IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al.,

Plaintiffs,

v.

Case No. 04-C-296-2
Judge Thomas A. Bedell

E. I. DUPONT DE NEMOURS & COMPANY, et al.,

Defendants.

ORDER RESPECTING MODIFICATION OF THE PERRINE MEDICAL MONITORING PROGRAM

Presently pending before the Court are the following: (1) the September 15, 2017, Report of the Claims Administrator and the Court-Appointed Medical Monitoring Advisory Panel (the "Panel"); (2) the September 15, 2017, Plaintiffs' Position Regarding Testing and Modifications to the Medical Monitoring Program; (3) the September 15, 2017, Submission of Guardian Ad Litem Regarding MMP Modifications and Remaining MMP Issue; (4) the September 15, 2017, Dupont's Opposition to Part of Request to Supplement Medical Monitoring Program; and (5) Response of Dupont in Support of Opposition to Part of Request to Supplement Medical Monitoring Program, which said Response was to be filed by Order entered contemporaneously with the submission of the Court's November 6, 2017, Letter Ruling. These submissions are regarding the possible modifications of the Medical Monitoring Program design, as contemplated by the Court's Order of August 4, 2017.

After reviewing all pleadings submitted pursuant to the Court's original Order entered herein on the 4th day of August, 2017, resulting from the July 18, 2017 proceedings, the Court has conducted an independent review of the applicable statutory case law, case orders,

Memorandum of Understanding, and Rule 23 of the West Virginia Rules of Civil Procedure. Having done so, this Court believes that oral argument or additional briefing by the Parties is unnecessary in order for the Court to rule upon said proposed modifications.

After reviewing the pleadings noted above as well as reviewing all other pleadings and submissions by Counsel in connection with the proposed modifications to the Medical Monitoring Program and having conducted a thorough review and examination of the remaining record and analyzing the pertinent legal authority, this Court concludes that it does in fact have the authority to GRANT some or all of the requested modifications to the Medical Monitoring Program throughout its thirty (30) year duration.

This Court further finds that the Court must consider the requested modification as well as Counsels' response thereto and exercise its discretion .cautiously, judiciously, and with the polar star of the best interest of the Medical Monitoring Program Claimants, guiding the Court.

The Court, after due consideration, believes that the request of the Claims Administrator for the Health Study and Medical Monitoring Testing Protocol Modifications be **GRANTED,** *in part,* and **DENIED,** *in part,* as follows:

A. Proposed Health Study

The Court finds that the Claims Administrator, the Panel, Plaintiffs, and Guardian ad litem propose that a Health Study be carried out as set out in Exhibit D to the Claims Administrator's September 15, 2017 Report. The Court finds that this proposed health study over the next three (3) years cannot be justified at this time.

While a Health Study may be able to use the database being established in connection with the Medical Monitoring Testing and may provide valuable information for the Claimants in this action as well as the public as a whole, the Court, at this time, does not believe that it is a

proper exercise of its discretion to order such a Health Study at DuPont's expense. Such scientific research may be of great benefit. However, the Court believes the design and implementation of such study, given the facts available to the Court at this time, should be borne by the academic or private sector.

In the Court's August 24, 2011, Order Permitting the Establishment of a Program Database to Facilitate and Assist in Future Scientific and Medical Research, the Court ordered that, "after a claimant provides informed consent, that claimant's information may be placed into a research database and provided upon request to assist in a legitimate medical or scientific purpose.".

In his Medical Monitoring Report dated March 30, 2007, Dr. Werntz recommended "a central repository of the screening, referrals, and outcome data will be maintained, and depersonalized data ***made available*** for epidemiological evaluations." Werntz Report at 10 (emphasis added). This Court found such a central repository was included in the MMP. However, this Court set specific restrictions on the use of this depersonalized data in its August 24, 2011 Order. In that Order, the Court noted that the depersonalized data may only be made available for scientific research after Court approval and subject to objections by the Defendant. August 24, 2011 Order, p. 10. Further, the Court must be convinced on a case-by-case basis that the data will "assist in a legitimate scientific or medical purpose." *Id.*, at 10.

Dr. Werntz stated, "It is clear from my literature review in preparing the [Werntz Report] that there is incomplete scientific evidence in the literature on screening programs, participating rates, referral rates, etc. This data could serve as the basis for answering many of these scientific questions." Werntz Report, at 10. DuPont and Dr. Werntz envisioned that a third party,

completely distinct from the MMP, could review the data gleaned from the MMP for research purposes.

