

No. 19-70115

IN THE
**United States Court of Appeals
for the Ninth Circuit**

NATIONAL FAMILY FARM COALITION, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents,

AND

MONSANTO COMPANY, BASF CORPORATION AND
E. I. DU PONT DE NEMOURS AND COMPANY,
Intervenor-Respondents.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**REPLY OF E.I. du PONT de NEMOURS AND COMPANY IN RESPONSE
TO PETITIONERS' OPPOSITION TO BASF CORPORATION'S CROSS-
MOTION TO RECALL AND STAY THE MANDATE**

Kirsten L. Nathanson
David Y. Chung
Amanda S. Berman
Tyler A. O'Connor
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2887
knathanson@crowell.com
*Counsel for Intervenor-Respondent E.I.
du Pont de Nemours and Company*

E. I. du Pont de Nemours and Company (“EID”) files this reply solely to address the arguments in Petitioners’ opposition that the Court should limit or abridge EID’s procedural rights as an intervenor. For the reasons set forth below (and irrespective of whether the mandate is recalled), EID’s right to participate in full in this proceeding should not be limited in any way.

ARGUMENT

Petitioners overreach in their response to BASF’s motion to recall the mandate (ECF 166-1), contending (at 2-4) that, if the Court recalls the mandate, it should also limit the scope of EID’s participation in any upcoming rehearing proceedings, and requesting (at 4-6) that the Court impose joint briefing requirements on all Respondent-side parties. Those attempts to limit EID’s participation in the remainder of this matter are misplaced.

This Court granted EID’s motion to intervene with no procedural or substantive limitations (ECF 162). EID thus has full party status in this proceeding, including the ability to file a petition for rehearing on the Court’s June 3, 2020 Opinion and Judgment. *See, e.g.*, Fed. R. App. P. 35(b) (a “party” may petition for en banc rehearing); and Fed. R. App. P. 40(a)(1) (“any party” may petition for panel rehearing). There is no legal or logical reason that EID should be limited in terms of the content of any rehearing petition it may file, or required to file jointly with other parties even if its interests and views do not sufficiently align to do so.

Petitioners misread *Day v. Apoliona*, 505 F.3d 963 (9th Cir. 2007), to suggest that EID should be limited in any rehearing petition it files to addressing the issue that motivated its intervention: the scope of the Court's merits decision (i.e., its application of the judgment to EID's FeXapan product). But in *Apoliona*, after granting intervention, this Court simply lodged the petition for rehearing that Hawai'i had requested leave to file. *Id.* at 966. And the Court said nothing that suggests that a post-decision Intervenor should be barred from addressing any issues it deems important to protect its interests. The remainder of the cases cited by Petitioners (at 3) stand simply for the undisputed proposition that any rehearing petition must be consistent with federal appellate rules.

As a matter of logic, the issuance of the mandate has no impact on the deadline for any rehearing petitions, or on the rights of parties to file individual petitions rather than joint petitions. *Compare* Fed. R. App. P. 41 *with* Fed. R. App. P. 35, 40 (illustrating no relationship between the mandate and the right to file rehearing petitions, and imposing no limitations on post-mandate petitions). As explained in EID's motion to intervene (ECF 129-1), EID has a unique property interest in its FeXapan registration that is distinct from the interests of every other Respondent party, including BASF. It should thus be permitted, consistent with its status as a party to this litigation, to submit the filings and raise the arguments it deems necessary to advocate for its rights and interests.

While, as indicated in its Reply in support of intervention (ECF 155 at 15), EID intends to collaborate with its fellow Respondent-Intervenors and file joint briefs where possible, this Court should not order it to do so—and it certainly should not order EID to file jointly with EPA, which does not share Respondent-Intervenors’ interests in important respects, as EID explained in its Motion for Leave to Intervene (ECF 129-1 at 14-15).

In short, the pending motion to recall the mandate bears no relation to any potential rehearing petitions that EID or other parties may file, and provides no reason for the Court to constrain EID’s rights to participate in these proceedings fully and independently in order to protect its interests, including by filing a petition for rehearing on the issues it deems appropriate, within the bounds of Fed. R. App. P. 35, 40. This Court should reject Petitioners’ demands to the contrary.

June 24, 2020

Respectfully submitted,

/s/ Kirsten L. Nathanson

Kirsten L. Nathanson

David Y. Chung

Amanda Berman

Tyler A. O’Connor

CROWELL & MORING LLP

1001 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 624-2887

knathanson@crowell.com

*Counsel for Intervenor-Respondent E.I.
du Pont de Nemours and Company*

CERTIFICATE OF COMPLIANCE

The foregoing reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 656 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This reply also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman Font.

/s/ Kirsten L. Nathanson
Kirsten L. Nathanson

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.