Case No. 15-2548

United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS
Interested Parties – Appellants,

v.

DEBTOR'S REPRESENTATIVES, DOW CORNING CORPORATION, CLAIMANTS' ADVISORY COMMITTEE,
Interested Parties – Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

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RESPONSE BRIEF OF APPELLEES DEBTOR'S REPRESENTATIVES, DOW CORNING CORPORATION AND THE CLAIMANTS' ADVISORY COMMITTEE

Deborah Greenspan
BLANK ROME LLP
1825 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 420-3100

Counsel for
Debtor's Representatives
and
Dow Corning Corporation

Ernest Hornsby
FARMER, PRICE, HORNSBY & WEATHERFORD LLP
100 Adris Court
Dothan, AL 36303
(334) 793-2424

Counsel for the
Claimants' Advisory
Committee

Dianna Pendleton-Dominguez
LAW OFFICE OF DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
(419) 394-0717

Counsel for the
Claimants' Advisory
Committee

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-2548 Case Name: In re Settlement Facility-Dow Corning

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Debtor's Representatives
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. The Debtor's Representatives consist of: two officers and employees of Dow Corning Corporation; counsel to Corning Incorporated; an employee of The Dow Chemical Company; and the undersigned, as counsel for Dow Corning Corporation.

CERTIFICATE OF SERVICE

I certify that on December 23, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Dickstein Shapiro LLP
1825 I Street, NW Wash. DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-2548 Case Name: In re Settlement Facility-Dow Corning

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Dow Corning Corporation
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.
See answer to No. 2

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.
Dow Corning Corporation is 50% owned by Corning Incorporated and 50% owned by Dow Holdings, Inc., a wholly-owned subsidiary of The Dow Chemical Company. Further, various publicly-owned corporations may be creditors of Dow Corning's Chapter 11 bankruptcy estate, but Dow Corning believes their interests are too attenuated to present any conflict issues here.

CERTIFICATE OF SERVICE

I certify that on December 23, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan
Dickstein Shapiro LLP
1825 I Street, NW; Wash. DC 20006

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 15-2548 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on April 11, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument will allow the attorneys for the parties to assist the Court by providing additional explanation of the matter.

INTRODUCTION

This appeal arises out of an order of the District Court that sets forth procedures for the prompt distribution of payments and the orderly closure of Class 7 – one of the classes established in the Dow Corning Corporation ("Dow Corning") Amended Joint Plan of Reorganization (the "Plan"). *Consent Order to Establish Guidelines for Distributions from The Class 7 Silicone Material Claimants' Fund*, RE 1227, Page ID ## 18474-503 (the "Consent Order").[1] Class 7 consists of claimants whose breast implants were made by companies other than Dow Corning and were implanted during a time period specified in the Plan. Class 7 claimants are paid from a capped 'sub-fund' called the Silicone Material Claimants' Fund or the "Class 7 Fund." To qualify for payment, a Class 7 claimant must demonstrate that she has a qualified implant that was implanted

[1] The Consent Order was agreed to by the Reorganized Debtor as well as the Debtor's Representatives and the Claimants Advisory Committee – the Appellees in this appeal. (The Debtor's Representatives (the "DRs") and the Claimants Advisory Committee (the "CAC") were created by the Plan and empowered with certain authority to assist in the implementation and enforcement thereof. In particular the CAC and the DRs have authority to issue interpretations of certain plan terms. *Settlement Facility and Fund Distribution Agreement* (the "SFA"), RE 1239-5, Page ID # 18847, § 5.05. Together, the CAC and Dow Corning are referred to as the "Plan Proponents."

"'Proponents' means the joint proponents of the Plan, Dow Corning and the Tort Committee." Plan, RE 1239-2, Page ID # 18641, § 1.138. Pursuant to the SFA, the Debtor's Representatives and the Claimants' Advisory Committee were created and the Claimants' Advisory Committee was substituted for the Tort Committee. RE 1239-5, Page ID ## 18841-42, § 4.09.

during the period January 1, 1976 through January 1, 1992, and, if the claimant seeks payment for a disease claim, she must submit the appropriate medical support. In addition, to be eligible, a Class 7 claimant must demonstrate that she has marshaled recoveries from other sources.[2]

The Settlement Facility – Dow Corning Trust (or the "SF-DCT") – the entity that is responsible for administering and evaluating claims – began processing Class 7 Claims in 2006.[3] The SF-DCT has issued payments to approximately 7,000 Class 7 Claimants who elected the $600 "Expedited Release Payment", approximately 6,000 Class 7 Claimants who elected the $3,000 "Disease Cash-Out Payment", and approximately 650 Participating Foreign Gel Claimants who also elected the Expedited Release Payment. The SF-DCT has also approved approximately 1,500 disease claims but was not able to pay those claims until the Consent Order was issued, as explained below. *Omnibus Response to Objections and Submissions Responding to Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund* (the "Omnibus Response") , RE 1169, Page ID # 18108.

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[2] The marshaling requirement obligates certain Class 7 claimants to seek other sources of compensation. *See* Statement of the Case and Facts Section C.2. herein.

[3] The deadline for submission of Class 7 Claims was June 1, 2006. *Annex A to Settlement Facility and Fund Distribution Agreement* ("Annex A"), RE 1239-6, Page ID # 18910, § 6.04(h)(ii).

The SF-DCT denied over 6,000 Class 7 Claims based on a failure to marshal. Many of these claimants disputed the SF-DCT's determination, arguing that the SF-DCT had improperly interpreted the marshaling requirement. Because the Plan prohibits the payment of Class 7 disease claims until all such claims are evaluated, and because the claims involved in the dispute over the interpretation of marshaling include disease claims, the SF-DCT could not distribute payments to the approved disease claims until this dispute was resolved. As a result, the approved disease claims were placed on hold for years pending resolution of the dispute.[4] The dispute – stated simply – was whether and under what circumstances filing a claim or the failure to file a claim with a class action settlement in *In re Silicone Breast Implant Products Liability Litigation*, MDL No. 926, Case No. CV-92-P-10000-S, which provided compensation to certain non-Dow Corning breast implant claimants, constitutes "marshaling" (This settlement is often referred to as the MDL 926 settlement or the "Revised Settlement Program" or "RSP".).[5] The Consent Order provides the interpretation[6] of the marshaling

[4] Because the Consent Order was not stayed pending this appeal, those eligible disease claimants now have been paid.

[5] The RSP arose from the Original Global breast implant class settlement, which included Dow Corning and was approved by U.S. District Judge Sam C. Pointer in 1994, but never went into effect. The RSP revised the settlement options from the Original Global Settlement and covered only implants made by Bristol, Baxter or 3M (or, under certain conditions, a post 8/84 McGhan implant). The RSP went into effect in late 1995 and concluded its operations in 2013.

requirement with respect to these disputed claims, thereby resolving the issue, and further prescribes the mechanism for payment in full of eligible Silicone Material Claimants[7] through a Class 7 Reserve Account established by the Consent Order. RE 1227, Page ID ## 18501-02. The Consent Order also establishes procedures for finalizing and closing Class 7 Claims that are not eligible for any further payment so that the SF-DCT may issue the appropriate notices and effect closure of the Class 7 process. *Id*. at Page ID ## 18493-501.

