UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 00-CV-00005-DPH**
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
REORGANIZED DEBTOR	§	**Hon. Denise Page Hood**

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE IN OPPOSITION TO MOTION FOR EXTENSION OF DEADLINE FOR CLASS 7 CLAIMANTS

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STATEMENT OF ISSUES PRESENTED

1. Whether, under the terms of Dow Corning's Amended Plan of Reorganization and its associated documents, this Court is authorized to hear challenges to administrative claim denials that do not raise plan interpretation issues.

2. Whether creditors in one class can seek a material modification of the terms of a bankruptcy plan after that plan has been confirmed and substantially consummated.

STATEMENT OF CONTROLLING AUTHORITY

11 U.S.C. § 1127(b) (2012)

11 U.S.C. § 1141(a) (2012)

The Claimants' Advisory Committee ("CAC") respectfully submits this response in opposition to the Motion for Extension of Deadline of Class 7 Claimants (the "Appeal Motion") brought by seventy-one Class 7 claimants (the "Korean Claimants"). For substantially the same reasons set forth in more detail in Dow Corning's motion to dismiss (Docket No. 962), the Appeal Motion should be denied.

The Korean Claimants seek to appeal the denial of their claims by the Settlement Facility-Dow Corning Trust ("SF-DCT"), which determined that all of these claimants received their implants after the January 1, 1992 eligibility cut-off date established under the Amended Joint Plan of Reorganization (the "Plan"). The Korean Claimants request that the Court modify Annex A to the Settlement Facility and Fund Distribution Agreement ("Annex A") to extend the implantation deadline for Class 7 claimants by three years. Appeal Mot. at 6.

The Appeal Motion should be denied on both procedural and substantive grounds. Annex A bars appeals to this Court from adverse claims decisions, which are final following administrative review by the Claims Administrator and the Appeals Judge. Claim denials may be brought before this Court only in the context of motions raising Plan interpretation issues. But even if this Court could entertain the Appeal Motion, the relief sought would improperly modify, rather than interpret, Plan provisions that are binding on all claimants and

that the Korean Claimants voluntarily accepted by choosing to settle their claims. The CAC agrees with Dow Corning that any such modification would be improper, as well as unfair to other claimants who have been and will continue to be bound by the 1992 cut-off date.

Argument

The Appeal Motion should be denied on two principal grounds.

First, the Plan documents limit claimant appeals to the administrative process. A settling claimant who disagrees with an eligibility or other claims determination made by the SF-DCT Claims Office may seek reconsideration through an error correction and appeals process set forth in Article VIII of Annex A. Claimants may appeal first to the Claims Administrator (Annex A, § 8.04) and then to the Appeals Judge (*id.*, § 8.05). The decision of the Appeals Judge is "final and binding on the Claimant." *Id.*

The importance of finality in the decisions of the Appeals Judge is underscored elsewhere in the Plan. Claimants who seek review under the Individual Review Process available to certain rupture claimants have a right to appeal directly to the Appeals Judge. Annex A, § 6.02(vi)(c). In those instances, Annex A also makes clear that the "[t]he decision of the Appeals Judge is final and binding on both Reorganized Dow Corning and the Claimant." *Id.*

Both this Court and the Court of Appeals have recognized and enforced the finality of administrative review for individual settling claimants under the Plan where determination of the claim raised no issues regarding plan interpretation. *See, e.g.*, *Clark-James v. Settlement Facility Dow Corning Trust (In re Clark-James)*, No. 08-1633, slip op. at 3 (6th Cir. Aug. 6, 2009) ("[T]he Plan provides no right of appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents."); *In re Settlement Facility Dow Corning Trust, Nina Rowland*, No. 08-CV-10510, 2008 WL 4427513, at *2 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court in this instance [following administrative claim review]."); *In re Settlement Facility Dow Corning Trust, Rosalie Maria Quave*, No. 07-CV-12378, 2008 WL 905865, at *2 (E.D. Mich. Mar. 31, 2008) ("The Plan provides no right to appeal to the Court and expressly sets forth that the decision of the Appeals Judge is final and binding on both the Reorganized Dow Corning and the claimants.").

