UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MOTION TO DISMISS AND RESPONSE TO THE APPEAL FILED BY KOREAN CLAIMANTS STYLED AS A "MOTION FOR EXTENSION OF DEADLINE OF CLASS 7 CLAIMANTS"

Counsel representing 71 individual Korean claimants has filed a *Motion for Extension of Deadline of Class 7 Claimants* (the "Appeal Motion"). The Appeal Motion appeals the decision of the Settlement Facility-Dow Corning Trust ("SF-DCT") and Claims Administrator denying Class 7 claims submitted by the 71 claimants and further asks this court to modify the confirmed and consummated Amended Joint Plan of Reorganization (the "Plan"). The Appeal Motion must be denied for three reasons: First, it must be denied because appeals from determinations of the SF-DCT and Claims Administrator are barred by the Plan and the prior rulings of this Court. Second, it must be denied because it seeks an impermissible modification of the Plan. Third, it must be denied because none of the claimants have exhausted the administrative remedies provided to them in the Plan. The Court, accordingly, lacks jurisdiction over the challenge brought by the

claimants' counsel, and Dow Corning's Motion to Dismiss and Response to the Appeal Motion must be granted.[1]

The grounds for this Motion are set forth more fully in the accompanying Memorandum.

Dated: March 24, 2014

Respectfully submitted,

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Debtor's Representative and Attorney for
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[1] Pursuant to § 4.09(c)(v) of the Settlement Facility and Fund Distribution Agreement, Dow Corning may file a motion to enforce the obligations in the Amended Joint Plan of Reorganization.

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND RESPONSE TO THE APPEAL FILED BY KOREAN CLAIMANTS STYLED AS "MOTION FOR EXTENSION OF DEADLINE OF CLASS 7 CLAIMANTS"

STATEMENT OF ISSUE PRESENTED

Should the Court follow its own prior precedent to bar appeals to this Court of claim decisions by the Settlement Facility-Dow Corning Trust and the Claims Administrator denying the claims of claimants that agree they do not meet the eligibility criteria outlined in the Amended Joint Plan of Reorganization?

STATEMENT OF CONTROLLING AUTHORITY

In re Settlement Facility Dow Corning Trust, Danielle McCarthy, No. 12-cv-10314 at 2-3 (E.D. Mich. Sept. 28, 2012), *appeal dismissed*, 12-2506 (6th Cir. Jan. 28, 2013)

11 U.S.C. § 1141(a)

11 U.S.C. § 1127(b)

INTRODUCTION

Dow Corning Corporation ("Dow Corning") respectfully submits this Memorandum of Law in Support of its *Motion to Dismiss and Response to the Appeal Filed by Korean Claimants Styled as "Motion for Extension of Deadline of Class 7 Claimants."* Yeon Ho Kim, counsel to many Korean claimants, filed a *Motion for Extension of Deadline of Class 7 Claimants* (the "Appeal Motion") challenging the determination of the Settlement Facility-Dow Corning Trust ("SF-DCT") and the Claims Administrator that 71 Korean claimants (the "Claimants") are not eligible for payments under Class 7 because they do not meet the eligibility requirements for Class 7 claims. None of the 71 claimants has submitted an administrative appeal to the Appeals Judge. The Appeal Motion asks this Court to reverse the decision of the SF-DCT and Claims Administrator and to modify the eligibility criteria in the Amended Joint Plan of Reorganization (the "Plan) to permit claimants who received implants after January 1, 1992 to be eligible for Class 7 benefits. The Appeal Motion must be denied because (1) it is nothing more than an appeal from an adverse decision of the SF-DCT or Claims Administrator which is barred by the Plan and prior rulings of this Court; (2) it seeks an impermissible modification of the Plan and (3) the Claimants have not invoked their administrative remedies under the Plan.