The Appellants are 289 claimants from Korea (the "Korean Claimants"). Of this group of Korean Claimants, 71 (24.5%) admit that they do not meet the definition of Class 7 and thus are not eligible to submit claims to the Class 7 Fund (the "Ineligible Korean Claimants"). *Objection to the Proposed Consent Order to Establish Guidelines for Distributions from the Class 7 Silicone Material Claimants' Fund*, (the "Korean Objection"), RE 1076, Page ID # 17708. Korean Claimants assert that the remaining Korean Claimants are eligible Class 7 claimants. *Reply to the Omnibus Response to Objection to the Proposed Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants' Fund* ("Korean Reply"), RE 1194, Pg. ID #18217. As set forth in the

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[6] *See* fn. 15, *infra*.

[7] Silicone Material Claimants are classified in Class 7 of the Plan. *Plan*, RE 1239-2, Page ID # 18650, § 3.2.14. Silicone Material Claimants may be referred to herein as "Class 7 Claimants" and their claims as "Class 7 Claims."

Motion to Dismiss Certain Appellants for Lack of Standing (the "*Appellees' Motion to Dismiss*"), filed in this appeal on April 11, 2016, the SF-DCT advises that approximately 52.5% (152) of the remaining Korean Claimants are not in fact Class 7 claimants but rather have asserted claims in other Plan classes. *Appellees' Motion to Dismiss* at pp.3-4. The SF-DCT also advises that 23% (66) of the 289 Korean Claimants have filed Class 7 Claims, but that all of these claims have either been paid, denied or have been fully processed and are ready for payment. *Id*.

The Korean Claimants assert that: 1) the District Court was without jurisdiction to enter the Consent Order because interpretation of the marshaling requirement does not require court approval; 2) the interpretation of marshaling in the Consent Order constitutes an impermissible Plan modification; and 3) the District Court erred by failing to amend the Plan's Class 7 definition to allow otherwise ineligible Korean claimants to become eligible. These assertions are both unsupported and unsupportable.

First, as Korean Claimants themselves concede, the Reorganized Debtor and the Claimants Advisory Committee are authorized to make the interpretation at issue. And it is equally clear that the District Court has authority to supervise the implementation of the Plan and to resolve disputes regarding its interpretation.

Second, the Consent Order does not modify the Plan language. It does nothing more than adopt the agreed interpretation of the word 'marshaling' with respect to the identified claims and establish guidelines for the wind down of Class 7.

Finally, the District Court has no authority to modify the Plan and properly declined the Korean Claimants' request to do so. The Korean Claimants are bound by the terms of the Plan and cannot now – nearly two decades after the confirmation hearing – decide to object to a term in the Plan. The Korean Claimants had ample opportunity to object to the definition of Class 7 in 1999 during the confirmation process. They did not do so.

The Consent Order provides an immediate benefit to all eligible Class 7 disease claimants and provides for the orderly wind down of the Class 7 Fund and claims process. The District Court acted properly to review, consider and ultimately approve the Consent Order as part of its ongoing supervisory jurisdiction over the implementation and ultimate termination of the Plan's settlement program. Appellees respectfully request that this Court affirm the District Court's entry of the Consent Order.

COUNTER-STATEMENT OF JURISDICTION

The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11"). This Court has jurisdiction to review the District Court's December 3, 2015 final order pursuant to 28 U.S.C. § 1291. *See* RE #1227.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court had jurisdiction to enter an order adopting an authorized, agreed-upon Plan interpretation and implementing procedures for the orderly processing and payment of claims determined to be eligible for payment under Class 7 of the confirmed Plan.

2. Whether a valid interpretation of a term in the Plan, consented to by the Plan Proponents and the Debtor's Representatives and incorporated into an order of the District Court, that does not alter the requirements for payment or the allowed amount of payments specified in the Plan for eligible individual claimants, constitutes an improper modification of the Plan.

3. Whether the District Court properly declined to amend the terms of the confirmed and consummated Plan that define Class 7 Claims.

STATEMENT OF THE CASE AND FACTS

A. Background.

This Court previously has discussed the history of Dow Corning's bankruptcy proceedings and Plan. *See, e.g., Dow Corning Corp. v. Claimants' Advisory Comm.* (*In re Settlement Facility Dow Corning Trust*), 628 F.3d 769 (6th Cir. 2010); *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002); *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996). Relevant portions of that history are summarized here.

B. Dow Corning's Amended Joint Plan of Reorganization.

The Dow Corning bankruptcy was caused by one of the largest and most contentious mass tort controversies of the last three decades. The litigation arose out of allegations that silicone gel breast implants could cause certain autoimmune diseases. By the mid-1990s, Dow Corning and other breast implant manufacturers were faced with tens of thousands of claims filed throughout the United States and in various other countries. Dow Corning was forced to seek protection under Chapter 11 of the Bankruptcy Code because of the massive number of cases filed.

Dow Corning filed its Chapter 11 petition on May 15, 1995. *Plan*, RE 1239-2, Page ID # 18640, §1.126. In 1999, Dow Corning and the representatives of the tort claimants – the Tort Claimants' Committee – agreed to the Plan, which

provided a comprehensive settlement package for claimants. Following appeals, the Plan became effective on June 1, 2004. *Order*, RE 934, Page ID #15761.

The cornerstone of the Plan is a program for the resolution of breast implant and other medical device tort claims funded by Dow Corning through a series of annual payments (as needed) over a 16-year funding period, up to an aggregate cap of $2.35 billion net present value ("NPV") as of the Plan's June 1, 2004 Effective Date. The Plan offers tort claimants the option of settling their claims through a Settlement Facility or litigating their claims against a Litigation Facility. *Plan,* RE 1239-2, Page ID #118655-58, §§ 5.4-5.4.2. The aggregate funding cap is divided between two funds: the $400 million NPV Litigation Fund is reserved for the Litigation Facility and the remainder, $1.95 billion NPV, is the Settlement Fund funding cap. *Id*. at Page ID #18654-55, §5.3; *SFA*, RE 1239-5, Page ID # 18830-31, §§ 3.02(a)(i)-(ii). The Settlement Fund is further divided into separate components – one of which is the Class 7 Fund described below.

C. The Class 7 Silicone Material Claimant's Fund and the Marshaling Requirement.

1. Introduction.

The SFA is the Plan Document that allocates funds to be paid by Dow Corning to the SF-DCT for the benefit of Personal Injury Claimants among the

various funds and sub-funds established by the Plan.[8] The SFA governs the liquidation, settlement and payment of claims within the limits of available Settlement Fund assets. *SFA*, RE 1239-5, Page ID # 18829, § 2.01. Among the sub-funds established by the Plan is the Silicone Material Claimants' Fund or the "Class 7 Fund". *SFA*, RE 1239-5, Page ID # 18832, § 3.02(b)(iii). The SFA defines the Silicone Material Claimants' Fund as a $57.5 million NPV sub-fund within the Settlement Fund. *Id*. The SFA further provides that the "maximum amount payable to Settling Silicone Material Claimants in the aggregate shall not exceed $57.5 million Net Present Value." *Id*. Silicone Material Claimants who wanted to settle their claims were required to submit their claim forms by June 1, 2006. *Annex A*, RE 1239-6, Pg. ID # 18910, § 6.04(h)(ii).[9]

The SFA and Annex A specify the amounts that can be paid to Settling Silicone Material Claimants. Eligible Settling Silicone Material Claimants may

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[8] The SFA is a Plan Document that was executed by Dow Corning and the Claimants' Advisory Committee. The Plan defines "Plan Documents" as

> the Settlement Facility Agreement, the Dow Corning Settlement Program and Claims Resolution Procedures, the Litigation Facility Agreement, the Funding Payment Agreement . . . the Depository Trust Agreement . . . and all other documents and exhibits . . . that aid in effectuating this Plan . . . .

