STATE OF NORTH CAROLINA CUMBERLAND COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 5612
STATE OF NORTH CAROLINA, *ex rel.* JOSHUA H. STEIN, ATTORNEY GENERAL, Plaintiff, v. E.I. DU PONT DE NEMOURS AND COMPANY; THE CHEMOURS COMPANY; THE CHEMOURS COMPANY FC, LLC; CORTEVA, INC.; DUPONT DE NEMOURS, INC.; and BUSINESS ENTITIES 1-10, Defendants.	**ORDER AND OPINION ON PLAINTIFF STATE OF NORTH CAROLINA'S MOTION FOR PARTIAL SUMMARY JUDGMENT [Public][1]**

1. **THIS MATTER** is before the Court on the 12 July 2023 filing of Plaintiff State of North Carolina's Motion for Partial Summary Judgment (the "Motion"). (ECF No. 214 ["Mot."].) Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure (the "Rule(s)"), Plaintiff State of North Carolina ("Plaintiff") seeks affirmative summary judgment against Defendants Corteva Inc. ("Corteva") and DuPont de Nemours, Inc. ("New DuPont"), on the legal issue of whether Corteva and New DuPont contractually assumed the liabilities of E.I. du Pont de Nemours and Company ("Old DuPont") arising from Old DuPont's use, manufacture, and discharge of per- and polyfluoroalkyl substances ("PFAS") in North Carolina.

[1] Recognizing that this Opinion cites to and discusses the subject matter of documents that the Court has allowed to remain under seal in this action, the Court filed this Order and Opinion under seal on 30 January 2024. (*See* ECF No. 267.) On 6 February 2024 the parties notified the Court that all parties conferred and agreed that there is no material in this Order and Opinion that requires sealing. Accordingly, the Court now files this public version of the Order and Opinion, and will promptly unseal the previously filed version, (ECF No. 267).

2. For the reasons set forth herein, the Court **GRANTS** the Motion.

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Bradley Arant Boult Cummings LLP by C. Bailey King, Jr. and Robert R. Marcus; and Bartlit Beck, LLP by Katherine L.I. Hacker, Amy R. McCalib, and Katharine A. Roin, for Defendants Corteva, Inc. and DuPont de Nemours, Inc.

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of the alleged contamination of North Carolina's air, land, and water through operations at a chemical manufacturing facility known as Fayetteville Works located in Bladen and Cumberland Counties in North Carolina. Plaintiff alleges that Old DuPont, Chemours, Inc., and Chemours FC (collectively, the "PFAS Defendants") have caused this contamination by using, manufacturing, and discharging PFAS, which resist biodegradation, persist in the environment, and accumulate in people and other living organisms.

4. Plaintiff alleges that Corteva and New DuPont contractually assumed the liabilities of Old DuPont, making them directly liable for Old DuPont's conduct arising from Old DuPont's use, manufacture, and discharge of PFAS in North Carolina.

II. FACTUAL AND PROCEDURAL BACKGROUND

5. The Court sets forth herein the allegations in the Complaint to aid in setting out the factual allegations giving rise to this action, notwithstanding the fact that the Complaint is unverified and cannot be treated as an affidavit. The Court does not make findings of fact and conclusions of law at this stage, but sets forth only those facts that will allow the Court to determine if there is a genuine issue of material fact such that it should be brought before a jury.

6. This Order and Opinion focuses on issues regarding the impact of the Supreme Court of North Carolina's decision in this case. *See State ex rel. Stein v. E.I. du Pont Nemours & Co.*, 382 N.C. 549, 565 (2022). Further, this Motion has been brought before the conclusion of discovery and, as a result, the allegations are treated as such and not as evidence.

A. The Relevant Parties

7. Old DuPont is a Delaware corporation with its principal place of business in Delaware, which conducts business throughout the United States, including in North Carolina. (Compl. ¶ 16, ECF No. 2 ["Compl."].)

8. Corteva and New DuPont are Delaware corporations with their principal places of business in Delaware, which both conduct business throughout the United States, including North Carolina. (Compl. ¶¶ 20–21.)

9. The Chemours Company ("Chemours") is a Delaware corporation with its principal place of business in Delaware. (Compl. ¶ 17.)

B. Acquisition and Operation of the Fayetteville Works Property

10. Old DuPont acquired the Fayetteville Works property, a chemical manufacturing facility, in 1969 and began operations in the early 1970s. (Compl. ¶¶ 77, 79.) The Fayetteville Works property is located near Fayetteville, North Carolina, (Compl. ¶ 78), and Old DuPont operated Fayetteville Works for over forty years before it transferred the property to Chemours on 1 February 2015 (Compl. ¶ 80).