ARGUMENT

I. Background.

The 71 Claimants listed in the Appeal Motion filed claims for benefits under Class 7 of the Plan. Class 7 claimants consist of Silicone Material Claimants and Foreign Gel Claimants. To be eligible as a Silicone Material Claimant, the Claimants must have been implanted with a Bristol, Baxter, Bioplasty, Cox-Uphoff, or Mentor breast implant at any time after January 1, 1976 and before January 1, 1992. Ex. 3 (Settlement Facility and Fund Distribution Agreement ("SFA"), Annex A), § 6.04(b). To be eligible as a Foreign Gel Claimant, the Claimants must have been implanted with a Medasil, Silimed, Societe Promotel, or Koken breast implant at any time after January 1, 1976 and before January 1, 1992. *Id*. (SFA, Annex A), § 6.04(e). The Plan thus defines eligibility for Class 7 based on the manufacturer of the implant and the date of implantation. (The Appeal Motion erroneously characterizes the eligibility criteria based on date of implantation as a "deadline".) In addition, if a Class 7 claimant seeks payment for a disease claim, the claimant must satisfy all the eligibility criteria governing disease claims. These eligibility criteria were incorporated into the Plan that was confirmed by the Bankruptcy Court in 1999. The Plan – including these criteria – was accepted by over 98 percent of those voting. The SF-DCT has been applying these criteria – as it must – since the Plan went effective on June 1, 2004. The SF-

DCT and Claims Administrator applied these criteria to the 71 Claimants and concluded that these Claimants were not eligible because they received their implants after January 1, 1992. Ex. 4 (Declaration of Ann M. Phillips). In fact, the Claimants admit in the Appeal Motion that their claims were properly denied under the Plan's eligibility criteria. The Claimants filed the Appeal Motion seeking to overturn the decision of the SF-DCT and Claims Administrator and to amend the Plan to change the Class 7 "date of implantation" eligibility requirements.

II. The Appeal Motion Is An Appeal Of SF-DCT And Claims Administrator Claim Decisions And Therefore Is Barred By The Plan And Must Be Denied.

Under the Plan (Ex. 1), there is no right to court review of claims decisions. The SFA (Ex. 2) and prior rulings of this Court expressly bar review of the SF-DCT's claims decisions. Ex. 3 (SFA, Annex A), §§ 8.04, 8.05.

A. **Background**

The SF-DCT sent Notification of Status letters to the 71 Claimants advising that the claims could not be approved because the claimants received their implants after January 1, 1992 and therefore are not eligible for Class 7 benefits. Ex. 4 (Declaration of Ann M. Phillips). Some of the Claimants received the Notification of Status letters between December 2006 and January 2007 and the remainder of the Claimants received Notification of Status letters in April 2009. Ex. 4 (Declaration of Ann M. Phillips). Although the Appeal Motion states that the 71

Claimants "appealed [the decisions] to the Appeals Judge," none of the Claimants appealed the SF-DCT's denial of their claims to the Appeals Judge as permitted by § 8.05 of Annex A to the SFA. Ex. 4 (Declaration of Ann M. Phillips). In fact, ten of the Claimants did not even pursue the first step of the Plan's appeal process by appealing the SF-DCT's denial of their claims to the Claims Administrator as permitted by § 8.04 of Annex A to the SFA.[2] Ex. 4 (Declaration of Ann M. Phillips). The remaining 61 Claimants appealed to the Claims Administrator, who upheld the denial of their claims.[3] The Claimants have now filed an appeal – several years after receiving the decision of the SF-DCT and the Claims Administrator.

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[2] The claim numbers of the ten Claimants who did not appeal the SF-DCT's denial to the Claims Administrator are SID #1036869, SID #6442899, SID #1035833, SID #1036478, SID #6474624, SID #1035783, SID #6460240, SID #1036697, SID #1035723 and SID #1037045.