Plan, RE 1239-2, Page ID ## 18640-41, § 1.131

[9] Silicone Material Claimants had the option of electing litigation. To do so, they were required to elect to opt out of the settlement program in 2004. *Annex A*, RE 1239-6, Page ID ## 18881-82, § 3.02(c).

receive one of two types of payments: an Expedited Release Payment or a Disease Payment. *Id*. at § 6.04(h)(i). The amount of the Disease Payment for any individual eligible claimant is specified in Annex A as an amount up to 40% of the amount specified in the applicable Disease Grid that would apply to claimants with Dow Corning breast implants. In addition, Participating Foreign Gel Claimants may receive payments from the Class 7 Fund. *Id*. at Page ID # 18910, § 6.04(g). The Participating Foreign Gel Claimants are eligible only for the Expedited Release Payment. *Id*. at Page ID ## 18910-11, §§ 6.04(h)(vi), 6.04(i).

To be eligible for a payment, Silicone Material Claimants must satisfy several criteria set forth in the SFA. First, the Silicone Material Claimants must submit proof that they have been implanted with a silicone gel breast implant made by one of several specified manufacturers during specified years – *i.e.*, between January 1, 1976 and January 1, 1992. *Id*. at Page ID # 18908-09, § 6.04(b). Second, if they seek a Disease Payment, a Silicone Material Claimant must submit medical documentation demonstrating an eligible medical condition. *Id*. at Page ID # 18909, § 6.04(c). (Silicone Material Claimants who seek only an Expedited Release Payment do not need to submit such medical documentation.) Third,

most[10] of the Silicone Material Claimants must demonstrate that they have marshaled recoveries from other sources outside the Plan. *Id*. at Page ID ## 18910-11, § 6.04(h)(v). If they fail to do so, they cannot be eligible for a payment from the Class 7 Fund.

Specifically, Section 6.04(h)(v) of Annex A to the SFA provides that:

> To be eligible to receive a payment from the Silicone Material Claimants' Fund, Silicone Material Claimants shall be required to marshal recoveries from the manufacturers of their breast implants. Silicone Material Claimants who do not marshal all recoveries from all manufacturers by the deadline for submission of Silicone Material Claims are not eligible to receive a payment. All such recoveries received by or for the benefit of the Silicone Material Claimant shall reduce, on a dollar-for-dollar basis, the amount otherwise Allowable under the terms of this Section 6.04. For purposes of this subparagraph, those Silicone Material Claimants whose sole manufacturers are not released under or are not participating in the Revised Settlement Program and consist specifically of any combination of Bioplasty, Cox-Uphoff, or Mentor shall be deemed to have marshaled all recoveries and there shall be no reduction of the Allowed amount for such Claimants based on any other recovery. Claimants who have both a breast implant made by any combination of Bioplasty, Cox-Uphoff, or Mentor and any breast implant made by any other manufacturer (except a Claimant who is classified as an "Other Registrant" as defined in the Revised Settlement Program with only a post-August 1984 McGhan breast implant, along with any combination of a Bioplasty, Cox-Uphoff, or Mentor breast implant) will be required to marshal all recoveries by such other manufacturers as stated above. The Claims Administrator shall determine whether all recoveries have been marshaled and shall require the Claimant to

[10] Silicone Material Claimants whose implants were manufactured by Bioplasty, Mentor or Cox-Uphoff are not required to marshal recoveries from other sources. *Annex A*, RE 1239-6, Page ID # 18910-11, § 6.04(h)(v).

> document the amount of recovery so that the Allowed amount can be calculated.

Annex A, RE 1239-6, Page ID # 18910-11, Section 6.04(h)(v).[11]

The Plan prohibits the distribution of payments for any Class 7 disease claims until all Class 7 disease claims are evaluated and the payment amount is determined. The purpose of this provision is to ensure that all eligible Class 7 disease claims are paid at the same *pro rata* amount from the capped Class 7 Fund. Thus, the SF-DCT must determine the full value of all Class 7 disease claims so that it can determine the amount that can be paid to each claimant (up to the specified maximum amount).[12]

2. The Dispute Regarding the Interpretation of the Marshaling Requirement.

The SF-DCT commenced evaluating Class 7 Claims after the June 1, 2006 Class 7 filing deadline and, by late 2014, had completed the review of the claims that it had determined were eligible for processing. *Omnibus Response*, RE 1169,

[11] To satisfy the marshaling requirement, a claimant does not have to collect money. For example, if a claimant litigated against other manufacturers and lost, that would satisfy the marshaling requirement. *See, e.g.*, *Settlement Facility-Dow Corning Trust, What is Marshaling?*, *available at*: http://www.sfdct.com/_sfdct/index.cfm/class-7/what-is-marshaling/.

[12] The SF-DCT, with the approval of the CAC, the DRs and Dow Corning, made "cash-out" offers to certain Class 7 Disease Claimants. The SF-DCT offered a one-time cash payment of $3,000 to certain Disease Claimants in lieu of a full evaluation of all submitted medical documentation. The claimants had the choice of accepting the payment or waiting several years for the SF-DCT to complete processing all the disease claims. As noted, thousands of Disease claimants elected the cash-out option.

Page ID # 18106. During the course of evaluating the claims, the SF-DCT determined that 6,235 claimants had failed to "marshal" recoveries based on their failure to file or pursue claims with the RSP[13] and, thus, were not eligible for processing or payment. *Id.* The SF-DCT defined all claims in this category as the "Disputed Marshaling Claims". *Id.*; *Annex A*, RE 1239-6, Page ID # 18910-11, § 6.04(h)(v). The SF-DCT determined that the individuals with Disputed Marshaling Claims (the "Disputed Marshaling Claimants") had the potential to submit a claim to the RSP, and, because these Disputed Marshaling Claimants had not submitted such claims, they did not meet the marshaling requirement. This determination, however, did not take into account each Disputed Marshaling Claimant's registration status in the RSP. The RSP registration status determines which payment options are available to the claimant in the RSP and the availability of payment options is relevant to determining whether pursuit of a claim in the RSP could potentially result in a recovery. If the individual had no option to

[13] The RSP was a settlement program that was offered to certain U.S. breast implant recipients who had at least one implant from Bristol, Baxter or 3M (or, under certain conditions, a post 8/84 McGhan implant). The RSP accepted claim filings until 2010. The RSP was administered by the MDL Claims Office, which was established in accordance with the global settlement in the multidistrict breast implant litigation *In re Silicone Breast Implant Products Liability Litigation*, MDL No. 926, Case No. CV-92-P-10000-S.

recover from the RSP, then there would be no need to pursue such a claim in order to comply with the marshaling requirement.[14]

Certain of the Disputed Marshaling Claimants disagreed with the SF-DCT's determination and appealed the denial to the Claims Administrator. *Omnibus Response*, RE 1169, Page ID # 18106. The CAC was contacted by a number of these claimants and their attorneys. *Id*. The CAC disagreed with the SF-DCT's interpretation of marshaling, *id*., and proposed that the issue be resolved through the process set forth in the SFA and in the Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan (RE 53, Page ID # 119-123). *Omnibus Response*, RE 1169, Page ID # 18106.

[14] The RSP classified claimants based on the date they registered with the MDL Claims Office. The claimants were entitled to apply for different benefits based on their registration date. For example, claimants who registered and submitted compensation forms by specified dates in 1994 under the Original Global Settlement that was the precursor to the RSP were defined as "Current Claimants" and were entitled to apply for all types of payments. Claimants who registered at a later date were entitled to apply only for "long-term benefits". The "long-term benefit option" in the RSP is equivalent to Disease Option II in the Plan. A claimant who was only eligible for a long term benefit payment in the RSP cannot receive an RSP payment for the equivalent of Disease Option I in the Plan and thus the RSP precludes such an individual from any recovery for the type of claim asserted in the Plan. Because such a claimant has no prospect of recovery by applying to the RSP, the claimant cannot marshal recoveries by applying to the RSP. *Consent Order*, RE 1227, Page ID ## 18482-83.

