

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In Re:

Settlement Facility Dow Corning Trust.

**Case No. 00-00005
Honorable Denise Page Hood**

ORDER DENYING MOTION TO COMPEL (Doc. No. 538)

I. BACKGROUND

On behalf of their clients, the law firm of Siegel, Kelleher & Kahn (“SKK”) filed a Motion to Compel the Settlement Facility Dow Corning Trust (“SF-DCT”) to follow the Stipulated Order dated January 16, 2007. (Motion, Doc. No. 538) The January 16, 2007 Agreed Order reset the cure deadlines relative to rupture, explant and disease claims. (Doc. No. 480) The Claimants’ Advisory Committee (“CAC”) and the Reorganized Debtor Dow Corning Corporation (“DCC”) filed a response to the motion. (Doc. Nos. 545, 546)

II. ANALYSIS

The relevant language in the January 16, 2007 Agreed Order Resetting Cure Deadlines states,

**B. FINAL Cure Deadline Extension for Rupture Claims
in Classes 5, 6.1, and 6.2.**

3. Category A. All claimants who received a Notification of Status letter from the SF-DCT stating that either (1) their Rupture claim was deficient because they did not submit the operative or pathology report required by the Plan, or (2) they did not have their Dow Corning implant removed, AND whose cure deadline has or will run on or before March 18, 2007. All Category A claimants shall have their cure deadline reset to March 19, 2007. **This is a final cure deadline for Category A claimants and such claimants who do not cure this deficiency on or by March 18, 2007 will have their Rupture claim permanently denied. The SF-DCT will notify claimants affected by this Order of their new and final cure deadline.**

(Doc. No. 480, January 16, 2007 Agreed Order, p. 2, ¶ 3)

The SKK Claimants' counsel claims that upon receipt of this Order, he notified his clients that this was their final opportunity to attempt to submit a rupture compensation claim but that they did not need to have their Dow Corning implants removed immediately. In response and reliance upon this representation, fifteen (15) Claimants underwent surgery to have their implants removed. Upon receipt of the operative and pathology reports, the SKK Claimants' counsel requested re-reviews on those confirmed ruptures.

The SKK Claimants' counsel thereafter received a Notification of Status ("NOS") letter from the SF-DCT indicating that the rupture claim was being denied because the claimant did not undergo explantation prior to June 2006. The SKK Claimants' counsel contacted David Austern (the SF-DCT Claims Administrator at

that time) indicating to Mr. Austern that the NOS was incorrect. Mr. Austern later called counsel stating that the CAC and DCC indicated that the January 16, 2007 Stipulated Order was not intended to extend the rupture deadline in regards to explanation. The SKK Claimants assert Mr. Austern indicated that the January 16, 2007 Agreed Order was ambiguous and that he agreed with the SKK Claimants' counsel's interpretation that the Order extended the rupture deadline. Counsel also indicated he spoke with Ernest Hornsby, a CAC member, that there was a discussion as to whether the January 16, 2007 Agreed Order was intended to extend the rupture deadline for explanation. Counsel also spoke with Deborah Greenspan, counsel for DCC, who indicated it was her position that the January 16, 2007 Agreed Order did not extend the rupture explanation deadline.

The SKK Claimants' counsel thereafter spoke with Mr. Austern advising him of counsel's conversations with the CAC and the Debtor's Representative. Counsel informed Mr. Austern that he should follow the clear language of the January 16, 2007 Agreed Order. If the Claims Administrator failed to do so, the SKK Claimants argue the Claims Administrator would violate the clear language of the January 16, 2007 Agreed Order to extend the explant deadline.

Mr. Austern called the SKK Claimants' counsel one week later advising counsel that he would not be extending the explant rupture deadline. The SKK

Claimants' counsel thereafter filed the instant motion seeking to compel the Claims Administrator to follow the January 16, 2007 Agreed Order resetting the deadline for all rupture claims. Counsel notes that a subsequent June 15, 2007 Agreed Order entered into by the parties resetting disease cure deadlines specifically stated the applicability of the deadline extension. If it had been the CAC and DCC's intention to limit the January 16, 2007 Agreed Order, the SKK Claimants argue such language should have been expressly stated in the Order.