[3] The claim numbers of the 61 Claimants who appealed the SF-DCT's denial to the Claims Administrator are SID #1036712, SID #1037102, SID #1036278, SID #6459174, SID #1035900, SID #6477885, SID #1036404, SID #1036595, SID #6473899, SID #1035932, SID #1036295, SID #6474528, SID #1036336, SID #1035529, SID #1035579, SID #1036770, SID #6460075, SID #1035816, SID #1036089, SID #1035534, SID #1035921, SID #6473607, SID #6460329, SID #6475044, SID #1036231, SID #1035925, SID #1035530, SID #1035949, SID #1035540, SID #1035881, SID #1035899, SID #1036291, SID #6475062, SID #1035751, SID #1036477, SID #1036852, SID #1036325, SID #1036844, SID #1038471, SID #1036282, SID #6461962, SID #1035771, SID #6460623, SID #1036727, SID #1038445, SID #1036445, SID #1036012, SID #6464070, SID #2783643,SID #1035971, SID #1036035, SID #1037084, SID #6474348, SID #6473476, SID #1036638, SID #1035560, SID #1035786, SID #1036268, SID #1036237, SID #1035562, and SID #1037112.

B. Governing Plan Provisions: Annex A

The Plan contains detailed criteria defining claims that are eligible for compensation and specifies a claims administration process for the resolution of Settling Personal Injury Claims. Ex. 2 (SFA), §§ 2.02, 4.03, 5.01; Ex. 3 (SFA, Annex A), Art. VI. The SFA provides that "[a]ll Settling Personal Injury Claims shall be reviewed, processed and resolved by the Claims Office" under the supervision of the Claims Administrator, Ex. 2 (SFA), §§ 4.02(a), 4.03(a), and requires all Settling Personal Injury Claims to be processed in accordance with the Claims Resolution Procedures outlined in Annex A to the SFA, *id*. (SFA), § 5.01(a). The SFA also provides that it and Annex A "shall establish the exclusive criteria for evaluating, liquidating, allowing and paying Claims," and that "[o]nly those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment." *Id*. (SFA), § 5.01(a).

The Claims Administrator is responsible for determining whether a claim is eligible based on the eligibility criteria set forth in Annex A and for "assur[ing] that payment is distributed only for Claims that satisfy the Claims Resolution Procedures." *Id.* (SFA), §§ 4.02(a), 5.04(b), 6.04.

C. Claimants' Claims Were Properly Denied By The Claims Administrator

The SF-DCT and Claims Administrator denied the claims of the Claimants because they did not meet the eligibility criteria specified by the Plan and Claims

Resolution Procedures for Class 7 claimants. Ex. 4 (Declaration of Ann Phillips). Annex A to the SFA specifies that Class 7 claimants must have been implanted with an eligible implant before January 1, 1992 in order to receive a payment. Ex. 3 (SFA, Annex A), § 6.04.

The Claimants do not dispute the validity of the Claims Administrator's determination under the terms of the Plan: they agree that they received their implants after January 1, 1992 and they agree that the Plan (in Annex A) requires that to be eligible for Class 7 benefits, the Claimants must have received their implants before January 1, 1992. The decision of the Claims Administrator is indisputably correct and mandated by the Plan.[4]

D. Governing Plan Provisions: Appeals of Decisions of the SF-DCT

A claimant who disagrees with the decision of the SF-DCT may seek reconsideration of her claim through the error correction and appeals process. Ex. 3 (SFA, Annex A), Art. VIII. Thereafter, she may seek review by the Claims Administrator and then, if unsuccessful, she may appeal that decision to the Appeals Judge. *Id*. (SFA, Annex A), Art. VIII, §§ 8.04, 8.05. The decision of the Appeals Judge is "final and binding on the Claimant." *Id.* (SFA, Annex A), § 8.05.

[4] For the same reasons, Dow Corning is entitled to relief under Rules of Civil Procedure 12(b)(1) and 12(b)(6). Because the Plan does not authorize claimants to appeal adverse claims decisions to this Court, and there is no allegation of an injury that may be redressed by this Court, the Court lacks jurisdiction over the Appeal Motion.

The provisions of the Plan are binding on Claimants as a matter of federal bankruptcy law. *See* 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor . . . has accepted the plan").

The procedures outlined in the Plan for the review, processing and resolution of claims ensure the fairness, integrity, consistency and efficiency of the administrative settlement process and serve to avoid litigation over the handling of every claim and over claims ultimately found to be deficient by the SF-DCT, Claims Administrator and Appeals Judge. This structure was agreed to by the Plan Proponents, approved by the Court, and accepted by the overwhelming vote of claimants.