The CAC, Dow Corning, and the DRs conducted an extensive review and analysis of the Class 7 Claims in question and agreed that the correct interpretation of the marshaling requirement should take into account the RSP registration status of each Disputed Marshaling Claimant. *Id*.

As a result, and pursuant to Section 5.05 of the SFA,[15] the DRs and the CAC interpreted and clarified the marshaling requirement as follows:

> Class 7 Claimants satisfy the marshaling requirement if the claim submitted to the SF-DCT on or before the deadline for submission of Class 7 Claims (June 1, 2006) seeks compensation for a type of claim or payment option that would not have been available to that specific claimant in the RSP or if the claimant in fact submitted all claims to the RSP for which the claimant was potentially eligible. Thus, for example, a claimant who was either an "Other Registrant" or "Late Registrant," as defined by the RSP, was not eligible to file for the Fixed Benefit Option Disease Payment in the RSP. The Fixed Benefit Option is the equivalent of Disease Payment Option I under the Plan. This Fixed Benefit Option was limited to "Current Disease Claimants." If a "Late Registrant" or "Other Registrant" submitted a claim to the SF-DCT for Disease Payment Option I, then that claimant will be deemed to have marshaled and may pursue the Disease Payment Option I claim in Class 7. Conversely, because a "Late Registrant" or "Other Registrant" was eligible to seek a payment in the RSP for the Long Term Benefit Option (which is the equivalent of

[15] Section 5.05 of the SFA provides that: "The Debtor's Representatives and Claimants' Advisory Committee are authorized to provide joint written interpretations and clarifications to the Claims Administrator and the Claims Administrator is authorized to rely on those joint written statements." *SFA*, RE 1239-5, Page ID # 18847. On June 11, 2004, the District Court entered an order setting forth procedures for implementing Section 5.05 in certain situations. *Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan*, RE 53, Page ID # 119-123.

> Disease Payment Option II), such claimants were required to "marshal" by filing the Long Term Benefit Option Claim in the RSP. Such individuals who did not file the Long Term Benefit Option claim in the RSP will not be eligible for a Disease Option II payment from the SF-DCT.

Consent Order, RE 1227, Page ID ## 18482-83. In other words, Disputed Marshaling Claimants who did not have a settlement option available to them in the RSP were not required to submit their claims to the RSP simply to satisfy the marshaling requirement.

D. The Class 7 Consent Order.

Because the resolution of the "Disputed Marshaling Claims" was the only issue holding up the distribution of payments to eligible Class 7 disease claimants, the Appellees concluded that it would be timely and appropriate to outline the procedures for resolving the dispute, evaluating and paying the remaining Class 7 Claims and for the orderly wind down of Class 7. Appellees filed the Consent Order on May 22, 2015 seeking the District Court's review and approval of the procedures outlined for finalizing Class 7 and resolving all Class 7 Claims. *Omnibus Response*, RE 1169, Page ID # 18102. The Consent Order sets forth the Appellees' joint interpretation of the marshaling requirement with respect to a claimant's status in the MDL 926 settlement process set forth above. *Consent Order*, RE 1227, Page ID # 18480. Under the interpretation of marshaling contained in the Consent Order, the vast majority of the Disputed Marshaling

Claims (approximately 80%) are eligible for review, evaluation and, where appropriate, payment. *Omnibus Response*, RE 1169, Page ID ## 18106-08. The CAC and DRs conducted a thorough analysis of the Disputed Marshaling Claims to determine the aggregate maximum value of the disputed marshaling claims that would be eligible for processing under the terms of the Consent Order (the "Eligible Disputed Marshaling Claims"). *Id. at* Page ID # 18106. The CAC and DRs were thereby able to determine that payment of the Eligible Disputed Marshaling Claims would not reduce the recovery for any class 7 claimant. *Consent Order*, RE 1227, Page ID # 18489.

The Consent Order provides the mechanism for immediate distribution of payments to eligible Class 7 disease claims by establishing the Reserve Account. *Omnibus Response*, RE 1169, Page ID # 18108. The Reserve Account is funded with the aggregate amount necessary to pay all the eligible Class 7 disease claims, including the Eligible Disputed Marshaling Claims that applied for a disease payment, and thereby ensures the availability of assets sufficient to pay all Class 7 disease claims at the maximum amount allowed under the Plan.[16] *Id*. By creating and funding the Reserve Account, the Consent Order satisfies the Plan requirement that the value of all disease claims be determined before individual disease claims

[16] The Reserve Account is funded with sufficient assets to pay all remaining Class 7 Claims (disease and expedited) – including those that are on hold because of deficiencies.

may be paid. *Id*. The Consent Order also sets forth detailed procedures for resolving and closing each category of Class 7 claim. *Consent Order*, RE 1227, Page ID ## 18493-501.

The Consent Order does not alter the substantive treatment of any Class 7 claim and does not change any of the eligibility or payment criteria. Each eligible disease claim will receive the maximum amount payable under the terms of the Plan. *Omnibus Response*, RE 1169, Page ID # 18121.

The Consent Order allowed the SF-DCT to issue payments almost immediately to the 1,556 claimants whose disease claims had been fully evaluated and whose payments had been held pending resolution of the Disputed Marshaling Claims. *Omnibus Response*, RE 1169, Page ID # 18108. The Consent Order also allows the SF-DCT to process 5,006 claims that previously had been deemed "Disputed Marshaling Claims" but are now eligible for evaluation and payment as a result of the interpretation of the marshaling requirement set forth in the Consent Order. *Id*. As noted, the processing and payment of these Eligible Disputed Marshaling Claims does not affect the payments to claimants whose claims have already been processed and approved by the SF-DCT, nor does it affect payments that have not been issued because of various payment deficiencies. *Consent Order*, RE 1227, Page ID # 18483.

On June 2, 2015, the Court authorized the distribution of the Notice of Proposed Order Establishing Guidelines for the Distributions from the Class 7 Silicone Material Claimants' Fund (the "Notice"), RE 1031, Page ID ## 17473-74, to approximately 56,000 Class 7 claimants to advise them of the Consent Order. *Omnibus Response*, RE 1169, Page ID # 18102. The Notice established a deadline of July 27, 2015 for filing any objections to the Consent Order. *Id*.

The Court received responses related to the Consent Order from a total of 83 individuals, as well as the objection filed on behalf of the Korean Claimants. *Omnibus Response*, RE 1169, Page ID # 18103. None of the individual responses actually objected to any of the terms of the Consent Order. *Order Approving Consent Order to Establish Guidelines for Distribution From The Class 7 Silicone Material Claimants' Fund* (the "Order Approving Consent Order"), RE 1226, Page ID # 18472. Rather, the responses raised a variety of other issues, including "seeking to implement their claim submission; asking for an update on the status of their claim, raising arguments about substantive terms of the Plan (increase in compensation amount); requesting guidance on their options; and, seeking additional compensation, even though they had received full payment under the expedited release offer." *Id*. at Page ID ## 18469-18470.

