The *Leach* case class claims were settled prior to trial, therefore, the negative inference jury instruction sanction was not imposed.

III. LEGAL ARGUMENT

A. Spoliation of Relevant Evidence Occurred.

The Sixth Circuit has recognized spoliation "as the intentional destruction of evidence that is presumed to be unfavorable to the party responsible for its destruction." *Little Hocking Water Ass'n v. E.I. duPont de Nemours & Co.*, 2015 U.S. Dist. LEXIS 36917, at *19 (S.D. Ohio Mar. 4, 2015) (citation omitted). "[T]he authority to impose sanctions for spoliated evidence arises not from substantive law but, rather, from a court's inherent power to control the judicial process.'" *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009) (en banc). Accordingly, the Court applies federal law when determining whether spoliation occurred. *Id.*

A party seeking sanctions for spoliation has the burden of establishing three criteria:

---

[33] *Id.* Ex. F1 at 421-28, 439 (Kennedy Dep., Aug. 1, 2002).
[34] *Id.* Ex. F at 437, 467-75, 477-85; *see also id.* Ex. R at 4-15 (*Leach*, Second Suppl. to Pls.' Second Mot. for Sanctions Against Defendant E.I. DuPont de Nemours & Co. (Sept. 25, 2002) (discussing Kennedy's destruction of documents, his explanations for the destruction and how the destroyed information was crucial to fully understanding how the CAT Team reached its 150 ppb health advisory level).)
[35] *Id.* Ex. T at 20:9-12, 398:9-16 (Bowman Dep. (June 3, 2015)).
[36] *Id.* Ex. S (*Leach*, Order Granting Pls.' Second Mot. for Sanctions Against DuPont (May 1, 2003)).

> (1) the party with control over the evidence must have had an obligation to preserve it at the time it was destroyed;
> (2) the party must have destroyed the evidence with a culpable state of mind; and
> (3) the destroyed evidence must be relevant to the other side's claim or defense

Pollard v. City of Columbus, 2013 U.S. Dist. LEXIS 135790, at *8 (S.D. Ohio 2013) (Deavers, J.) (citation and internal quotations omitted).

As this Court has noted, "an obligation to preserve evidence arises when a party should have known that the evidence may be relevant to future litigation." *Id.* at *9, 12-13 (citation omitted). It is indisputable that as early as 2000, DuPont had knowledge that future C8 litigation was possible and that DuPont was therefore under a duty to preserve all relevant information relating to C8.[37] In fact, as discussed *supra*, much of the destruction at issue occurred after the *Leach* case was filed in August 2001. Likewise, as noted by the *Leach* Court, WVDEP had a legal duty to preserve its CAT Team documents.[38]

Federal Rule of Evidence 401 sets a low threshold for relevancy in this context. *United States v. Worthington*, 145 F.3d 1335 (6th Cir. 1998). The party seeking an adverse inference "must make some showing indicating that the destroyed evidence would have been relevant to a contest[ed] issue." *Pollard*, 2013 U.S. Dist. LEXIS 135790, at *10. The facts set forth above demonstrate that the documents destroyed by DuPont, and by the agency it was funding to perform and oversee the CAT Team, were relevant to Plaintiff's claims and that any information relating to the health effects of C8 and any efforts by DuPont to potentially manipulate science (and public agencies charged with assessing C8 risks) in its favor supports Plaintiff's claims.

"[T]he 'culpable state of mind' element may be satisfied by showing only that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or negligently." *Beaven*, 622 F.3d at 554 (internal quotations and citations omitted); *Pollard*, 2013

[37] Expert Report of Steven Amter at 59-63 [ECF No. 2702-2] (citing internal DuPont emails).
[38] Bilott Aff. Ex. J at 3-4.

U.S. Dist. LEXIS 135790, at *13. As discussed *supra,* both WVDEP and Kennedy admitted that they knowingly destroyed information relating to their work on the CAT Team.[39]

B. The Conduct at Issue Warrants an Adverse Inference Instruction[40]

When spoliation has occurred, the Court has the discretion to impose appropriate relief. *Adkins*, 554 F.3d at 653. As the Sixth Circuit has noted, evidence that is intentionally destroyed is presumed to be unfavorable to the party responsible for the destruction. *Beck v. Haik*, 377 F.3d 624, 641 (6th Cir. 2004). In addition, courts must take care not to "hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence, because doing so would . . . allow parties who have . . . destroyed evidence to profit from that destruction." *One Beacon Ins. Co. v. Broadbast Dev. Group, Inc.*, 147 Fed. Appx. 535, 541 n.6 (6th Cir. 2005) (citation and internal quotations omitted).

