IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

LENORA PERRINE, et al.,

Plaintiffs,

vs.

Case No. 04-C-296-2
(Honorable Thomas A. Bedell)

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

Defendants.

SUBMISSION OF GUARDIAN AD LITEM IN RESPONSE TO SETTLEMENT ADMINISTRATOR'S PROPOSALS FOR REMEDIATION PROGRAM SURPLUS

Now comes Meredith H. McCarthy, Guardian Ad Litem for the minor children and incompetent adults, and offers the foregoing as a response to the correspondence of the Claims Administrator dated April 24, 2017, regarding the Remediation Program Surplus. The issues to the Court are as follows:

I. Can $600,000.00 surplus from the Remediation Program be used to benefit the Medial Monitoring Class and/or Program?

Yes. The relevant portions of the Memorandum of Understanding (MOU) provide as follows:

> 2. The Defendant shall pay to the Plaintiffs the sum of $70,000,000.00 plus medical monitoring consistent with the Court Order dated February 25, 2008, as only modified by this agreement, under the following terms and conditions:
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> . . .
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> 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.

c. The remaining $4,000,000.00 of the total $70,000,000.00 payment shall be made available only for a cash payment program for the medical monitoring sub-class of Plaintiffs as directed by the Court. Said sum shall not be used for any purpose other than for the sole benefit of the medical monitoring sub-class.

. . . .

Paragraph 2b clearly directs that the $66,000,000.00 shall be available to the Plaintiffs "for the purposes of paying for remediation services, medical monitoring costs and expenses...." Further, the only limitation placed on any settlement funds was specifically the $4,000,000.00 for the Medical Monitoring Program Class. Thus, those ear-marked Medical Monitoring funds could not be shared with the Remediation Program Class, however, there was not a reciprocal limitation placed on the remaining settlement funds in the MOU, generally referred to as the Remediation Program funds. This Court adopted the parties MOU in its Final Order Approving Settlement entered January 4, 2011. To the extent that the Settlement Administrator is a neutral agent/subordinate to the Court and can only make suggestions as to Settlement implementation, Counsel requests that the April 24, 2017 correspondence be treated as a Motion to allow the use of the Surplus Settlement Funds to be used for Medical Monitoring Claimants and Medical Monitoring Program (MMP) objectives.

II. Should the $600,000.00 be divided in half to allow for a second dividend to all Claimants, and allot the remaining half to provide for Medical Monitoring participation incentives and a MMP Data Study?

Yes. The remaining surplus monies should be divided among all Claimants as equitable relief to the litigants of this extensive civil action. The Property Remediation class was awarded the lion's share of the settlement funds for property/home remediation, and already received a significant dividend in December of 2016 pursuant to the Final Order Determining the Use and

Distribution of the Remediation Fund Surplus entered July 13, 2016. While there have been many Orders regarding both Class groups throughout this settlement, this Court in its Final Order Approving Settlement of January 4, 2011, retained "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 Courts jurisdiction and to protect and effectuate its judgements." Thus, this Court has retained all authority over this matter, including the use of any and all remaining settlement funds. A $300,000.00 surplus divided among all the Claimants, regardless of Property or Medical Class, is a fair and equitable way to conclude this litigation.

With regard to the incentive payments and transportation recommendations, the Medical Panel believes that the utilization of an incentive for Medical Monitoring Participants may boost program participation. A common complaint throughout the case has been that the MMP does not provide for treatment of any disease which may be detected, so individuals may not be as motivated to participate. The incentive gift card, as well as, the renewed discussion of the benefits of early detection of disease, could revive interest thereby benefitting the Claimants and the MMP. Whether the incentive is paid at the beginning of the medical visit or at the completion of the process should be decided by the individual Claimant when scheduling the medical appointment. Researchers with the US Department of Veterans Affairs studying veterans medical survey response rates, found that the promise of a $5.00 cash incentive increased response rates by 34%, and actually providing the $5.00 up front increased response rates by 52%, as compared to individuals not receiving any

incentive.[1] It may be that once a participant receives the incentive, he/she feels obligated to complete the process. As to the Transportation Assistance Program, aiding a Claimant in need of transportation to a medical appointment seems support one of the underlying ideas of the litigation and is a worthy use for the Settlement vehicle.

With regard to the recommendation regarding funding scientific research with a portion of the surplus, the undersigned believes there is a strong legal basis to support this idea. While the Final Order Approving Settlement and MOU do not specifically provide for funding of "scientific research" with the Medical Monitoring Data, neither does either document specifically addresses the use of surplus settlement funds for any purpose. Nevertheless, it appears that the Court considered many of the concerns regarding use of MMP Claimant data in its August 24, 2011, Order Permitting the Establishment of a Program Database to Facilitate and Assist in Future Scientific and Medical Research. In allowing a program database containing depersonalized information of MMP Claimants to be available for future research, the Court concluded:

> Underlying this Court's current decision in the immense value that a database of this kind would provide to both the Plaintiffs and the scientific and medical community at large. Testimony in this case has already established that this field of study is barren of the kind of knowledge that the proposed database could provide. This data could be tremendously helpful in assessing the sorts of harms, if any, that prolonged exposure to arsenic, cadmium, and lead can incur. It would also assist in determining the interplay between these potential harms and the medical monitoring process. Furthermore, any privacy concerns may be dealt with by a waiver. Because the benefits of such a database far outweigh the costs, it would be a mistake to neglect this opportunity.

Because the Court, through its Claims Administrator, was prudent and conservative with the use of the Settlement funds, the Claimants are blessed to have a surplus. After receiving at least one

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[1] Coughlin, Steven S., et al., The Effectiveness of a Monetary Incentive on Response Rates in a Survey of Recent US. Veterans. Survey Practice, Vol 4, no. 1, 2011. www.surveypractice.org.

dividend, the Claimants could also benefit from knowing whether the MMP data reveals any type of specific disease or disease trends associated with their exposure to heavy metals- lead, cadmium, arsenic and zinc. It should be determined by the Medical Panel whether the most productive use of the $150,000.00 surplus should be expended for: 1) general scientific research; 2) "data crunch" type research; or 3) epidemiologic type study. This answer may be limited by the type of research requests received by the Panel. The Medical Panel should be allowed publicize the availability of the MMP data, and seek interest from graduate/doctoral students, peers and professionals. The Medical Panel should also be permitted to pursue grant funding and/or external sponsors to compliment the medical/scientific research contemplated. This Court should provide the Medical Panel specific time frames to vet and secure a research requests, and have a general deadline for the presentation of a completed research product to the Claimants. By providing time requirements, it is the hope that research/study of the MMP data will keep advancing, rather than languish.

Based upon the foregoing, the undersigned counsel supports the Claims Administrator's recommendations to the Court in the correspondence of April 24, 2017. Specifically, that the $600,000.00 settlement surplus be divided as follows: 1) that $300,000.00 be used to provide a dividend to all claimants in the litigation; 2) that $150,000.00 be used as incentive payments to MMP participants; and 3) that $150,000.00 be used to fund medical or scientific research of the MMP data, with a goal of determining if any correlation of disease or disease trends due to heavy metal exposure like that experienced by the Medical Monitoring population.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meredith H. McCarthy, do hereby certify that I have this 24th day of May 2017, given notice of the filing of the foregoing *Submission of Guardian Ad Litem In Response to Settlement Administrator's Proposals for Remediation Program Surplus* upon the following counsel of record, by email and/or by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to:

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