E. The Korean Claimants' Objection.

On July 22, 2015, the Korean Claimants filed their objection to the Consent Order. *Korean Objection*, RE 1076, Page ID ## 17708-23. In their objection, the Korean Claimants appeared to argue that the interpretation of the marshaling requirement with respect to the status of claimants in the MDL 926 settlement alters the meaning of the term "marshaling" because there are other ways in which a claimant could marshal recoveries. *Id*. at Page ID # 17710. They also argued that the Consent Order was not "justified" because it does not expand the Plan-mandated implantation date range that defines Class 7 claimants. *Id.* at Page ID ## 17711-15.[17] The Korean Claimants did not challenge the jurisdiction of the District Court in their objection.

The Korean Claimants' objection focused on and referred only to the 71 Korean Claimants who admittedly do not meet the Plan's definition of Class 7. *Id*. They argued that it was unreasonable to interpret the marshaling requirement without also redefining the Class 7 eligibility requirements to include the 71 claimants. *Id*. The Korean Claimants appended a list of 289 claimants to the

[17] Although the Korean Claimants purported to object to the entire Consent Order, *Korean Reply*, RE 1194, Page ID # 18217, their objections were focused solely on the interpretation of the marshaling requirement and the fact that the eligibility requirements for Class 7 were not expanded. They did not assert any specific objections to any other provision of the Consent Order and have not objected to any other provisions of the Consent Order in this appeal.

objection but did not refer to or define those claimants. Indeed, the list ends with a statement that there were over 2,670 claimants. RE 1076-1 at Page ID # 17723. Because the Korean Claimants' objection purported to be asserted only on behalf of the 71 claimants who are not members of Class 7, Dow Corning, the DRs and the CAC presumed that it was only the 71 Ineligible Korean Claimants that were asserting an objection to the Consent Order. *Omnibus Response*, RE 1169, Page ID # 18112, n.4. In their reply brief, the Korean Claimants asserted that the objection actually was asserted on behalf of other Korean Claimants described as "Class 7 Claimants" without any further explanation of their status or specific identification on the list. *Korean Reply*, RE 1994, Page ID # 18217.[18]

F. The District Court's Decision.

The District Court held oral argument on the Consent Order on October 20, 2015. Various purported "objectors" appeared, as did the Korean Claimants. On December 3, 2015, the District Court overruled the objections and approved the Consent Order. RE 1226, Page ID ## 18464-73. This appeal followed. RE 1229, Page ID # 18552.

[18] Dow Corning, the DRs and the CAC took at face value the representation of the Korean Claimants in the pleading submitted to the District Court that all 289 had applied as Class 7 claimants.

SUMMARY OF ARGUMENT

The Consent Order allows the SF-DCT to effect an orderly wind down of the Class 7 Claims. It does so by incorporating an agreed plan interpretation authorized, as Korean Claimants concede, by Section 5.05 of the SFA, and by establishing procedures to pay the remaining claims and to close the ineligible claims.

The Korean Claimants assert that the Consent Order is improper because 1) the District Court did not have authority to issue an interpretation of the Plan and therefore lacked jurisdiction to enter the order; 2) the Plan interpretation approved by the Consent Order is an unlawful Plan modification and 3) the District Court improperly declined to amend the Plan to revise the definition of Class 7. The Korean Claimants do not cite any law in support of their arguments.

Their contentions are without merit and are asserted without support.

The District Court plainly has jurisdiction under 28 U.S.C. § 1334 to enter orders in aid of the implementation of the Plan. Moreover, the Plan expressly authorizes the District Court to provide ongoing supervision and jurisdiction over the SF-DCT. Approving the consent order was a proper exercise of the District Court's retained jurisdiction.

The Korean Claimants' assertion that the Plan interpretation constitutes an unlawful Plan modification is internally inconsistent. The Korean Claimants concede that the interpretation provided by the CAC and the DRs was authorized under the Plan and reasonable. Yet the Korean Claimants then assert that the interpretation itself modifies the definition of marshaling by focusing only on the status of the claimant's RSP claim (or lack thereof). But this is precisely the factual situation that gave rise to the dispute that the interpretation addresses. The Consent Order simply clarifies how certain claimants can marshal recoveries based on their status in the RSP. The Korean Claimants have not identified and cannot identify any specific defined or bargained for right granted to any individual claimant that is affected detrimentally by the Consent Order. There is no basis for any assertion that the Consent Order constitutes an unlawful modification.

Finally, the Korean Claimants' requested relief not only would constitute an improper modification of the Plan but is also barred by *res judicata* and their own failure to assert the issue at the time of confirmation. The law is clear: the District Court does not have authority to amend the Plan. Moreover, the Korean Claimants are barred at this point from objecting to a term of the Plan nearly two decades after the confirmation process during which such objections could and should have been asserted.

The Korean Claimants' assertions lack both factual and legal support. The District Court properly entered the Consent Order and the Consent Order should be affirmed.

STANDARD OF REVIEW

This Court has previously set forth the standard of review that applies on appeal when reviewing the District Court's interpretation of Plan Documents in the Dow Corning bankruptcy case. *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 592 F. App'x 473, 477-78 (6th Cir. 2015) (involving whether certain second priority claimants should receive "premium payments," even though not all higher-priority creditors had yet been paid); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368, 372 (6th Cir. 2013) (involving the application of Time Value Credits to account for early payments under the Plan language); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769, 771-72 (6th Cir. 2010) (involving the Plan's definition of tissue expanders and total disability). In each case, this Court explained that where the District Court's interpretation of a Plan provision is confined to the Plan Documents (without reference to extrinsic evidence), its review is *de novo*. *In re Settlement Facility Dow Corning Trust*, 592 F. App'x

477; *In re Settlement Facility Dow Corning Trust*, 517 F. App'x at 372; *In re Settlement Facility Dow Corning Trust*, 628 F.3d at 772.

Issues concerning lack of jurisdiction, interpretation of the term "marshaling," and the extent to which the interpretation constitutes a modification or required modification are reviewed *de novo*. *In re Dow Corning Corp.*, 86 F.3d 482, 488 (6th Cir. 1996); *In re Wolverine Radio Company*, 930 F.2d 1132, 1138 (6th Cir. 1991). We note that this Court has also described the District Court's long-standing familiarity with the Plan and Plan Documents and involvement in the implementation of the Plan, and has indicated that some deference may be owed to the District Court in such circumstances. Thus, this Court reviews the District Court's determination concerning its authority to issue an order supervising the implementation of settlement program procedures for abuse of discretion. *In re Settlement Facility Dow Corning Trust*, 628 F.3d at 771-72.

ARGUMENT

A. The District Court Plainly Had Jurisdiction To Enter The Consent Order.

The District Court retains jurisdiction over Dow Corning's Plan pursuant to Section 1334 of Title 28. 28 U.S.C. § 1334(b) ("the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11"). This Court's Bankruptcy

Appellate Panel has recognized that "even the most restrictive views of post-confirmation jurisdiction acknowledge that the … courts retain jurisdiction to interpret and enforce confirmed plans of reorganization." *In re Thickstun Bros. Equip. Co., Inc.*, 344 B.R. 515, 522 (B.A.P. 6th Cir. 2006); *see also In re Gordon Sel-Way, Inc.*, 270 F.3d 280, 288-89 (6th Cir. 2001) (discussing post-confirmation jurisdiction of the court even where retention of jurisdiction not explicit in the plan of reorganization).

Further, Dow Corning's Plan provides for ongoing supervision and jurisdiction by the District Court. Section 8.7 of the Plan provides, in relevant part:

> 8.7 Retention of Jurisdiction. Notwithstanding entry of the Confirmation Order or the occurrence of the Effective Date, the [Bankruptcy] Court and, as applicable, the District Court, will retain exclusive jurisdiction:
>
> 8.7.3 to resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents;
>
> . . .
>
> 8.7.5 to *enter orders in aid of this Plan and the Plan Documents including*, without limitation, appropriate orders (which may include contempt or other sanctions) to protect the Debtor, the Reorganized Debtor, the Released Parties, the Parties, the Tort Committee and any of the Joint Ventures and Subsidiaries from actions prohibited under this Plan and to enforce the terms of the Funding Payment Agreement;

Plan, RE 1239-2, Page ID ## 18690-92, § 8.7 (emphasis added).

