UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

VICTORIA CAREY, MARIE BURRIS, MICHAEL KISER, and BRENT NIX, individually and on behalf of all others similarly situated, Plaintiffs, v. E.I. DUPONT de NEMOURS AND COMPANY and THE CHEMOURS COMPANY FC, LLC, Defendants.	Case No.: 7:17-CV-00189-D Case No.: 7:17-CV-00197-D Case No.: 7:17-CV-00201-D
CAPE FEAR PUBLIC UTILITY AUTHORITY, Plaintiff, v. THE CHEMOURS COMPANY FC, LLC, et al., Defendants.	Case No.: 7:17-CV-00195-D
BRUNSWICK COUNTY, a governmental entity, Plaintiff, v. DOWDUPONT, INC., et al., Defendants.	Case No.: 7:17-CV-00209-D

PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO DEFENDANTS' SECOND SUPPLEMENTAL MEMORANDUM REGARDING PLAINTIFFS' REQUEST FOR EXPEDITED DISCOVERY

The above-captioned Plaintiffs submit their Opposition to Defendants' Motion for Leave to File Second Supplemental Memorandum Regarding Plaintiffs' Request for Expedited Discovery. *See* ECF No. 59. Defendants' motion is baseless and should be denied under Federal Rule of Civil Procedure 11(b)(1) as an impermissible attempt to delay these proceedings. In their motion, Defendants argue that "new circumstances"—*i.e.*, Cape Fear Public Utility Authority's ("CFPUA") submission of a public report to the North Carolina General Assembly—undercuts Plaintiffs' rationale for expedited discovery. *Id.* at 3. Nothing could be further from the truth.

First, the research summarized in CFPUA's report is hardly "new." As Defendants acknowledge in their own motion, CFPUA discussed the *very research* described in its final report at the January 4, 2018 hearing: "[W]e are now in the process of spending our own money, money the legislature has provided to Cape Fear to engage UNC Wilmington to study the water intake […] [and] how to remove these [perfluorinated compounds]." Jan. 4, 2018, Hrg. Tr. at 10:20-11:7; *see* Defendants' Proposed Memorandum, ECF No. 59-2 at 2. CFPUA's submission of the results of that ongoing analysis—of which Defendants have been aware since at least the January 2018 hearing—does not constitute a "new circumstance[]" warranting supplementation.

Second, the report in no way undermines Plaintiffs' rationale for expedited discovery. CFPUA's partial success in reverse engineering some of the contents of Defendants' discharges from the intake of CFPUA's water treatment plant hardly allays Plaintiffs' need to test Defendants' discharges *before they are diluted*. As Plaintiffs explained in their Motion for Expedited Discovery—and as DuPont itself has conceded—*any* dilution of wastewater impedes the detection of fluorinated constituents. *See* Mot. for Expedited Discovery, ECF No. 35, at 4;

ECF No. 35-2, at 2 (April, 23, 2002, Letter from DuPont to N.C. Division of Water Quality, stating that dilution causes perfluorinated compounds to drop below detectable levels). Only by sampling Defendants' wastewater at the source will Plaintiffs be able to determine the full array of pollutants generated by Defendants' manufacturing processes, and develop authentic standards of measurement for each. Moreover, as a recent Report to the Environmental Review Commission from UNC Wilmington demonstrates, this research is uncovering perfluorinated compounds in the river not previously disclosed by Defendants and not previously detected in sediments and thus not specifically targeted for identification. *See* Exhibit 1, Report to the Environmental Review Commission from the University of North Carolina at Wilmington Regarding the Implementation of Section 20(a)(2) of House Bill 56 (S.L. 2017-209), at 11 Figure 3 (showing PFAS compounds detected through non-targeted analysis). Plaintiffs need access to the Chemours plant to determine what other perfluorinated compounds are being released from the plant.

Third, Defendants' offer to provide standards of measurement for three perfluorinated chemicals—only made after CFPUA was able to identify those chemicals through UNC Wilmington's efforts—underscores the extent of Defendants' dilatory tactics. One of the first steps CFPUA took in response to the discovery of GenX in the Cape Fear River was to request from Chemours both the identity of perfluorinated chemicals generated by Defendants, and "all testing methods known to Chemours or DuPont" for identifying them. *See* ECF No. 35-6, at 1 (June 27, 2017 Letter from CFPUA to Chemours). Defendants refused to provide the requested information at the time. Nearly ten months later, Defendants have now offered to provide the testing methods for just three perfluorinated chemicals—of "dozens or hundreds" in their effluent (ECF No. 35-2, at 1)—that CFPUA has been able to identify. Defendants'

obstructionism should not be mistaken for cooperation. Their motion is yet another transparent attempt to impede Plaintiffs' identification of the toxic perfluorinated chemicals Defendants have released to the environment over decades.

Fourth, Defendants' representations in their motion reinforce Plaintiffs' concern about spoliation. In protesting that current wastewater samples will not be representative of the wastewater discharged before June 2017, Defendants admit that they have made "changes in the plant operations" that, in their view, have altered the composition of their wastewater. Defendants' Mem., ECF No. 59-2, at 6. Plaintiffs identified this very issue in their initial motion, noting that expedited discovery will help guard "against . . . spoliation concerns" if Defendants "alter, indefinitely suspend, or terminate certain manufacturing processes." Mot. for Expedited Discovery, ECF No. 35, at 4-5. Whether Defendants' argument has any merit may be debated at a later stage—what matters now is that Plaintiffs be given access to current wastewater streams before any further changes are made to Defendants' plant.

At bottom, Defendants' claim that CFPUA's Final Report renders Plaintiffs' request less urgent is disingenuous and another attempt to delay Plaintiffs' access to Defendants' discharged wastewater. *See* Fed. R. Civ. P. 11(b)(1) (no pleading should be filed if its purpose is to "cause unnecessary delay"). Accordingly, Defendants' motion to submit their second supplemental memorandum should be rejected.[1]

[1] Plaintiffs also note that under Local Rules 7.1(g)(2) and 26.1(d), Defendants are not permitted to file a reply to their motion, and with the submission of this response Defendants' motion is now ripe.

Dated: April 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the undersigned electronically filed the foregoing document with the Clerk of the Court using the ECF system, with notices of case activity to be generated and sent electronically to the following counsel of record who are registered to receive such service:

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