11. Old DuPont has allegedly generated and released hundreds of PFAS, including perfluorooctanoic acid ("PFOA") and GenX, into the air, ground, and water. (Compl. ¶ 4.) Exposure to these chemicals over time can pose serious health and environmental risks to the citizens of North Carolina. (Compl. ¶ 10.)

C. Restructuring of Old DuPont

12. On 26 June 2015, Old DuPont and Chemours entered into a separation agreement, which effectively transferred Old DuPont's "Performance Chemicals" segment to Chemours, which included Old DuPont's business associated with the manufacture and use of PFAS and Fayetteville Works. (Compl. ¶¶ 157–58; Index Exs. Mot. Ex. 1 at 209, ECF No 215.1 ["Corteva Form 10-K"].) On 1 July 2015, Old DuPont completed the spin-off to Chemours, (*see* Corteva Form 10-K at 10), previously a wholly owned subsidiary of Old DuPont, and as a result, Chemours became an independent, publicly traded company (Compl. ¶ 154).

13. In December 2015, Old DuPont merged with Dow Chemical Company to form New DuPont. (Compl. ¶ 171; Index Exs. Mot. Ex. 2 at 4, ECF No 215.2 ["New

DuPont Form 10-K"].) According to the merger agreement, Old DuPont and Dow Chemical Company would become subsidiaries of New DuPont. (Compl. ¶ 171; New DuPont Form 10-K at 4.)

14. New DuPont restructured the combined assets of Old DuPont and Dow Chemical Company into three business lines: (i) Materials Science, (ii) Agriculture, and (iii) Specialty Products. (Compl. ¶ 174; Corteva Form 10-K at 6; New DuPont Form 10-K at 4.) New DuPont then transferred the Materials Science business to a new subsidiary, Dow, Inc. ("New Dow"), the Agriculture business was transferred to Old DuPont, and the Specialty Products business was kept by New DuPont. (Compl. ¶ 177; *see also* Corteva Form 10-K at 6–8; New DuPont Form 10-K at 4; Index Exs. Mot. Ex. 3 at 66, ECF No. 215.3 ["New DuPont Mar. 2019 10-Q"].)

15. Following the transfer of the Agriculture business to Old DuPont, Old DuPont was transferred to another newly formed subsidiary, Corteva. (Compl. ¶ 179; Corteva Form 10-K at 6–8.) From April to June 2019, New Dupont spun off Corteva as an independent public company. (Compl. ¶ 179; Corteva Form 10-K at 6–8; New DuPont Mar. 2019 10-Q at 66.)

16. On 1 April 2019, the Separation and Distribution Agreement (the "Separation Agreement") was signed, governing the internal restructuring of New DuPont into three separate, publicly traded companies: one for the Agricultural Business, one for the Materials Science Business, and one for the Specialty Products Business. (*See* Index Exs. Mot. Ex. 4 at 4, ECF No. 215.4 ["Separation Agt."].)

17. Under the Separation Agreement, Corteva assumed the "Agricultural Liabilities" and New DuPont assumed the "Specialty Products Liabilities." (Separation Agt. § 2.2(c).) The term "Agricultural Liabilities" is defined as "any of the Liabilities set forth on Schedule 1.1(38)(vii)," (Separation Agt. § 1.1(38)(vii)), and "Specialty Products Liability" is defined as "any of the Liabilities set forth on Schedule 1.1(309)(vi)," (Separation Agt. § 1.1(309)(vi)).

18. On 1 June 2019, Corteva and New DuPont entered into the Letter Agreement (together with the Separation Agreement, the "Agreements"), which amended Schedules 1.1(38)(vii) and 1.1(309)(vi) to the Separation Agreement. (Index Exs. Mot. Ex. 5 at NCAG-CTVA-001346, 001373-75, ECF No. 215.5 ["Ltr. Agt."].)

19. The "Agricultural Shared DuPont Percentage," is defined within the Separation Agreement as 29%. (Sep. Agt. § 1.1(41). Further, Schedule 1.1(309)(vi) of the Separation Agreement was amended to show that New DuPont agreed to assume 71% of Old DuPont's PFAS liabilities. (Ltr. Agt. at NCAG-CTVA-001374-75.)

D. Procedural History

20. On 13 October 2020, this action was initiated by Plaintiff with the filing of its Complaint. (*See generally* Compl.)

21. On 29 January 2021, Corteva and New DuPont filed their Consolidated Motion to Dismiss (the "Motion to Dismiss"), (ECF No. 76 ["Mot. Dismiss"]), which sought dismissal of Plaintiff's claims against them pursuant to Rules 12(b)(2) and 12(b)(6), (Mot. Dismiss 1).

