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 GRANTING MOTION TO DISMISS KOREAN CLAIMANTS' "MOTION FOR EXTENSION OF DEADLINE OF CLASS 7 CLAIMANTS" AND DENYING KOREAN CLAIMANTS' MOTION FOR EXTENSION OF DEADLINE OF CLASS 7 CLAIMANTS

I. BACKGROUND

This matter is before the Court on a Motion filed by the Reorganized Debtor Dow Corning Corporation ("Dow Corning")[1] (Doc. No. 962) for an order dismissing the Korean Claimants' Motion for Extension of Deadline of Class 7 Claimants (Doc. No. 958). The Korean Claimants filed responses/replies opposing the motion. (Doc. Nos. 1028 and 1075)

Dow Corning considers the Korean Claimants' Motion as an appeal from the Claims Administrator's and/or Appeals Judge's decision denying their request to

[1] Now known as Dow Silicones Corporation, but continued to be referred to as Dow Corning.

extend the implantation date deadline of January 1, 1992. Dow Corning asserts that the Court lacks authority to review the motion. The Claimants Advisory Committee ("CAC") also seeks an order denying the Korean Claimants' motion/appeal. (Doc. No. 963)

Seventy-one Class 7 Korean Claimants assert that they received implants with silicone materials manufactured by Dow Corning after January 1, 1992. The Korean Claimants argue that the Settlement Facility Dow Corning Trusts ("SF-DCT") denied their claims because they received the implants between 1992 to 1994, but after January 1, 1992. The Korean Claimants seek an extension of the January 1, 1992 so that their Class 7 claims may be covered.

The Claims Administrator for the SF-DCT submitted a declaration indicating that the 71 Korean Claimants' Class 7 claims were not approved by the SF-DCT because they were implanted after January 1, 1992. The Claims Administrator asserted that Section 6.04 of Annex A of the Settlement Facility and Fund Distribution Agreement ("SFA") provided that those who received implants after January 1, 1992 were not eligible for payments. (Doc. No. 962-5, Ex. 4, Phillips Decl., ¶6) Of the 71 Korean Claimants, 61 Claimants appealed the denials (the other 10 did not submit any appeal) to the Claims Administrator, who upheld the denials. *Id.* at ¶¶7-8. None of the Korean Claimants appealed the Claims Administrator's decision to the Appeals

Judge, despite claiming that such appeals were taken to the Appeals Judge in their motion. *Id.* at ¶9.

II. ANALYSIS

On June 1, 2004, the Amended Joint Plan of Reorganization ("Plan") governing the Dow Corning Corporation bankruptcy matter became effective. The Court retains jurisdiction over the Plan "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow, disallow, estimate, liquidate or determine any Claim, including Claims of a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, §§ 8.7.3, 8.7.4, 8.7.5) The Plan Documents pertinent to this matter include the Settlement Facility and Fund Distribution Agreement ("SFA") and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA ("Annex A").

The Settlement Facility-Dow Corning Trust ("SF-DCT") implements the claims of those claimants who elected to settle their claims under the Settlement Program of the Plan. (Plan, § 1.131) The SF-DCT was established to resolve Settling Personal Injury Claims in accordance with the Plan. (Plan, § 2.01) The SFA and Annex A to the SFA establish the exclusive criteria by which such claims are evaluated, liquidated, allowed and paid. (SFA, § 5.01) The process for resolution of claims is set

forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01) Section 5.05 of the SFA provides that Dow Corning and the CAC may submit joint interpretations and clarifications regarding submissions of claims to the Claims Administrator. (SFA, § 5.05) The Court may approve an amendment to the SFA after notice and hearing as directed by the Court. (SFA, § 10.06) Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) There is no provision under the Plan or the SFA which allows a claimant to submit an issue to be interpreted by the Court or to amend the Plan.

The Plan establishes administrative claim review and appeals processes for Settling Personal Injury claimants. Any claimant who does not agree with the decision of the SF-DCT may seek review of the claim through the error correction and appeal process. (SFA, Annex A, Art. 8) A claimant may thereafter obtain review by the Appeals Judge. (SFA, Annex A, Art. 8) The Plan provides that "[t]he decision of the Appeals Judge will be final and binding on the Claimant." (SFA, Annex A, § 8.05) Claimants who seek review under the Individual Review Process also have a right to appeal directly to the Appeals Judge. The Plan provides that "[t]he decision of the Appeals Judge is final and binding on both Reorganized Dow Corning and the claimant." (SFA, Annex A, § 6.02(vi))

Generally, the provisions of a confirmed plan bind the debtor and any creditor.

11 U.S.C. § 1141(a). Section 1127(b) is the sole means for modification of a confirmed plan which provides that the proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of the plan. 11 U.S.C. § 1127(b). "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.

As noted by the Claims Administrator, none of the 71 Korean Claimants appealed the Claims Administrator's decision to uphold the initial SF-DCT's denials of their claims. The Plan does not provide any provision for the Court to review a claim which was denied by the Claims Administrator. Even if a claim was fully processed and appeals were brought before the Appeals Judge, the Plan's language is clear and unambiguous that the decision of the Appeals Judge is final and binding on the claimant and the Reorganized Dow Corning. The Plan provides no right of appeal to the Court.

The Court also has no authority to extend any deadlines set forth under the Plan and agreed to by Dow Corning and the CAC. As noted above, Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) There is no provision under the Plan or the SFA which allows the Court to extend the deadlines without the agreement of Dow Corning and the CAC.

In any event, the Korean Claimants' motion is moot. The Korean Claimants appealed to the Sixth Circuit Court of Appeals a Consent Order entered on December 3, 2015 by this Court clarifying certain procedures for distributing part of the settlement fund. On appeal, the Korean Claimants argued that the Consent Order should have modified the SFA to allow recovery for claimants who received implants after the January 1, 1992 date. The Sixth Circuit ruled that the Korean Claimants who received implants after January 1, 1992 were barred from raising their claims because the bankruptcy court confirmed the Plan and its eligibility criteria in 1999. The Sixth Circuit noted that the Korean Claimants were present at the confirmation hearing and could have made then the argument they made before the Sixth Circuit. (Doc. No. 1267, Opinion, *Korean Claimants v. Debtor's Representatives,* Case No. 15-2548 (6th Cir. Nov. 23, 2016); Doc. No. 1272, Mandate) The Korean Claimants are barred from seeking an extension of the January 1, 1992 date set forth in the SFA.

Accordingly,

IT IS ORDERED that the Korean Claimants' Motion for Extension of Deadline of Class 7 Claimants **(Doc. No. 958)** is DENIED. Any motion or appeal by the Korean Claimants regarding their Class 7 claims before the SF-DCT is DISMISSED.

IT IS FURTHER ORDERED that Dow Corning Corporation's Motion for an Order Dismissing the Korean Claimants' Motion for Extension of Deadline of Class 7 Claimants **(Doc. No. 962)** is GRANTED.

S/DENISE PAGE HOOD
DENISE PAGE HOOD
Chief United States District Judge

DATED: December 12, 2018

CERTIFICATE OF SERVICE/MAILING

I certify that a copy of this document was served on this date electronically or by ordinary mail to all parties in interest.

Dated: December 12, 2018

/s/ Sarah Schoenherr
Deputy Clerk (313) 234-5090