This Court and the Court of Appeals explicitly and repeatedly have held that the Plan language does not permit individual claimants to appeal decisions of the SF-DCT, Claims Administrator or Appeals Judge to this Court. *See, e.g., In re Settlement Facility Dow Corning Trust, Danielle McCarthy*, No. 12-cv-10314 at 2-3 (E.D. Mich. Sept. 28, 2012) ("The Plan provides no right of appeal to the Court."), *appeal dismissed*, 12-2506 (6th Cir. Jan. 28, 2013); *In re Settlement Facility Dow Corning Trust, Marlene Clark-James*, 08-1633 at 3 (6th Cir. Aug. 8, 2008) ("The district court properly dismissed Clark-James' complaint . . . essentially seek[ing] a review of the SF-DCT's determination that she has not submitted sufficient proof to show that her implants had ruptured. [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."), *aff'g* No. 07-CV-10191 (E.D. Mich. Mar. 31, 2008); *In re Settlement Facility Dow Corning Trust, Jodi Iseman*, No. 09-CV-10799 at 4 (E.D. Mich. Mar. 25, 2010) ("The Plan provides no right to appeal to the Court. Allowing the appeal to go forward . . . would be a modification of the Plan language. The Court has no authority to modify this language."); *In re Settlement Facility Dow Corning Trust, Nina Rowland*, No. 08-CV-10510 at 3 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Dale Reardon*, No. 07-CV-14898 at 3 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Mary O'Neil*, No. 00-00005 at 4 (E.D. Mich. Mar. 31, 2008) ("The Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Rosalie Maria Quave*, No. 07-CV-12378 at 6 (E.D. Mich. Mar. 31, 2008) (granting Dow Corning's motion to dismiss appeal "since Ms. Quave has no right to appeal the Appeals Judge's decision.").

The terms of the Plan and this Court's prior decisions are clear: the Claimants may not seek review in this Court of claims determinations made by the

SF-DCT and the Claims Administrator. The Claims Administrator's decisions are final and binding.[5]

III. The Appeal Motion Seeks An Impermissible Modification Of The Plan And Therefore Must Be Denied.

The provisions of the Plan are binding on claimants as a matter of federal bankruptcy law. *See* 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor . . . has accepted the plan"); *see, e.g.*, *In re Settlement Facility Dow Corning Trust, Danielle McCarthy*, No. 12-cv-10314 at 2-3 (E.D. Mich. Sept. 28, 2012) ("[T]he provisions of a confirmed plan bind the debtor and any creditor."), *appeal dismissed*, 12-2506 (6th Cir. Jan. 28, 2013).

In interpreting a confirmed plan, "courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." *See, e.g., In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). "An agreed order, like a consent decree, is in the nature of a contract, and the interpretation of its terms presents a question of contract interpretation." *City of Covington v. Covington Landing, Ltd. P'ship*, 71 F.3d 1221, 1227 (6th Cir. 1995).

[5] As noted, the Claimants may appeal to the Appeals Judge – and if they do so, the decision of the Appeals Judge is final and binding. Since they have elected not to seek review by the Appeals Judge, the decision of the Claims Administrator is final.

Under settled contract principles, "if a plan term is unambiguous, it is to be enforced as written." *See, e.g.*, *In re Dow Corning*, 456 F.3d at 676.

Annex A to the SFA unambiguously provides that to be eligible as a Silicone Material Claimant or Participating Foreign Gel Claimant, "the Claimant must submit Proof of Manufacturer of a Qualified Breast Implant implanted after January 1, 1976 and before January 1, 1992." Ex. 3 (SFA, Annex A), § 6.04(b)(ii); *see also id*. (SFA, Annex A), § 6.04(e)(ii).

The Claimants, as noted, admit that their claims were properly denied under the Plan's eligibility criteria. They ask this Court to overturn the admittedly correct decision of the Claims Administrator by modifying the terms of the confirmed and consummated Plan: the Claimants ask the Court to "extend the deadline for implantation for eligibility of the benefits of Class 7 up to January 1, 1995 or the date that the Court believes appropriate." Appeal Motion 6, Mar. 7, 2014, ECF No. 958. In other words, the Claimants ask this Court to change the agreed upon terms of the Plan.