Similarly, the SFA grants the District Court both the power to supervise the SF-DCT and to interpret and enforce the SFA. Section 10.08 of the SFA provides:

> Section 10.08. Jurisdiction. Except as specifically provided herein, *all matters relating to the validity, interpretation and operation* of this Settlement Facility shall be under the exclusive jurisdiction of the District Court.

SFA, RE 1239-5, Page ID # 18861, § 10.08 (emphasis added). Section 4.01 of the SFA further provides:

> Section 4.01. *Court Supervision.* The resolution of Claims under the terms of this Settlement Facility Agreement and the Claims Resolution Procedures and the function in this Article IV (as specified in this Article IV) the functions in Articles V and VI herein shall be supervised by the District Court. The District Court shall have the authority to act in the event of *disputes or questions regarding the interpretation of Claim eligibility criteria*, management of the Claims Office or the investment of funds by the trust. The District Court shall perform all functions relating to the distribution of funds and all determinations regarding the prioritization or availability of payments, specifically including all functions related to Articles III, VII, and VIII herein.

Id. at Page ID # 18832 (emphasis added).

The Consent Order cannot be deemed anything other than a proper exercise of the District Court's retained jurisdiction. This dispute arises out of the implementation of a Chapter 11 plan of reorganization and falls squarely within the scope of 28 U.S.C. § 1334. And the Consent Order plainly falls within the scope of the District Court's retained jurisdiction in the Plan. On its face, the Consent Order constitutes an "order in aid of [the] Plan and Plan Documents." *Plan*, RE 1239-2, Page ID # 18690, § 8.7. It resolves a controversy regarding "interpretation and implementation of [the] Plan and the Plan Documents," by providing an interpretation of the marshaling requirement. *Id*. It directly resolves "questions

regarding the interpretation of Claim eligibility criteria." *SFA*, RE 1239-5, Page ID #18832, § 4.01. The Consent Order also properly implicates the District Court's role in connection with the final resolution of claims and claims processing functions for Class 7. *In re Thickstun Bros.*, 344 B.R. at 522; *Plan* § 8.7, RE 1239-2, Page ID ## 18690-92. The Consent Order provides the mechanism for the orderly wind down of Class 7 and therefore is well within the District Court's authority.

The Korean Claimants argue that the District Court had no jurisdiction to approve the Consent Order because the SFA authorizes the DRs and the CAC to provide joint written Plan interpretations to the Claims Administrator.[19] *Brief of Appellant Class 7 Korean Claimants* ("*Appellants' Brief*") at p.10. Of course, the fact that the Appellees have the authority to proffer binding Plan interpretations does not mean that the District Court is somehow divested of jurisdiction to approve those interpretations and to provide for their implementation and the conclusion of the Class 7 Claims process. *See In re Wolverine*, 930 F.2d at 1137-38 (parties cannot divest the court of subject matter jurisdiction).

[19] The Korean Claimants also assert, without support, that the Appellees lack standing. The CAC and the DRs have certain rights and obligations under the Plan and they, as well as the Reorganized Debtor, have the right and obligation to enforce the terms of the Plan. *Plan*, RE 1239-2, Page ID # 18675, § 6.14.3.

B. The Korean Claimants Concede that the Consent Order Contains A Valid Interpretation Of A Plan Term.

In interpreting a confirmed plan, "courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors." *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a).[20] State law governs those interpretations, and a plan must be enforced as written. *Id*. The relevant documents are governed by New York law. *Plan*, RE #1239-2, Page ID # 18675, §6.13; *SFA*, RE #1239-5, Page ID # 18861, §10.07. "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).

Having conceded that the Appellees have the clear right to make the Plan interpretation that is incorporated into the Consent Order without the approval of the District Court, *Appellants' Brief* at p. 10, the Korean Claimants cannot then assert that Appellees' agreed-upon interpretation of the marshaling requirement constitutes an improper modification of the Plan. *Id*. The Korean Claimants argue

[20] The provisions of the Plan are binding on claimants – including Korean 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).

that the interpretation of the marshaling requirement with respect to the status of claimants in the MDL 926 settlement alters the meaning of the term marshaling because it "reduce[s] the marshaling requirements to the submission of all claims to the RSP," *Appellants' Brief* at 12, and there are other ways in which a claimant could marshal recoveries. *Id*.

The Plan does not purport to identify every way in which the marshaling requirement could apply to a claimant. Nor could it. Korean Claimants contend that the Consent Order "seeks to reduce the marshaling requirement to the submission of all claims to the RSP." *Appellants' Brief* at p. 15. The dispute, however, arose solely because of the SF-DCT's determination about how marshaling applies in the context of RSP claims. The Consent Order does nothing more than clarify how the term applies to claimants based on their status, or lack thereof, in the RSP. The Consent Order does not – and does not purport to – address other forms of marshaling. For example, if a claimant has pursued litigation against her implant manufacturer, that act would constitute "marshaling".[21] The Consent Order does not address this form of marshaling, nor does it prevent the SF-DCT from determining whether a claimant had marshaled – or failed to marshal – recoveries in other contexts. The Korean Claimants'

[21] It is worth noting that, because of the class action status of MDL 926, only claimants who opted out of the settlement could pursue litigation against the manufacturers of their implants.

assertion that this interpretation modifies the Plan is based on their mistaken characterization of the Consent Order. Whether exercised by the District Court or the CAC and DRs under Section 5.05, the Plan interpretation contained in the Consent Order is a simple explanation of the application of the term "marshaling" to specific factual circumstances. It does nothing more.

The interpretation of the marshaling requirement does not constitute an impermissible modification under 11 U.S.C. § 1127(b). Section 1127(b) prohibits the modification of a substantially consummated plan of reorganization. In this context, a modification means the alteration of a provision that would materially affect a specific right granted to identifiable creditors under the plan.

Courts that have addressed the central issue of material modification have found that a plan modification is barred under section 1127(b) only if it would reassign, redistribute or eliminate a right that was granted in the plan to identifiable individuals or entities. *In re Johns-Manville Corp.*, 920 F.2d 121, 128-29 (2d Cir. 1990) (allowing the property damage claims facility to suspend operations on the grounds that it was a mere "variation . . . [in] timing and intensity of claim processing," and therefore not a modification of the plan prohibited by Section 1127(b)); *LPP Mortgage, Ltd. v. Park Bowl, Inc.*, No. 02-CV-10278-BC, 2003 WL 22995011, at *6 (E.D. Mich. Dec. 4, 2003) (agreement to defer loan payments or

amend payment schedules was not an impermissible modification under Section 1127(b) since the agreement did not alter the legal relationship between the debtor and other parties or affect the bargain struck by creditors during the confirmation process); *Hawkins v. Chapter 11 Trustee*, No. 6:07–cv–0766 (LEK), 2009 WL 701115, at *3 (N.D.N.Y. Mar. 13, 2009) (finding that the plan was not modified because no provision in the plan was "violated" or "removed"); *In re Sea Island Co.*, 486 B.R. 559, 572 (Bankr. S. D.Ga. 2013) (holding that there was no modification where the appellate court could not "say as a matter of law, or on the basis of the facts … before" it that relief was inconsistent with what the plan provided).