22. On 17 August 2021, the Court entered its Order and Opinion on Consolidated Motion to Dismiss by Defendants Corteva, Inc. and DuPont de Nemours, Inc. (the "17 August Order and Opinion"). (ECF No. 153 ["17 Aug. Opinion"].) The 17 August Order and Opinion limited its ruling to the issue of whether the Court could properly exercise personal jurisdiction over Corteva and New DuPont pursuant to Rule 12(b)(2), and the Court noted that it would later enter an order and opinion on the remainder of the Motion to Dismiss. (17 Aug. Opinion ¶ 2 n.2.) The Court concluded that it could properly exercise personal jurisdiction over Corteva and New DuPont. (17 Aug. Order ¶ 59.)

23. On 16 September 2021, Corteva and New DuPont timely filed their Amended Notice of Appeal to the North Carolina Supreme Court, appealing the 17 August Order. (ECF No. 156). Subsequently, the Court stayed all proceedings in this case, including discovery, until final resolution of the appeal. (ECF No. 161.)

24. On appeal, the Supreme Court of North Carolina affirmed the 17 August Order and remanded this case for additional proceedings. *See State ex rel. Stein v. E.I. du Pont Nemours & Co.,* 382 N.C. 549, 565 (2022).

25. Following remand, the Court heard arguments on the Rule 12(b)(6) aspect of the Motion to Dismiss, and on 2 March 2023, the Court filed its Order and Opinion on Motions to Dismiss, denying both Motions. (ECF No. 193.)

26. The parties are currently engaged in discovery. (*See* ECF No. 194.)

27. On 12 July 2023, Plaintiff filed the Motion and its supporting brief. (*See* Mot.; Memo. Supp. Mot., ECF No. 216 ["Br. Supp."].) After briefing was completed,

the Court held a hearing on the Motion on 20 November 2023 (the "Hearing"), at which all parties were present and represented through counsel. (*See* ECF No. 237.)

28. The Motion is ripe for resolution.

III. LEGAL STANDARD

29. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the Court must consider the evidence in the light most favorable to the nonmoving party, drawing all inferences in the nonmoving party's favor. *See, e.g., Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018).

30. The moving party "bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579 (2002). The moving party meets its burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citations and quotation marks omitted). If the moving party makes that showing, "the burden shifts to the nonmoving party to 'produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial.' " *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (quoting *DeWitt*, 355 N.C. at 682).

31. When a party requests affirmative summary judgment on its own claims for relief, "a greater burden must be met." *Brooks v. Mount Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The moving party "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985). For that reason, it is "rarely . . . proper to enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984).

IV. ANALYSIS

32. The sole issue presented in the Motion is whether a genuine issue of material fact exists as to whether Corteva and New DuPont contractually assumed the liabilities of Old DuPont arising from Old DuPont's use, manufacture, and discharge of PFAS in North Carolina.

A. Law of the Case

33. Plaintiff contends that the Supreme Court of North Carolina's ruling that Corteva and New DuPont assumed Old DuPont's PFAS liabilities is the law of this case, and as such, summary judgment is warranted on this issue. (Br. Supp. 13.) The Court agrees.

34. The law of the case doctrine applies to "points actually presented and necessary to the determination of the case." *Condellone v. Condellone*, 137 N.C. App. 547, 551 (2000); *see also Premier, Inc. v. Peterson*, 2016 NCBC LEXIS 39, at **14

(N.C. Super. Ct. May 13, 2016) (applying the law of the case doctrine to a question of contract interpretation). It requires that "[n]o judgment other than that directed or permitted by the appellate court may be entered." *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722 (1966). "As a result, '[o]n remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation or departure.' " *Premier, Inc.*, 2016 NCBC LEXIS 39, at **15 (quoting *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667 (2001)).

35. The parties have argued the issue of whether Corteva and New DuPont assumed Old DuPont's PFAS liabilities once already: before the Supreme Court of North Carolina. In affirming this Court's decision concerning the exercise of personal jurisdiction, our Supreme Court reviewed the Agreements to determine the plain language of those documents as it relates to the assumption by Corteva and New DuPont of Old DuPont's PFAS liabilities and their impact on the personal jurisdiction analysis.

36. In its decision, the Supreme Court stated, in relevant part, that "the Business Court's interpretation of the plain language of the Agreements is well supported," and that it "upheld [this Court's] finding that Corteva and New DuPont expressly assumed Old DuPont's PFAS liabilities." *E.I. du Pont de Nemours & Co.,* 382 N.C. at 563.