In West Virginia, medical monitoring must be supported by reliable medical research and is not a platform to explore whether a medically reliable link exists. *See generally Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1995). Medical monitoring, as with all future damages, must be proven to a reasonable degree of certainty. *Id.* at 431.

Expanding testing and having the MMP fund research in the hopes of establishing whether a link exists is not supported by law and was not contemplated by the agreement of the parties.

The Court finds that DuPont argues that health studies are not included in *Bower* and could never have been a part of a jury award against DuPont.

The Court believes the design and implementation of such study, given the facts available to the Court at this time, to take place, should be borne by the academic or private sector, and hereby **DENIES** the Claims Administrator's request for a Health Study at this time.

B. Recommended Medical Monitoring Testing Protocols Modifications

In the previous Order of January 18, 2011, the Court "determined that there shall be a Medical Advisory Panel to facilitate the Claims Administrator's quality control audits of the medical monitoring program, and to advise the Claims Administrator and the Court, with input from the Parties, on periodically updating medical monitoring protocols based on scientific and medical developments following the first five years of medical monitoring . . ." See Final Order Setting Forth the Scope and Operation of the Medical Monitoring Plan, page 14, paragraph 6.

As such, one of the assignments of the Medical Advisory Panel, as agreed to by the Finance Committee, was the consideration of the following question:

Based upon scientific and medical developments since early 2011, do the existing medical monitoring protocols of the Perrine Medical Monitoring Program require updating?

As explained in the June 23, 2017 Report to the Court in Exhibit F to the Claims Administrator's and Panel's September 15, 2017 Report to the Court, the Panel has carefully considered this question, and the unanimous answer is "Yes."

The Court finds that the Panel's recommended updated Medical Monitoring Testing Protocols regarding the tests for the toxic materials involved in the case at bar were vetted with CTIA, the Settlement's Third-Party Administrator. The Court finds that CTIA analyzed the costs of the suggested updated Medical Monitoring Testing Protocols. The Court finds that DuPont and the Guardian ad litem are in agreement as to certain areas.

To the extent the Panel and the Plaintiffs seek to interpret the language of the February 25, 2008 Order adopting the Werntz Report "in its entirety" in a vacuum, the Court rejects that. The law requires analyzing the context surrounding the formation of the MOU to establish the parties intent and meaning of the term, the "February 25, 2008 Order." "It is the duty of the court to construe [contracts] as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." *Cabot Oil*, 227 W. Va. at 117, 705 S.E.2d at 814 (Syl. pt. 1, *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921)). Courts may only interpret or construe a term of a contract if that term is ambiguous. However, it has long been held:

> [W]hen the language used in a written instrument is susceptible of more than one interpretation, courts will look at the surrounding circumstances which exist at the time a contract in writing was entered into, the situation of the parties, and the subject matter of the instrument and, when the words are ambiguous, will call in aid the acts done under it as a clue to the intention of the parties.

Kanawha Banking & Trust Co. v. Gilbert, 131 W. Va. 88, 107–08, 46 S.E.2d 225, 236 (1947).

The February 25, 2008 Order must be read in the context of its writing which, importantly, includes the issues presented to the jury and the jury verdict. There is no indication that the parties intended to include diseases in the MMP that were not part of the jury verdict, and they should not be included by way of a supplement seven years after the MOU was signed.

DuPont asked Dr. James B. Becker to review the MMP and the proposed supplement suggested by the Panel. Dr. Becker has significant experience with medical monitoring and equally important he has significant experience with medical surveillance and general wellness plans. In addition to being an active treating clinical physician for many years, Dr. Becker has specific experience in overseeing medical monitoring and surveillance programs. Dr. Becker reviewed Dr. Werntz's Report, the Court's orders, the MMP as originally designed and the suggested supplements to it, and related materials. Dr. Becker reviewed the proposed tests for their benefits in detecting and treating the subject diseases, potential harm caused by proposed testing, relevance (or not) of the testing to the diseases at issue, and the introduction of tests for disease not considered by the jury. His opinions were set forth in his Affidavit, and are reflected in Exhibit 6 to the Response of DuPont in Support of Opposition to Part of Request to Supplement Medical Monitoring Program. That exhibit/chart also includes the positions of the Panel, Plaintiffs, and the Guardian Ad Litem, which the Court has utilized to identify areas of agreement amongst the parties.

The Court finds that the Medical Monitoring Program is currently properly limited to test or procedures that are "reasonably necessary" to monitor any of the diseases agreed to by the Parties. Moreover, *Bower* clarifies that medical monitoring should only cover diagnostic examination "different from what would be prescribed in the absence of exposure." *Bower*, 522

S.E.2d at 433. The Court's Order of February 25, 2008, governs the scope of the Medical Monitoring Program. The Courts finds that the Memorandum of Understanding and the February 25, 2008 Order only contemplated monitoring for the subject diseases accepted by the jury in the verdict form Phase II.