In response, the CAC notes that Section 6.02(e)(ii) of the Claims Resolution Procedures, Annex A to the Settlement Facility and Fund Distribution Agreement ("Annex A"), which states that to be *eligible* for a review of a Rupture claim, claimants must submit documentation showing that their Dow Corning implant was removed. (Annex A, § 6.02(e)(ii)) Section 7.09 of Annex A further provides that claimants must submit their supporting documents for rupture on or before the second anniversary of the Effective Date, or by June 1, 2006. (Annex A, § 7.09)

DCC argues that the plain language, structure and intent of the January 16, 2007 Agreed Order did not modify the June 1, 2006 implant removal surgery requirement under the Plan. DCC claims the SKK Claimants confuse two very different issues: eligibility and documentation of eligibility. To be eligible, the implants must be removed by the June 1, 2006 deadline. If the claimant does not provide

documentation, after the implant is deemed eligible, then the claim is deficient. The Notice of the Agreed Order Resetting Cure Deadlines dated January 31, 2007 stated that the “new and FINAL” *cure deadline* for submitting additional documents to *cure a deficiency* on a rupture claim was reset by the Cure Deadline Order to March 19, 2007.

Both the CAC and DCC argue that the January 16, 2007 Agreed Order extended the deadlines for those rupture claims that were deemed eligible but deficient in the documentation. They argue that the language in the NOS letter which states, “[t]o correct this problem with your records and receive compensation for your rupture claim, you must provide proof that your ruptured Dow Corning implant was removed by June 1, 2006.” The January 16, 2007 Agreed Order only applied to cure the deficiency of documentation by March 19, 2007. The CAC and DCC assert the Order did *not* extend the implant removal deadline, nor the eligibility criteria that the removal must have occurred by June 1, 2006.

Mr. Austern submitted a letter response dated July 30, 2007 addressing the statements made by the SKK Claimants’ counsel. Mr. Austern indicated that he routinely speaks with attorneys regarding specific claims and that he has spoken to the SKK Claimants’ counsel on at least 15 different occasions about a number of issues. Mr. Austern does not make notes during his conversations. Mr. Austern’s recollection

was that he did speak with counsel regarding this issue. He thereafter reviewed the January 16, 2007 Agreed Order and discussed the issue with members of the CAC and the SF-DCT staff. He also reviewed the January 16, 2007 Agreed Order before it was submitted to the Court. Mr. Austern concluded that the January 16, 2007 Agreed Order extended the rupture cure deadlines only for deficient claims and did not apply to claims that were ineligible. The SF-DCT staff reminded Mr. Austern that the SF-DCT treated the June 1, 2006 explant deadline as an *eligibility* issue and not a *deficiency* issue. Mr. Austern then returned counsel's call and told him that while he understood why counsel read the language in the January 16, 2007 Agreed Order to extend the explant deadline, Mr. Austern asserted that by its terms, the Order applied only to rupture *deficiencies* and not rupture *eligibility*. Mr. Austern stated he was not "influenced" to interpret the January 16, 2007 Agreed Order in this manner.

Initially, the SKK Claimants submitted only the Rupture Claim Forms to the SF-DCT, with no supporting documentation as required by § 6.02(e)(ii)(b) showing rupture or that the implants were removed. The SF-DCT denied the claims as ineligible because they did not have their implants removed by June 1, 2006, as required by § 7.09. The SF-DCT letter stated, "[w]e received your Rupture Payment claim form; however you are not eligible for a review under the Rupture Payment Option." (CAC Br., Ex. 3) The letter goes on to indicate that the claimant must

provide proof that the Dow Corning implant was removed by June 1, 2006. (CAC Br., Ex. 3) Later, the SKK Claimants submitted records indicating that the implants were removed in February and March 2007. The SKK Claimants did not go through the appeal process set forth in the Plan but instead filed the instant motion.

“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). “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). A court construing an order consistent with the parties’ agreement does not exceed its power. *Id.* at 1228.

Here, given the parties’ intent as to the January 16, 2007 Agreed Order, that the order only applied to claims that were reviewed and found deficient and that the eligible removal deadline of June 1, 2006 was not extended, the court must defer to the parties’ agreement. The Order is entitled “Agreed Order Resetting Cure Deadlines.” In order for a “cure” there must be a deficiency. The NOS letters to the SKK Claimants expressly noted that they were ineligible since the implants were not removed by June 1, 2006. The deadline to be *eligible* for a rupture claim was not extended. Only the deadline to cure any *deficiencies* of a rupture claim was extended

by the January 16, 2007 Agreed Order. The SKK Claimants' motion must be denied.

III. CONCLUSION

For the reasons set forth above, the SKK Claimants' Motion to Compel the SF-DCT Administrator to follow the January 16, 2007 Agreed Order to extend the rupture eligibility deadline (**Doc. No. 538**) is DENIED.

S/DENISE PAGE HOOD

DENISE PAGE HOOD

Chief Judge

DATED: December 27, 2017