In each of these cases, the courts focused on two factors: (1) whether the modification would affect a specific defined or bargained for right granted in the plan (or an action that was expressly barred by the plan) and (2) whether the proposed action would change or reassign that right or action. Here, no Class 7 claimant can identify a specific substantive right that has been granted to them by the Plan that is altered by the interpretation of "marshaling" in the Consent Order. The Consent Order expressly maintains and preserves the substantive eligibility requirements necessary to qualify for a disease payment set forth in Annex A, RE 1239-6, Page ID ## 18908-911, and the payment terms applicable to Class 7 Claims as set forth at Section 6.04(h)(iv). *Id*. at Page ID # 18910. The

interpretation of the word marshaling cannot possibly alter the payment terms applicable to Class 7 claimants. The interpretation does not affect other forms of marshaling. The Consent Order simply contains the Appellees' interpretation of marshaling with respect to those Class 7 claimants who had not pursued claims in the RSP.

The Korean Claimants contend that they have been harmed because allowing the SF-DCT to process and pay Disputed Marshaling Claimants who meet the marshaling requirement as interpreted by the Appellees would reduce their recovery. *Appellants' Brief* at pp. 13-14. This contention is incorrect. The Plan provides that the maximum amount payable to disease claimants in Class 7 is 40% of the grid amount that would be applicable to claimants who had Dow Corning breast implants (*i.e.* claimants in Plan Classes 5, 6.1 and 6.2). *Annex A*, RE 1239-6, Page ID # 18910, § 6.04(h)(iv). The Consent Order makes clear that every Class 7 disease claimant will in fact receive this maximum payment and that the inclusion of the Eligible Disputed Marshaling Claims will not reduce any Class 7 claimant's recovery. *Consent Order*, RE 1227, Page ID # 18492. To the extent that the Korean Claimants assert some potential claim to any excess funds in the Class 7 Fund, the argument fails. There is no specific right under the Plan for any identifiable payment to a Class 7 claimant in the event that there are excess funds in the Class 7 Fund. Section 6.04(i) of Annex A provides that the Claims

Administrator has discretion to distribute excess funds from the Class 7 Fund to eligible Silicone Material Claimants and Participating Foreign Gel Claimants. RE 1239-6, Page ID # 18911. This discretionary distribution is the sole source of payment for Participating Foreign Gel Claimants. In fact, the Claims Administrator has determined to provide a distribution to Participating Foreign Gel Claimants and has thereby exercised this discretion. The Claims Administrator has never exercised any discretion to provide any specific additional distribution to any Silicone Material Claimant. (Indeed, because the disease claimants will receive the maximum per claim recovery allowed there is no basis to provide for any additional payment.) This discretionary option is by its terms discretionary. It does not mandate the distribution of funds to any Class 7 claimant and does not confer on any Class 7 claimant a specific measurable right to property or assets.[22] The Korean Claimants' assertion is without merit.

[22] The Korean Claimants also assert that the interpretation of the marshaling requirement is improper because it increases the settlement value of the Disputed Marshaling Claims, in violation of Section 10.06 of the SFA. *Appellant's Brief* at pp. 13-14. Contrary to such assertion, Section 10.06 of the SFA prevents increasing the settlement value of claims in a manner inconsistent with the payment grid established as part of the Plan. *SFA*, RE 1239-5, Page ID # 18860, § 10.06. It does not prevent determining claims to be eligible that were previously found to be ineligible because of a mistaken interpretation of Plan language.

C. The District Court Properly Rejected The Korean Claimants' Request to Modify The Plan's Eligibility Requirements for Class 7 Claims.

Ironically, despite arguing that the Appellee's interpretation of the marshaling requirement should not be permitted because it is a "modification" of the Plan, the Korean Claimants then assert that the Consent Order should not have been approved because it does not modify the Plan: "appellees should have corrected their old mistake by inserting in the Consent Order the seventy one (71) Class 7 Korean Claimants … who were not paid due to the cut-off date …." *Appellants' Brief* at p.15.

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 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." *Annex A*, RE 1239-6, Page ID # 18909; § 6.04(b)(ii); *see also id*. at § 6.04(e)(ii).

Korean Claimants, as noted, concede that many of them fall outside the Class 7 eligibility criteria. *Appellants' Brief* at pp.14-15. They ask this Court to reverse the Consent Order and require the District Court expand those criteria: "the extension of the cut-off date for eligibility [for Class 7] is reasonable. The

exclusion of the seventy one (71) Class 7 Korean Claimants … is unreasonable." *Appellants' Brief* at 15. In other words, the Korean Claimants ask this Court to change the confirmed and substantially consummated Plan.

1. The District Court Does Not Have The Authority To Modify The Plan, As Requested by Korean Claimants.

The District Court has no power, under 11 U.S.C. § 1127, or otherwise, to modify a plan. *Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633, slip op. at 4 (6th Cir. Aug. 6, 2009) ("the district court had no authority to modify the Plan, equitable or otherwise"); *In re MCorp Financial*, 137 B.R. 219, 228 (Bankr. S.D. Tex. 1992) (section 1127 provides that "only the proponent of a chapter 11 plan can seek to have it modified," and a court "cannot, *sua sponte*, modify the chapter 11 plan."); *see also Goodman v. Philip R. Curtis Enterprises, Inc.*, 809 F.2d 228, 234 (4th Cir. 1987) ("Under § 1127(b), post-confirmation modification can only be initiated by the proponent of a plan or a reorganized debtor."). The Sixth Circuit long ago made clear that the court's only option is to confirm – or deny confirmation of – the plan as proposed. *See Memphis Bank & Trust v. Whitman*, 692 F.2d 427, 431 (6th Cir. 1982) (stating in a chapter 13 case that, aside from confirming or denying confirmation, court could only "suggest" modifications to the plan).[23]

[23] Even if the Korean Claimants' request to change the eligibility requirements of Class 7 were not invalid, they lack standing to modify the Plan, because they do

The District Court properly rejected the Korean Claimants' request to alter the terms of the confirmed Plan by eliminating the requirement that, to be eligible for Class 7, the claimant must have been implanted with the eligible implants by January 1, 1992.

2. Korean Claimants' Request to Amend the Terms Of A Plan That Was Confirmed 17 Years Ago is Barred.

Even if the District Court could make the change to the Plan that Korean Claimants request, that request is nearly two decades too late. Dow Corning's Plan was agreed upon and confirmed by the bankruptcy court after a three-week confirmation hearing in 1999. The Plan ultimately became effective after appeals were concluded on June 1, 2004. *Order*, RE 934, Page ID # 15761. The Plan, which established "'a mechanism for resolving the claims at issue in the most fair

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not constitute "proponents of a plan." Courts have uniformly rejected on standing grounds attempts by claimants, creditors or other parties in interest who are not plan proponents to modify a confirmed plan. *See In re Longardner & Assocs., Inc.*, 855 F.2d 455, 462 n.8 (7th Cir. 1988); *Goodman v. Phillip R. Curtis Enter., Inc.*, 809 F.2d 228, 233 (4th Cir. 1987); *In re Logan Place Prop., Ltd.*, 327 B.R. 811, 813-14 (Bankr. S.D. Tex. 2005) (rejecting attempt by trust to modify the plan based on mutual mistake to reflect property's current value as trust was neither debtor nor plan proponent and noting that debtor/plan proponent opposed the modification); *In re Vencor, Inc.*, 284 B.R. 79, 85 (Bankr. D. Del. 2002) (denying creditors' request for relief from confirmed plan which purported to release it from certain claims that creditors might assert; request was tantamount to request for modification, which creditors did not have standing to seek); *In re Charterhouse, Inc.*, 84 B.R. 147, 151 (Bankr. D. Minn. 1988) (bondholders' committee was not plan proponent since it "did not engage in the initial process of plan formulation or preparation" and therefore lacked standing to seek plan modification that would authorize use of interest accrued on settlement fund in a manner not provided in confirmed plan).