The MMP can only monitor for the nine (9) subject diseases incorporated in the Jury's Verdict for Phase II. Ex. 1. In establishing the scope of the MMP, this Court stated:

> The program shall be implemented consistent [with] the Court's Order of February 25, 2008, and as modified by the Final Order Approving Settlement [January 4, 2011] and this Order. The Program shall provide those examinations and tests *set forth in the Court's Order of February 25, 2008*, with the exception that the duration of the program shall be thirty (30) years in length, and that no routine CT scans shall be performed.

January 18, 2011 Order, p. 9, ¶ g (emphasis added). Thus, the February 25, 2008 Order governs the scope of the MMP, except that CT scans are only permitted if there is a "diagnostically medically necessary purpose linked to exposure to the heavy metal exposure at issue," and the MMP will last 30 years rather than 40 years. Final Order Approving Settlement dated January 4, 2011.

The Court hereby finds that the following supplemental testing should be implemented at this time:

1. X-ray fluoroscopy for lead as suggested by Dr. Werntz.
2. Esophagogastroduodenoscopy (ECD)
3. Liver function test
4. Urine micro albumin/creatinine ratio
5. Glomerular Filtration Rate (GFR)
6. Urine calcium

7. Uric Acid

8. CBC/Diff (complete blood count with differential)

The Court hereby finds that the following laboratory tests should be discontinued:

1. Assay of Beta-2 protein urine

2. Sedimentation rate (ESR)

3. Zinc & Free erythrocyte protoporphyrin

C. Making Claimant Wellness Exam Form Uniform

In carrying out its duties, the Court understands that the Panel was provided protected access to the confidential medical testing information compiled by CTIA, in conjunction with LabCorp, for participating Class Members who consented to make the information for research. The Court understands that this data is maintained in a uniform database, that may be sorted and analyzed. The Court understands that the Panel also reviewed a sample of the Claimant wellness exam results for the Program. The Court understands that the • medical data obtained from wellness exams by Program participating Physicians was not compiled in a uniform manner and is therefore not being compiled by CTIA into a database, so that its accessibility for a health study or other scientific research is limited.

The Court understands that the Panel recommends that a uniform wellness exam form substantially in the form of Exhibit Ito the Claim Administrator's and the Panel's. September 15, 2017 Report be utilized by the Program to facilitate compilation and study of the resulting medical records, but with the form to be modified from time to time as reasonable necessary.

The Court hereby approves the use of a proposed wellness exam form substantially in the form presented by the Claims Administrator and the Panel in their September 15, 2017 Report. The Court grants the Claims Administrator and the Panel the ability to modify this form in the future, without the need for Court approval.

D. Proposed Use of Settlement Automobile

The Court finds that the Settlement currently owns a vehicle, which was formerly used for the Remediation Program. The Court finds that the Settlement is no longer using the vehicle.

The Claims Administrator and the Panel have proposed that the vehicle be donated to the Spelter Volunteer Fire Department, with the stipulation that the vehicle be made available for loan from the Fire Department to the Settlement to use for transporting disabled Medical Monitoring Claimants or as otherwise necessary for the Settlement.

The Court understands that the Claimants' Committee recommended, when the vehicle is used to transport disabled Medical Monitoring Claimants, that the driver be trained in CPR and shall have passed a drug test within the preceding six (6) months.

The Court hereby finds that the Claims Administrator's and the Panel's request and recommendations are fair and reasonable. The Court hereby ORDERS that the Settlement vehicle ownership be transferred, in gift, to the Spelter Volunteer Fire Department. Furthermore, the Court ORDERS that the transfer be subject to the stipulations stated herein.

E. Proposed Claimant Participation Incentive Payments

The Court finds that the Claims Administrator, the Panel, Plaintiffs and the Guardian ad litem propose that incentive payments be made to the participating claimants, while DuPont objects to the same.

"Where contractual language is clear, then such language should be construed as reflecting the intent of the parties; courts are not at liberty to *sua sponte* add or detract from the parties' agreement." *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 117, 705 S.E.2d 806, 815 (2010). To require DuPont to make payments to reward participation six years into the administration of the MMP is to add a new obligation and cost to the settlement. Adding an additional term to the agreement of the parties would require mutual assent to allow "incentive payments" which would be additional consideration. *See Citizens Telecommunication Co. of West Virginia v. Sheridan*, 799 S.E.2d 144, 149 (W. Va. 2017) ("Notice requirements and mutual assent to modification are contract principles that apply irrespective of the subject matter of the term or terms being modified"). There has been no meeting of the minds on new incentive payments. Further, modification of a written contract requires consideration, different and distinct from what the parties are already bound to do under the terms of the contract. *Id.*, at 152. This suggested supplement to the MMP was not bargained for or agreed to, and DuPont did not agree to it.