Because DuPont's and WVDEP's conduct in destroying information relating to the CAT Team was intentional, a mandatory or non-rebuttable adverse inference instruction is appropriate, as previously held by the *Leach* court. *Beaven v. United States DOJ*, 622 F.3d 540, 553-54 (6th Cir. 2010); *Zarwasch-Weiss v. SKF Economics USA, Inc.*, 2011 U.S. Dist. LEXIS 113707, at *19 n.7 (N.D. Ohio 2011).[41] Although a permissive or rebuttable adverse inference instruction is more common than a mandatory or non-rebuttable inference, a permissive instruction is not appropriate in situations involving the intentional destruction of evidence.

> However, courts have also noted that non-mandatory inference instructions are a very mild sanction. The Sixth Circuit explained that a permissive instruction is "simply a formalization of what the jurors would be entitled to do even in the

[39] Bilott Aff. Ex. F1 at 437, 467-75, 477-85; *Id.* Ex. J at 2-3.
[40] DuPont should also be collaterally estopped from arguing that neither it nor WVDEP did not destroy documents, as this identical issue was decided on the merits resulting in final orders involving the same parties. (*See* Pls. Memo. in Supp. of Mot. for Partial. Summ. J. Under Rule 56 or for Determination of Issues Under Rule 16(c) [ECF 820] at 12-13 (citing authority)); Pl's. Mot. *in Limine* to Preclude DuPont's Already Waived Privileged Claims at 4-6 (being filed contemporarily herewith) (citing authority)).
[41] See also *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013) ("Whether an adverse inference is permissive or mandatory is determined on a case-by-case basis, corresponding in part to the sanctioned party's degree of fault").

> absence of a specific instruction." The Court thus concluded that "even if the district court had not given the instruction . . . , the jury's discretion would not have been affected in any way, and thus no relief is warranted."

Clemons v. Corr. Corp. of Am., 2014 US DIST LEXIS 95007, at *17-18 (E.D. Tenn. 2014) (internal citations omitted).

C. This Court Should Take Judicial Notice of the Prior *Leach* Court Orders.

Plaintiff also requests this Court to take Judicial Notice of the June 25, 2002, *Leach* Order finding intentional destruction of documents by WVDEP and the May 1, 2003, *Leach* Order granting a negative inference jury instruction. Courts may take judicial notice of the existence of prior proceedings and the record in the case before it, or in closely related cases. FED. R. EVID. 201(b)(2).[42]

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully moves this Court *in limine* to enter an order prohibiting DuPont from denying that it and WVDEP destroyed documents, an order for an adverse inference instruction, and an order taking judicial notice of state court orders from prior C8 litigation. The relief requested by Plaintiff would counter any advantage that DuPont might have obtained by its conduct.

[42] *See also Old Thyme Remedies, LLC v. Amish Origins LLC*, 2015 U.S. Dist. LEXIS 41814, at *9 (N.D. Ohio 2013) ("A court may take judicial notice of another court's opinion not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute.") (citations and internal quotations omitted); *Mayes v. City of Hammond*, 2006 U.S. Dist. LEXIS 50950, at *25 (N.D. Ind. 2006) ("A federal court may take notice of a state court order") (citation omitted); *United States ex rel. Robinson Rancheria v. Borneo, Inc*., 971 F.2d 244, 248 (9th Cir. 1992) (judicial notice of "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" is proper).

Respectfully submitted,

/s/ Michael A. London
Michael London
Douglas & London, PC
59 Maiden Lane, 6th Floor
New York, NY 10038
Telephone: 212-566-7500
Fax: 212-566-7501
Email: mlondon@douglasandlondon.com

Robert A. Bilott
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Telephone: 513-381-2838
Fax: 513-381-0205
Email: bilott@taftlaw.com

Jon C. Conlin
Cory Watson, PC
2131 Magnolia Ave., Suite 200
Birmingham, AL 35205
Telephone: 205-328-2200
Fax: 205-324-7896
Email: jconlin@corywatson.com

Plaintiffs' Steering Committee Co-Lead Counsel

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 20th day of July, 2015 and was thus served electronically upon all counsel of record.

/s/ Michael A. London