The Plan and its implementing documents are binding on all claimants, as creditors of Dow Corning, whether or not they voted to accept the Plan at confirmation. 11 U.S.C. § 1141(a) (2012) ("the provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not such creditor . . . has accepted the plan"). Moreover, the Korean Claimants affirmatively accepted the

procedures set forth in Annex A when they chose to settle and submit their claims to the Settlement Facility.

The Korean Claimants appear to admit that their claims were properly denied under the governing Plan standards. To be eligible for compensation, settling claimants must submit proof of implantation occurring after January 1, 1976 and before January 1, 1992 (Annex A, § 6.04(b)(ii)), yet according to the Appeal Motion, "[a]ll of the [Korean] Claimants who filed this Motion received implantation of the covered implant between 1992 and 1994" (Appeal Mot. at 5). Thus, the SF-DCT properly denied each of these claims, and each claimant had full opportunity to appeal that decision to the Claims Administrator and, if not satisfied with the result, to the Appeals Judge. That is all the process available to them under the Plan. The administrative decisions are final and cannot be challenged through the device of a "motion" in this Court that raises no legitimate issue of Plan interpretation. Accordingly, the Appeal Motion should be denied on procedural grounds regardless of the merits of its substantive arguments.

Second, the relief sought in the Appeal Motion would constitute an impermissible Plan modification beyond the Court's power to impose and unfair to thousands of settling claimants who have played by the rules in place for nearly a decade. As noted above, to be eligible for compensation, Class 7 Claimants (which include Silicone Material Claimants and Participating Foreign Gel

Claimants) must submit "Proof of Manufacturer of a Qualified Breast Implant implanted after January 1, 1976 and before January 1, 1992." Annex A, § 6.04(b)(ii); *see also id.*, § 6.04(e)(ii) (providing same dates). The Appeal Motion asks the Court to extend the period of eligibility for Class 7 Claimants from 1992 to 1995. *See* Appeal Mot. at 6.

The Korean Claimants identify no authority under which the Court could simply rewrite the Plan to their liking. They do not argue that their request comes within the Court's power under Section 8.7 of the Plan to resolve Plan interpretation disputes. Rather, the Appeal Motion straightforwardly seeks a *change* in the Plan's qualification standards – *i.e.*, a substantive Plan modification.

This Court has recognized that "[Bankruptcy Code] Section 1127(b) is the sole means for modification of a confirmed plan which provides that the proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of the plan." *Rowland*, 2008 WL 4427513, at *2 (citing 11 U.S.C. § 1127(b)). There can be no question that the Plan, confirmed in 1999 and in effect since 2004, has been substantially consummated, and thus substantive and material modifications of the Plan – particularly without the consent of the Plan parties and a demonstration that the change will not adversely affect any party – may no longer be made under Section 1127(b). Finally, even if the Plan could otherwise be modified with the

consent of appropriate parties, the Korean Claimants should not be heard to complain about Plan provisions that they voluntarily accepted by agreeing to settle their claims and submit them to the Settlement Facility. Rewriting the Plan for their benefit at a point more than halfway through implementation of the Dow Corning settlement would be unfair both to the thousands of claimants in other classes who would remain bound by the 1992 cut-off date and to potential Class 7 Claimants who never filed claims because they were implanted after January 1, 1992.

Conclusion

For the foregoing reasons, the Appeal Motion should be denied.

Dated: New York, New York
March 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 24, 2014, I electronically filed a copy of the foregoing Response of Claimants' Advisory Committee in Opposition to Motion for Extension of Deadline for Class 7 Claimants with the Clerk of the Court through the Court's electronic filing system, which will send notice and copies of the aforementioned document to all registered counsel in this case.

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