The Court believes that the incentive payments as proposed by the Claims Administrator, Plaintiffs, and Guardian ad litem would in fact create greater participation by the Medical Monitoring Claimants, but the Court believes that the use of such payments **IS NOT** an appropriate function of the Court's program. The Court would hope that the individual Claimant's desire to be tested and screened and, if appropriate, treated for their own health and well-being should take precedence over their desire to receive what the Court believes would otherwise be nominal payments.

Thus, the Court hereby **DENIES** the request for participation incentive payments.

F. Proposed Town Hall Meetings

The Court believes that the modifications as provided herein do not justify the use of Town Hall Meetings. The Court previously addressed how, and under what circumstances, the Claims Administrator may contact inactive MMP participants. October 21, 2011 Order Resolving Pending Medical Monitoring Program Issues In Preparation For November 1, 2011 Implementation Date, at 3. In that Order, after briefings and oral argument, the Court held that inactive participants may be contacted, **by mail**, "every two years reminding the claimant that he or she originally wanted to participate in the [MMP] and invite the claimant to become an active claimant upon checking a box and providing good cause for having become inactive." *Id*, at 3, referring to Medical Monitoring Plan Design, Letter July 21, 2011 (Attachment III to Claims Administrators Letter to the Hon. Thomas A. Bedell re Claims Administrator's Medical Monitoring Plan Unresolved Issues Report to the Court (Oct. 10, 2011). As previously utilized as communication, the Court is of the opinion, and hereby **ORDERS**, that the Medical Monitoring Program Participants be notified, in writing by a letter and a copy of this Order, as to the current protocol for testing and screening.

G. Supplement to Budget

The Court hereby delegates to the Finance Committee any necessary budgetary adjustments that may be incurred as a result of the modifications to the Medical Monitoring Program as herein described subject to further approval and Order of the Court.

After many hours of review of the pleadings, the Court believes that the granting of the **relief** as hereinabove described is a necessary and appropriate exercise of its discretion, and it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That a Health Study should not be implemented, at this time;

2. That the cost of the design and implementation of such Health Study should be borne by the academic/private sector, if implemented at this time;

3. That the proposed revised Medical Monitoring Testing Protocols should be implemented as agreed upon by DuPont and the Guardian ad litem, and as set out hereinabove;

4. That the Court hereby approves the use by the Medical Monitoring Plan of a uniform participant wellness exam form submitted by the Claims Administrator and the Panel in substantive form in Exhibit I to their September 15, 2017 Report, with Claimants being allowed- to complete and sign the Form, at their option, during their initial Medical Monitoring Provider visit, and with the Claims Administrator and the Panel being allowed to modify and implement the Form as necessary without prior Court approval.

5. That the Settlement vehicle ownership be transferred, in gift, to the Spelter Volunteer Fire Department, subject to the stipulations stated herein.

6. That the incentive program as proposed by the Claims Administrator's Report is not an appropriate function of the Court's program;.

7. That the supplement to the September 1, 2017 to August 31, 2018, Settlement Budget is delegated to the Finance Committee as set out hereinabove;

8. That the use of Town Hall Meetings is not justified; and

9. That provided that the Claims Administrator and his staff act substantially in accordance with the Court's Order in this matter, the Claims Administrator and his staff are granted judicial immunity.

Pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this Order as a Final Order as to the claims and issues above upon an express determination that there is no just reason for delay and upon an express direction for the entry for judgment.

IT IS SO ORDERED.

The Clerk of this Court shall provide certified copies of this Order to the following:

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ENTER: November 27 2017

Thomas A. Bedell, Circuit Judge

STATE OF WEST VIRGINIA

COUNTY OF HARRISON, TO-WIT

I, Albert F. Marano, Clerk of the Fifteenth Judicial Circuit and the 18th Family Court Circuit of Harrison County, West Virginia, hereby certify the foregoing to be a true copy of the ORDER entered in the above styled action on the 27 day of November, 2017.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the Seal of the Court this 27 day of November, 2017.

Albert F Marano SC

Fifteenth Judicial Circuit & 18th

Family Court Circuit Clerk

Harrison County, West Virginia