IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al.,

Plaintiffs,

vs.

CIVIL ACTION NO. 04-C-296-2
(Judge Thomas A. Bedell)

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware corporation doing business in West Virginia, et al.,

Defendants.

_____/

PLAINTIFFS' REPLY TO DUPONT'S PROPOSAL FOR THE DISTRIBUTION OF SURPLUS IN THE PROPERTY REMEDIATION FUND

DuPont's objections to the proposals submitted by the Class Counsel and Guardian Ad Litem raise two questions:

1. Does the Court have the discretion to allocate the surplus to the medical monitoring class?

2. If it does have the discretion to direct some or all of the surplus to the medical monitoring class, does the Court have the discretion to use the surplus money as incentive payments to encourage participation in the medical monitoring program and to fund a medical study?

The answer to both of these questions is yes. An affirmative response to each of these questions is supported by the "Final Order Regarding the Scope, Duration and Cost of the Medical Monitoring Plan" (February 25, 2008); "Final Order Approving Settlement" (January 4, 2011); "Final Order Setting Forth the Scope and Operation of the Medical Monitoring Plan" (January 11, 2018); and "Memorandum of Understanding" (MOU) between the Plaintiffs and DuPont.

Based upon the language of the MOU, the Court does have discretion to use the surplus to benefit the medical monitoring class. Paragraph 2.b. sets out the uses for the fund that resulted in the surplus.

> b. $66,000,000.00 of the total $70,000,000.00 payment shall be available to the Plaintiffs as directed by the Court for the purposes of paying for remediation services, medical monitoring costs and expenses, and attorney fees and expenses.

With respect to the $66,000,000.00, the fund that generated the surplus, the MOU does not require that it be spent solely on the property class; in fact, it gives the Court discretion to allocate this money between property remediation and medical monitoring.

In its January 8, 2011 Order, the Court did place the $66,000,000.00 into an account for the "the purposes of paying for remediation services and attorneys' fees and expenses for Plaintiffs' Counsel." In this same Order, however, the Court retained jurisdiction to control the "interpretation, implementation and enforcement of the Settlement."[1] Remediation has been completed, and the purposes for placing this money in this account have been fulfilled. Neither the MOU nor this Court's Order contemplated that this money could not be used for some other purpose especially since remediation has been completed.

Support for the conclusion that the Court has the discretion to allow the incentive payment to the medical monitoring class can be found in the prior orders of this Court. The Court allowed cash payments to be made to the property class although this is not expressly addressed in the MOU. If making a cash payment to the property class was permissible, then the same should be true for allowing incentive payments to the medical monitoring.

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[1] Final Order Approving Settlement, ¶ 13 (January 4, 2011) (. . . "the Court hereby retains exclusive jurisdiction over this action, and every aspect of the interpretation, implementation and enforcement of the Settlement, until the Settlement has been consummated and each and every act agreed to be performed by the Parties thereto shall have been performed, and thereafter for all other purposes necessary to interpret and enforce the terms of the Settlement, the Orders of this Court, and in aid of this Court's jurisdiction and to protect and effectuate its Judgments.").

Allowing money to be spent to investigate and research data generated from the medical monitoring program was always part of the medical monitoring plan, and the Court is within its discretion to allow money to be used for this purpose. In its orders entered after the settlement, this Court relied upon and referenced its February 2008 "Final Order Regarding the Scope, Duration and Cost of the Medical Monitoring Plan."[2] The February 2008 Order contemplated that medical data generated from the medical monitoring program would be used for academic research. In its February 2008 Order, the Court found, "WVU is uniquely qualified to accumulate a mass data base of all the data from the class members and provide periodic reports to the plan administrator and court, as well as analyze the data and prepare reports and findings, as appropriate, for publication in medical journals. Tr. (1115108) at 15-16." Collecting and analyzing data has always been part of the medical monitoring plan approved by this Court.

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[2] For example, in its 2011 Final Order Approving Settlement, the Court stated, "Defendant DuPont is **ORDERED** to pay for the cost of a medical monitoring program on a 'pay-as-you-go' basis, consistent with the February 25, 2008, 'Final Order Regarding the Scope, Duration and Cost of the Medical Monitoring Plan,' except as modified by the Memorandum of Understanding, for a period of thirty (30) years;" and in its 2011 Final Order Setting Forth the Scope and Duration of the Medical Monitoring Plan, the Court stated, "Additionally, the Court previously entered the 'Final Order Regarding the Scope, Duration, and Cost of the Medical Monitoring Plan,' on February 25, 2008, although certain aspects of that Order have changed in conjunction with the Settlement, as noted in this Order and the Final Order Approving Settlement entered on January 4, 2011."

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CERTIFICATE OF SERVICE

I, J. Farrest Taylor, counsel for Plaintiffs, hereby certify that service of ***Plaintiffs' Reply to DuPont's Proposal for the distribution of Surplus in the Property Remediation Fund*** has been made on the parties herein by electronic and regular U.S. Mail, this 14th day of July, 2017, addressed as follows:

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