and equitable manner possible,'" *In re Dow Corning Corp.*, 113 F.3d 565, 571 (6th Cir. 1997) (quoting *In re Dow Corning Corp.*, 86 F.3d 482, 487 (6th Cir. 1996)), was voted on and overwhelmingly approved by the various claimants. *In re Dow Corning Corp.*, 287 B.R. 396, 413 (E.D. Mich. 2002) (94.1% of those who voted in the tort classes accepted the Joint Plan). The Korean Claimants participated in the confirmation hearing, and, although they raised objections to the Plan, those objections did not include an objection to the Class 7 eligibility criteria.[24] *See*, *e.g.*, *In re Dow Corning Corp.*, 244 B.R. 634, 658 (Bankr. E.D. Mich. 1999), *aff'd*, 255 B.R. 445 (E.D. Mich. 2000), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002) (characterizing certain objection of Korean Claimants as objecting to the fact that the Plan suggests that their claims fall within Class 6.2 rather than Class 6.1).[25]

As an initial matter, the Korean Claimants' request is based on a factual mistake. The Korean Claimants contend that the January 1, 1992 "cut-off" date is the date on which the non-Dow Corning manufacturers stopped making implants. *Appellants' Brief* at p.15. They assert that the date should be changed to allow for

[24] The Korean Claimants' objection was filed on April 16, 1999 in Dow Corning's underlying bankruptcy case, *In re Dow Corning Corp.*, 95-20512 (Bankr. E.D. Mich.).

[25] The only objections related to Class 7 – which were not raised by any of the Korean Claimants – related to which foreign breast implant manufacturers would be included in the Class 7 eligibility criteria. The Plan Proponents agreed to modify the definition of Class 7 to include additional manufacturers in order to resolve this objection.

the fact that it would take some time to "transport" these implants to Korea. *Id*. But the January 1, 1992 date is not, as they contend, based on dates of manufacture. The January 1, 1992 date was intended to provide a substantial "cushion" after Dow Corning stopped selling silicone gel to other breast implant manufacturers.[26] The vast majority of the Class 7 Korean Claimants allege implantation with Cox Uphoff implants. Dow Corning stopped selling gel to Cox Uphoff almost 10 years before the January 1, 1992 date. *See, e.g., Safety of Silicone Breast Implants* (S. Bondurant *et al*. eds., Institute of Medicine, Committee on Safety of Silicone Breast Implants, 1999) at pp. 75-76 (Dow Corning supplied silicone gel to Cox Uphoff from 1976 to 1983; Dow Corning supplied silicone gel to Bioplasty in 1987 and 1988); *Omnibus Response*, RE 1169, Page ID # 18119 at n.8.

Further, the Korean Claimants long ago waived any objection to the eligibility requirements of Class 7. Korean Claimants could (and should) have raised the issue as an objection before Plan confirmation. *See, e.g., In re USN Communications, Inc.*, 280 B.R. 573, 600 (Bankr. D. Del. 2002). They are barred

[26] The Appellants already acknowledged this mistake and conceded this argument once. *See* Korean Reply, RE 1194, Page ID # 18220 at n.2 ("[A]s the Movants corrected …, the January 1, 1992 date was not based on dates of manufacture but was intended to provide a substantial 'cushion' after Dow Corning stopped selling silicone gel to other manufacturers. So the Class 7 Korean objectors *drop this contention* ….") (emphasis added). Despite this concession, they again raise an argument they know to be factually incorrect.

from raising this objection at this time. *Still v. Rossville Bank* (*In re Chattanooga Wholesale Antiques, Inc.*), 930 F.2d 458, 463 (6th Cir. 1991) (confirmation of a Chapter 11 plan "has the effect of a judgment by the district court and *res judicata* principles bar relitigation of any issues raised or that could have been raised in the confirmation proceedings."); *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). Korean Claimants had another remedy: those Korean Claimants who do not meet the definition of Class 7 had the option of electing to litigate their claims. *Plan*, RE 1239-2, Page ID ## 18657-58, § 5.4.2. They did not do so.[27] Korean Claimants cannot now complain about the terms of the settlement program in which they elected to participate.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court affirm the Order of the District Court.

[27] *See* footnote 9, *supra*.

Dated: April 11, 2016

Respectfully submitted,

On Behalf of Dow Corning Corporation and Debtor's Representatives

/s/ Deborah E. Greenspan

Deborah E. Greenspan, Esq.
Blank Rome LLP
1825 Eye Street, N.W.
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
DGreenspan@blankrome.com

On Behalf of Claimants' Advisory Committee:

/s/ Dianna L. Pendleton-Dominguez

Dianna L. Pendleton-Dominguez, Esq.
Law Office Of Dianna Pendleton
401 N. Main Street
St. Marys, OH 45885
Telephone: (419) 394-0717
Facsimile: (419) 394-1748
DPEND440@aol.com

On Behalf of Claimants' Advisory Committee:

/s/ Ernest H. Hornsby

Ernest H. Hornsby, Esq.
Farmer, Price, Hornsby & Weatherford, L.L.P.
100 Adris Place
Dothan, AL 36303
Tel: 334-793-2424
Fax: 334-793-6624
Ehornsby@fphw-law.com

ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THEDISTRICT COURT DOCKET (00-00005)

RE #	Description of Filing	Page ID #
53	Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan	119 - 123
934	Memorandum Opinion and Order Regarding Partial Premium Payment Distribution Recommendation by The Finance Committee	15761 – 15779
1031	Order Authorizing Distribution of Notice Pursuant to Proposed Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	17473 - 17474
1076	Objection to the Proposed Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	17708 – 17716
1076-1	Exhibit 1 to Objection to the Proposed Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	17717 – 17723
1169	Omnibus Response to Objections and Submissions Responding to Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	18099 – 18128
1194	Reply to the Omnibus Response to Objections to the Proposed Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	18217 – 18222
1226	Order Approving Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	18464 – 18473
1227	Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	18474 – 18503
1229	Notice of Appeal	18552 - 18555

RE #	Description of Filing	Page ID #
1239	Additional Further Supplemental Information Regarding Additional Submissions Responding to and Supplementation of the Record Related to Consent Order to Establish Guidelines for Distributions From the Class 7 Silicone Material Claimants' Fund	18601 – 18605
1239-2	Amended Joint Plan of Reorganization	18607 – 18718
1239-5	Settlement Facility and Fund Distribution Agreement	18822 - 18867
1239-6	Annex A to Settlement Facility and Fund Distribution Agreement	18868 - 18985

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word), this brief contains 12,053 words.

/s/ *Deborah Greenspan*
Deborah Greenspan
BLANK ROME LLP
1825 Eye Street, N.W.
Washington, DC 20006
Tel.: (202) 420-3100
Fax: (202) 420-2201
dgreenspan@blankrome.com

CERTIFICATE OF SERVICE

I certify that on April 11, 2015, I electronically filed a copy of the foregoing Brief of Appellants Dow Corning Corporation, Debtor's Representatives and the Claimants Advisory Committee with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

/s/ *Deborah Greenspan*
Deborah Greenspan
BLANK ROME LLP
1825 Eye Street, N.W.
Washington, DC 20006
Tel.: (202) 420-3100
Fax: (202) 420-2201
dgreenspan@blankrome.com