37. As a result of the Supreme Court of North Carolina's conclusion that, when read together, the Agreements established that Corteva and New DuPont were liable for Old DuPont's PFAS liabilities, the Supreme Court necessarily determined that

Corteva and New DuPont will be held liable if, at a later point in this litigation, Old DuPont is found liable for conduct related to its use, manufacture, and discharge of PFAS.

38. The Court further notes that there have been no new developments that would warrant reconsideration of the liability provisions within the Agreements. Therefore, that issue has been decided with finality for purposes of this case. *See Ray v. Hill Veneer Co.*, 199 N.C. 414, 415 (1924) (holding that an exception to the law of the case doctrine applies only when there is a "material difference" between the record in the prior appeal and the present record); *cf. Metts v. Piver*, 102 N.C. App. 98, 100–01 (1991) (holding that even new evidence did not entitle a party to a second chance at summary judgment on the same issues; otherwise "an unending series of motions for summary judgment could ensue").

B. <u>Claims Against PFAS Defendants</u>

39. Corteva and New DuPont contend that because Plaintiff is seeking summary judgment on the issue of whether Corteva and New DuPont assumed Old DuPont's PFAS liabilities, Plaintiff is necessarily seeking summary judgment on Plaintiffs' first four causes of action, which are asserted in the Complaint exclusively against the PFAS Defendants,[2] not Corteva and New DuPont. (Br. Opp. Pl.'s Mot. 5, ECF No. 235 ["Br. Opp."].) The Court disagrees.

40. Application of the law of the case doctrine to this dispute means only that, if Old DuPont is found to have liability for the use, manufacture, and discharge of

[2] As noted above, Old DuPont is a PFAS Defendant. (*See supra* ¶ 3.)

PFAS, Corteva and New DuPont will be held liable as a result of, and limited to, their assumed contractual obligations under the Agreements. Plaintiff does not assert the first four causes of action, against Corteva and New DuPont. However, Corteva and New DuPont's contractual obligations to Old DuPont result in their assumption of any contemplated PFAS liabilities belonging to Old DuPont, at least to the extent Corteva and New DuPont assumed Old DuPont's liabilities as set forth in the Agreements.

41. Therefore, while the Complaint does not assert the first four causes of action, which directly pertain to Old DuPont's PFAS-related conduct, against Corteva and New DuPont, their contractual obligations to Old DuPont result in their assumption of any contemplated PFAS liabilities belonging to Old DuPont, at least to the extent Corteva and New DuPont's assumed Old DuPont's liabilities, as set forth in the Agreements.

42. Finally, while Corteva and New DuPont concede, as they must, that the ruling by the Supreme Court is binding in this case, (Br. Opp. 1), they contend that summary judgment as to the issue before the Court is not appropriate because Plaintiff is simply seeking an advisory ruling from this Court. (Br. Opp. 8.) Corteva and New DuPont argue that "any assumption of liabilities by [Corteva and New DuPont] does not affect whether the *PFAS Defendants*–the ones against whom Plaintiff actually asserted the causes of action–committed any acts or omissions that prove or disprove any element of the claims." (Br. Opp. 8).

43. Corteva and New DuPont have affirmatively denied Plaintiff's allegations that the pair assumed Old DuPont's PFAS liabilities, even after the Supreme Court of North Carolina issued its decision. (*See* Def. Corteva, Inc.'s Ans. 180, ECF No. 205 ["Corteva Ans."]; Def. New DuPont's Ans. 180, ECF No. 204 ["New DuPont Ans."] (admitting that they entered into the Separation Agreement, but denying the remaining allegations related to assumption of Old DuPont's direct financial liability.)) Therefore, and notwithstanding Corteva and New DuPont's argument to the contrary, the Court's determination of this issue as a matter of law is not an advisory ruling, but instead one that will provide clarity as to liability pending determination of whether Old DuPont is found liable for conduct related to its use, manufacture, and discharge of PFAS.

44. To be abundantly clear, this ruling relates only to the narrow issue of the liability assumed by Corteva and New DuPont as to Old DuPont's PFAS liabilities, as was outlined by our Supreme Court in its 2022 Opinion affirming the Court's 17 August Order and Opinion.

45. This Order and Opinion does not address whether any other terms or provisions of the Separation Agreement or the Letter Agreement are satisfied or enforceable as a matter of law, and the Court does not determine herein whether Old DuPont is liable for the alleged conduct set forth in the Complaint concerning its use, manufacture, and discharge of PFAS.

V. CONCLUSION

46. For the foregoing reasons, the Court hereby **GRANTS** Plaintiff's Motion for Partial Summary Judgment.

SO ORDERED, this the 7th day of February, 2024.

/s/ Michael L. Robinson
Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases