UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: **SETTLEMENT FACILITY DOW CORNING TRUST**	§	**Case No. 00-CV-00005** **(Settlement Facility Matters)** **Hon. Denise Page Hood**

MEMORANDUM IN SUPPORT OF THE RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE CLAIMANTS' ADVISORY COMMITTEE AND THE FINANCE COMMITTEE TO THE KOREAN CLAIMANTS' MOTION FOR ORDER TO CORRECT THE DISPOSITION OF THE SF-DCT REGARDING THE KOREAN CLAIMANTS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court Deny the Motion to Correct as a prohibited appeal of a decision of the Claims Administrator and Appeals Judge applying the Plan's cure deadline requirements?

   Respondents Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Dow Corning Amended Joint Plan of Reorganization
- The Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A
- Closing Order 1 For Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, and Appeal Deadlines), ECF No. 1447

Dow Silicones Corporation ("Dow Silicones")[1], the Debtor's Representatives (the "DRs"), the Claimants' Advisory Committee (the "CAC"), and the Finance Committee (the "FC") (collectively, "Respondents") respectfully submit this Memorandum of Law in support of their Response to the Motion for Order to Correct the Disposition of the SF-DCT Regarding the Korean Claimants, ECF No. 1752 ("Motion to Correct") filed by the Korean Claimants ("Movants") and request the Court deny the Motion to Correct.

INTRODUCTION

The Motion to Correct is another in a series of motions filed by Korean Claimants belatedly disputing actions taken by the Settlement Facility-Dow Corning Trust ("SF-DCT" or "Settlement Facility"). *See e.g.,* Motion for Order Vacating Decision of the Settlement Facility Regarding Address Update/Confirmation, ECF No. 1569 (Jan. 15, 2021); Motion for Extension of Deadline for Filing Claim, ECF No. 1586 (Feb. 3, 2021), Motion for Reversal of Decision of SF-DCT Regarding Korean Claimants, ECF No. 810 (Sept. 26, 2011); Motion for Re-Categorization of Korea, ECF No. 965 (Apr. 7, 2014); Motion for Extension of Deadline of Class 7 Claimants, ECF No. 958 (Mar. 7, 2014); Motion of Korean Claimants for the Settlement Facility to Locate Qualified Medical Doctor of Korea and Either Pay for

[1] Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

that Qualified Medical Doctor to Travel to Korea and Conduct the Disease Evaluations or Hire Qualified Medical Doctor in Korea to Conduct the Reviews at the Settlement Facility's Expense, ECF No. 77 (Dec. 15, 2004).

In the Motion to Correct, Korean Claimants seek to appeal multiple determinations of the Claims Administrator and the Appeals Judge concluding that 109 disease claims filed by Korean Claimants had deficiencies that were not cured by the Plan mandated deadline. Now, more than 5 years after the expiration of the last cure deadline applicable to their claims, Korean Claimants seek to avoid the application of the Plan mandated cure deadline and ask this Court to overrule the decisions of the Claims Administrator and Appeals Judge. This appeal, styled as a 'motion', is plainly barred by the Plan and must be denied. The underlying decision at issue is simple: the Korean Claimants by their own admission failed to submit corrective documents within the one-year cure period and, accordingly, the claims were not eligible and correctly denied.

For the reasons set forth herein, the Motion to Correct must be denied.

BACKGROUND

A. Controlling Plan Documents and Court Orders

This Court is, of course, familiar with the relevant facts: In 1999, Dow Corning and the representatives of the tort claimants—the Tort Claimants' Committee—filed the Dow Corning Amended Joint Plan of Reorganization ("Plan") (Exhibit A), which became effective on June 1, 2004. The Plan established an

administrative process for the resolution of claims of individuals who assert that they suffered injury as a result of the use of certain implanted medical devices. The Plan specifies the terms of the treatment of all classes of creditors and the means for implementing the Plan. Those individuals who elected to resolve their claims through this administrative process are Settling Personal Injury Claimants.[2] The procedures for the submission of claims for benefits and for the review and resolution of such claims are set forth in the Settlement Facility and Fund Distribution Agreement ("Settlement Facility Agreement" or "SFA") (Exhibit B) and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA ("Annex A" or the "Claims Resolution Procedures") (Exhibit C).

Section 5.3 of the Plan provides that the Settling Personal Injury Claims, including the Breast Implant claims, shall be resolved under the terms of the SFA. The SFA, along with Annex A, establishes the detailed rules and guidelines for determining the eligibility of claims for the settlement program and for the submission, evaluation, and payment of Breast Implant claims eligible for a settlement under the Plan. The Settlement Facility, through the Claims Administrator, manages the Plan's administrative settlement program. The Claims

[2] Capitalized items have the meaning defined in the Plan and Plan Documents unless otherwise noted herein.

Administrator is responsible for ensuring that claims are reviewed and evaluated in accordance with the strict criteria set forth in the Claims Resolution Procedures and has no discretion to apply other criteria in reviewing and allowing claims.

B. The Plan's Appeal Process

Under the terms of the Claims Resolution Procedures, every claimant receives a Notification of Status letter advising the claimant of the results of the claim review and identifying any deficiencies in the claim. *See* Exhibit D, December 22, 2023, Declaration of Kimberly Smith-Mair, at ¶ 6; Annex A at § 7.06. Under the terms of the Claims Resolution Procedures, claimants asserting a disease claim have one year from the date of the Notification of Status letter to cure those deficiencies. Smith-Mair Dec. at ¶ 7; Annex A at § 7.09(b)(ii). The Claims Resolution Procedures provide that to be compensable, a disease claim must meet the eligibility criteria set forth in the Plan. Consequently, any claim that does not meet the eligibility criteria is deficient and must be denied if not cured timely. The Court's July 25, 2018 Closing Order 1 for Final June 3, 2019 Claim Deadline (Establishing Final Cure Deadlines, Revised Claim Review Procedures, And Appeal Deadlines) reiterated the Plan requirements and states that the "SF-DCT shall deny all deficient claims that are not cured by the applicable deadline." ECF No. 1447.

The decisions of the Settlement Facility are subject to an administrative appeal process. A claimant who disagrees with a decision of the Settlement Facility may

seek a review by the Claims Administrator and then, if the Claims Administrator denies the appeal, the claimant may appeal the decision to the Appeals Judge. *Id*. at §§ 8.04, 8.05. The Appeals Judge issues written opinions and the "decision of the Appeals Judge will be final and binding on the Claimant." *Id*. at § 8.05. There is no right of appeal to this or any other Court. *See id*. at § 8.05.

C. SF-DCT Data Regarding Korean Claimants Appeals At Issue In Motion to Correct

Each of the 109 Korean Claimants at issue in the Motion to Correct filed a Disease Claim. All of the claims were reviewed and found to have deficiencies. The Settlement Facility sent a Notification of Status letter to each claimant identifying the specific deficiencies in their disease claim. *See* Smith-Mair Dec. at ¶ 7. The Notification of Status letters sent to the 109 Korean Claimants explained the one-year cure deadline and provided the date when the claimant was required to submit documents to cure the deficiencies. *Id*. The cure deadline for each of the 109 Korean Claimants expired without the required submissions. *Id*. at ¶ 9. That is, none of the 109 Korean Claimants submitted the necessary documents to cure the deficiencies by the applicable deadline. *Id*. The last cure deadline date for any of the 109 Korean Claimants expired in July 2017. *Id*.

In 2017 and 2018 in accordance with the applicable rules, the SF-DCT issued expedited payments to each of the 109 Korean Claimants. *Id*. at ¶ 10. All of the 109 Korean Claimants returned the expedited payment. *Id*. In 2018 and 2019 the SF-

DCT sent a letter to each of the Korean Claimants acknowledging the return of the expedited payment. *Id*. The Acknowledgment Letters stated that the cure deadline for the disease claims had expired and that no additional reviews could occur on those previous claims. *Id*. The Acknowledgment Letters further explained the options available to the Korean Claimants under the Plan. *Id*. The Acknowledgement Letters advised that each claimant could, at that point:

- File an Error Correction. OR
- Apply for a claim for a **new** disease or condition on or before June 3, 2019 provided that the **new** disease or condition manifested after the cure deadline expired on their original disease claim OR
- Request the return of the original Expedited Release Payment.

Id.

Two years after the final cure deadline expired, at approximately the time of the final deadline for submission of any claim to the SF-DCT, the counsel for Korean Claimants requested an extension of the cure deadline dates for these 109 claims and further submitted forms purporting to provide information to cure the deficiencies in at least some of the 109 original disease claims. *Id*. at ¶ 12. Each of the 109 Korean Claimants received a determination letter from the Claims Administrator ("Determination Letter") finding that the cure deadline had expired and that the submissions could not be considered. *Id*. at ¶ 13.

Counsel for the Korean Claimants appealed these decisions to the Appeals Judge. *Id*. at ¶ 14. The Appeals Judge issued written opinions notifying each of the

Korean Claimants that the decisions of the Claims Administrator were affirmed and that the appeals were denied due to the failure to cure the deficiencies by the deadline. Smith-Mair Dec. at ¶ 16.

On May 4, 2023, Counsel for the Korean Claimants filed a motion for reconsideration of the denial of the appeals on behalf of the 109 Korean Claimants. *Id*. at ¶ 17. The Plan does not provide a procedure for reconsideration of final appeals decisions. *Id*. On October 25, 2023, the Appeals Judge issued an order denying the motion for reconsideration. *Id*.

ARGUMENT

A. THE MOTION TO CORRECT MUST BE DENIED BECAUSE IT IS AN UNAUTHORIZED APPEAL OF A DECISION OF THE CLAIMS ADMINISTRATOR BARRED BY THE PLAN

The Motion to Correct is an appeal of a decision of the Appeals Judge which is expressly prohibited by the Plan. The Plan specifically, unequivocally, and unambiguously bars appeals of the decisions of the Claims Administrator or Appeals Judge to this or any other court. *See Claims Resolution Procedures*, at Article VIII, § 8.05. The provisions of the Plan are binding on claimants as a matter of federal bankruptcy law. *See* 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor . . . has accepted the plan").

This Court and the United States Court of Appeals for the Sixth Circuit have explicitly and repeatedly held that the Plan does not permit individual claimants to appeal determinations of the Claims Administrator or Appeals Judge. *See In re*

Clark-James, 08-1633, 2009 WL 9532581, at **2, 3 (6th Cir. Aug. 6, 2009) (holding that the district court properly dismissed plaintiff's complaint as she was "essentially seek[ing] a review of the SF-DCT's determination that she has not submitted sufficient proof to show that her implants had ruptured. But the Plan provides no right of appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents."), aff'g No. 07-CV-10191 (E.D. Mich. Mar. 31, 2008).

As this Court has previously explained:

> 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).)

In re Settlement Facility Dow Corning Tr., No. 00-00005, 2017 WL 7660597, at *3 (E.D. Mich. Dec. 28, 2017), *aff'd*, 760 Fed. App'x 406 (6th Cir. 2019)*; See also Hawkins v. Claims Adm'r of Settlement Facility*, No. J:21-CV-10764, 2021 WL 8343045, at *1 (E.D. Mich. Oct. 19, 2021) ("The Court has held on several occasions