As this Court has recognized, the Court does not have the power to modify the terms of the Plan. Section 1127(b) of the Bankruptcy Code is the sole means for modification of a confirmed plan. Section 1127(b) 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. 11

U.S.C. § 1127(b) (emphasis added). Section 1127(b) bars modification of the Plan. This Court has previously held that the Court does not have authority to modify any term of the Plan. *See, e.g., In re Settlement Facility Dow Corning Trust, Jodi Iseman*, No. 09-CV-10799 at 4 (E.D. Mich. Mar. 25, 2010).

The Bankruptcy Code prohibits modification post substantial consummation for good reason. Here, the Claimants seek a payment from Class 7 – a capped "sub fund" of the Settlement Fund. Class 7 claims were required to be submitted to the SF-DCT by June 1, 2006. Any change in the Class 7 eligibility criteria would be fundamentally unfair to other Class 7 claimants. Indeed, it could well generate demands to "re open" the filing period so that other individuals who received implants after January 1, 1992 could seek compensation. Further, because Class 7 is a capped fund, expanding the scope of the eligible claims could result in a reduction of payments to other Class 7 claimants. Claimants' request for an unauthorized Plan modification must be denied. *See, e.g., In re Settlement Facility Dow Corning Trust, Danielle McCarthy*, No. 12-cv-10314 at 2-3 (E.D. Mich. Sept. 28, 2012), *appeal dismissed*, 12-2506 (6th Cir. Jan. 28, 2013) (citing 11 U.S.C. § 1141(a)). *See In re Settlement Facility Dow Corning Trust, Jodi Iseman*, No. 09-CV-10799 at 4 (E.D. Mich. Mar. 25, 2010) ("Even if [claimant had] sought . . . review by the Appeals Judge, the Plan's language is clear and unambiguous that the decision of the Appeals Judge is final and binding . . . The Plan provides no

right to appeal to the Court. Allowing the appeal to go forward . . . would be a modification of the Plan language. The Court has no authority to modify this language."); *see also In re Dow Corning,* 456 F.3d at 678 ("[A] bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code.").

IV. The Claimants Have Not Exhausted The Administrative Remedies Provided To Them In The Plan And Therefore The Appeal Motion Must Be Denied.

Instead of following the Plan's appeal process by appealing the denial of their claims to the Claims Administrator and the Appeals Judge as permitted by §§ 8.04 and 8.05 of Annex A to the SFA, the Claimants impermissibly appealed to this Court. The Claimants have not yet exhausted the administrative remedies provided to them in the Plan. The Claimants have the right to seek relief from the Appeals Judge. But they have no right to seek relief from this Court.

CONCLUSION

For the foregoing reasons, Dow Corning respectfully requests that the Court grant Dow Corning's Motion to Dismiss the Appeal Motion.

Dated: March 24, 2014

Respectfully submitted,

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Debtor's Representative and Attorney for Dow Corning Corporation

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

Dated: March 24, 2014 By: */s/* Deborah E. Greenspan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PROPOSED ORDER GRANTING DOW CORNING'S MOTION TO DISMISS AND RESPONSE TO THE APPEAL FILED BY KOREAN CLAIMANTS STYLED AS "MOTION FOR EXTENSION OF DEADLINE OF CLASS 7 CLAIMANTS"

The Court has considered Dow Corning Corporation's Motion to Dismiss and Response to the Appeal Filed by Korean Claimants Styled as Motion for Extension of Deadline of Class 7 Claimants (Doc. No. 958 in 00-CV-00005-DT), and the Court finds and concludes that the Motion to Dismiss is meritorious and should be granted.

ACCORDINGLY, it is hereby ORDERED that:

The Motion to Dismiss is GRANTED in all respects; and

The Motion for Extension of Deadline of Class 7 Claimants is DENIED.

Dated: _____

_____
DENISE PAGE HOOD
United States District Judge