that the Plan provides no right of appeal to the Court by claimants who do not agree with the decisions of the SF-DCT, the Claims Administrator and/or the Appeals Judge."); *In re Settlement Facility Dow Corning Trust*, 760 Fed. App'x 406, 412 (6th Cir. 2019) ("'The Plan provides no right of appeal to the Court.'") (quoting *In re Settlement Facility Dow Corning Tr.*, No. 12-10314, 2012 WL 4476647, at *2 (E.D. Mich. Sept. 28, 2012)). Movant's disagreement with decisions regarding claims "are decisions for the Claims Administrator and the Appeals Judge selected under the terms of the plan, and not the district court" and thus her effort to "seek review of substantive decisions regarding particular claims . . . is contrary to the terms of the plan." *In re Settlement Facility Dow Corning Trust*, 760 Fed. App'x at 412; *See also In re Settlement Facility Dow Corning Tr.*, No. 08-CV-10510, 2008 WL 4427513, at *2 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court..."); *In re Settlement Facility Dow Corning Trust, Dale Reardon*, No. 07-CV-14898, 2008 WL 4427520, at *2 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court…"); *In re Settlement Facility Dow Corning Trust, Mary O'Neil*, No. 00-00005, 2008 WL 907433, at *3 (E.D. Mich. Mar. 31, 2008) ("The Plan provides no right to appeal to the Court…").

The Motion to Correct is nothing more than an attempt to appeal an adverse decision and is plainly barred by the Plan and this Court's prior rulings.

B. THE MOTION TO CORRECT MUST BE DENIED BECAUSE THE KOREAN CLAIMANTS FAILED TO CURE DEFICIENCIES BY THE CURE DEADLINE AS REQUIRED BY THE PLAN

The Korean Claimants admit that they did not cure their disease claims by the applicable cure deadline. *See* Motion to Correct at 1-2. It seems that they contend that the letter sent by the Settlement Facility to acknowledge the return of the expedited payments indicated that they had the right to file corrections to their disease claims at any time up until June 3, 2019. *Id*. at 2-3. But that is not correct: Each Acknowledgement Letter clearly states that the cure deadline on the specific type of claim previously submitted had expired and no additional review can be performed on that original specific disease claim. *See* Exhibit 2 to Smith-Mair Dec. The letter clearly states that the only options claimants have after the cure deadline has expired are to (1) file an error correction, or (2) apply for a **new** disease or condition on or before June 3, 2019 that manifested after the expiration of the previous cure deadline, or (3) request the return of the original expedited release payment. *See Id*.; Smith-Mair Dec. at ¶ 10.

The Korean Claimants did not exercise any of these options: they did not file an error correction or appeal at that time; they did not request return of the expedited payment; and they did not file claims for a new disease. Instead, two years after the expiration of their cure deadlines, they submitted Supplemental Disease Review Forms in an effort to cure some of the original disease claims. *Id*. at ¶ 12. The

Claims Administrator and Appeals Judge correctly denied this effort to avoid the cure deadline. Korean Claimants have no right or basis to seek this Court's intervention.

CONCLUSION

For the foregoing reasons, Dow Silicones Corporation, the Debtor's Representatives, the Finance Committee, and the Claimants' Advisory Committee respectfully request that the Court deny the Motion to Correct.

Dated: December 29, 2023

Respectfully submitted,

/s/ Karima Maloney
Karima Maloney
SMYSER KAPLAN & VESELKA
717 Texas Avenue
Suite 2800
Houston, TX 77002
Telephone: (713) 221-2382
KMaloney@skv.com
Counsel for the Finance Committee

/s/ Deborah E. Greenspan
Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com
Debtor's Representative and Attorney for Dow Silicones Corporation

/s/ Ernest H. Hornsby
Ernest H. Hornsby
FARMER PRICE LLP
100 Adris Place
Dothan, AL 36303
Telephone: (334) 793-2424
Ernie@farmerprice.com
Claimants' Advisory Committee

/s/ Dianna L. Pendleton-Dominguez
Dianna L. Pendleton-Dominguez
LAW OFFICE OF
DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
Telephone: (419) 394-0717
DPend440@aol.com
Claimants' Advisory Committee

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SETTLEMENT FACILITY DOW CORNING TRUST	§	**Hon. Denise Page Hood**

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2023, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Dated: December 29, 2023

/s/ Deborah E. Greenspan

Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com
Debtor's Representative and Attorney for Dow Silicones Corporation