UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CROSS-MOTION TO DISMISS
THE KOREAN CLAIMANTS' APPEAL (STYLED AS "MOTION FOR REVERSAL OF DECISION OF SFDCT REGARDING KOREAN CLAIMANTS")

Dow Corning Corporation ("Dow Corning") opposes the Motion for Reversal of Decision of SFDCT Regarding Korean Claimants ("Motion for Reversal"). Those claimants, represented by Yeon-Ho Kim, seek relief from an adverse decision of the Claims Administrator. Because the Motion for Reversal is nothing more than an appeal from an adverse claims decision by the Settlement Facility-Dow Corning Trust ("SF-DCT"), Dow Corning herein moves, pursuant to the Settlement Facility and Fund Distribution Agreement ("SFA"), Annex A, Section 8.05, and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss that appeal and for such other and further relief as the Court deems just and proper. Under the Amended Joint Plan of Reorganization, there is no right of appeal from adverse claims decisions. The Court, accordingly, lacks jurisdiction over the Korean Claimants' challenge, and Dow Corning's Cross-Motion to dismiss that appeal must be granted.[1]

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

[1] Pursuant to Section 4.09(c)(v) of the SFA, Dow Corning may file a motion to enforce the obligations in the Amended Joint Plan of Reorganization.

Dated: October 13, 2011

Respectfully submitted,

DICKSTEIN SHAPIRO LLP

By: /s/ Deborah E. Greenspan

Deborah E. Greenspan
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
GreenspanD@dicksteinshapiro.com

Debtor's Representative and Attorney for
Dow Corning Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF DOW CORNING'S CROSS-MOTION TO DISMISS THE KOREAN CLAIMANTS' APPEAL (STYLED AS "MOTION FOR REVERSAL OF DECISION OF SFDCT REGARDING KOREAN CLAIMANTS")

Dow Corning Corporation ("Dow Corning") respectfully submits this Memorandum in support of its Cross-Motion to Dismiss the Korean Claimants' Appeal, styled as "Motion for Reversal of Decision of SFDCT Regarding Korean Claimants" ("Motion for Reversal" or "Mot."). The Motion for Reversal, filed by Korean Claimants represented by Yeon-Ho Kim, was in response to an August 22, 2011 letter from the Claims Administrator of the Settlement Facility-Dow Corning Trust ("SF-DCT") advising Mr. Kim that: (1) it would no longer accept Affirmative Statements as Proof of Manufacturer ("POM") from Mr. Kim's clients; (2) those of Mr. Kim's clients who have not submitted a claim form must submit other acceptable POM; and (3) those who have received benefits on the basis of Affirmative Statements will not be eligible for further benefits, including Premium Payments.

According to the August 22 letter, the Claims Administrator's decision was based, *inter alia*, on the following factors:

- Prior acceptance of Affirmative Statements for approximately 1,400 of Mr. Kim's clients was due to his assertion that medical records in Korea were routinely destroyed after 10 years, an assertion that Mr. Kim has admitted was false. Mot., Ex. J.

- There is substantial if not overwhelming evidence that Korean physicians signed the Affirmative Statements "without any basis for concluding that Dow Corning products were, in fact, used for those patients' implants." *Id.*

- Mr. Kim's explanation that he relied upon "claimant recollection" to determine that his clients had Dow Corning implants was "unreliable" and does not meet Plan criteria for establishing POM. *Id.*

The Claims Administrator also advised Mr. Kim that claims submitted on behalf of his clients that were supported by altered documents will not be processed, and that the SF-DCT intended to consult with Korean attorneys or government officials with respect to Mr. Kim's misstatements and submission of altered records. *Id.*

The Motion for Reversal, by its terms, is an appeal of the Claims Administrator's decision. It therefore must be denied and Dow Corning's motion to dismiss the appeal granted. The Settlement Facility and Fund Distribution Agreement ("SFA") and prior rulings of this Court expressly bar appeals of claims decisions to this Court.

A. Claimants' Appeal Must Be Dismissed Pursuant To The Plain Language Of The SFA

The Amended Joint Plan of Reorganization (the "Plan") (Ex. A hereto) contains detailed criteria defining the documentation that is necessary to establish an eligible claim for compensation and specifies a claims administration process for the resolution of Settling Personal Injury Claims. Ex. B (SFA), §§ 2.02, 4.03, 5.01; Ex. C (SFA, Annex A), Art. VI. The Plan delegates decisions regarding settling claims to the Claims Administrator. Ex. B (SFA), § 4.02(a). The Claims Administrator, in turn, is responsible for ensuring that the SF-DCT staff applies the appropriate guidelines prescribed by the Plan. *See id.* A claimant who disagrees with the decision of the SF-DCT may seek reconsideration of her claim through the error correction and appeals process. Ex. C (SFA, Annex A), Art. VIII. Thereafter, the claimant may seek a review by the Claims Administrator and then, if unsuccessful, may appeal that decision to the

Appeals Judge. *Id*. (SFA, Annex A), Art. VIII, §§ 8.04, 8.05. Under Plan language that could not be plainer, the decision of the Appeals Judge is "***final and binding*** on the Claimant." *Id.* (SFA, Annex A), § 8.05 (emphasis added).

Under the Plan, there is no right to further review. Appeals to this Court are expressly and unambiguously barred. The provisions of the Plan are binding on claimants as a matter of federal bankruptcy law. *See* 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor . . . has accepted the plan"). The Plan was expressly intended to prohibit judicial review of determinations by the Claims Administrator in the context of the settlement program. This structure follows the methodology and process of the MDL settlement, and it was agreed to by the Plan Proponents, approved by the Court, and accepted by the overwhelming vote of claimants.

The appeals process outlined in the Plan ensures the integrity of the administrative settlement process and serves to avoid litigation over every claim found deficient by the Claims Administrator. In recognition of this, this Court and the Court of Appeals explicitly and repeatedly have held that the Plan does not permit claimants to appeal the decisions of the Claims Administrator or Appeals Judge to this Court. *See, e.g., In re Settlement Facility Dow Corning Trust, Marlene Clark-James*, 08-1633 at 3 (6th Cir. Aug. 8, 2008) ("The district court properly dismissed Clark-James' complaint . . . essentially seek[ing] a review of the SF-DCT's determination that she has not submitted sufficient proof to show that her implants had ruptured. [T]he Plan provides no right of appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents."), *aff'g* No. 07-CV-10191 (E.D. Mich. Mar. 31, 2008); *In re Settlement Facility Dow Corning Trust, Jodi Iseman*, No. 09-CV-10799 at 4 (E.D. Mich. Mar. 25, 2010) ("Even if [claimant had] sought . . . review by the Appeals Judge, the Plan's language is clear and unambiguous that the decision

of the Appeals Judge is final and binding . . . The Plan provides no right to appeal to the Court. Allowing the appeal to go forward . . . would be a modification of the Plan language. The Court has no authority to modify this language."); *In re Settlement Facility Dow Corning Trust, Nina Rowland*, No. 08-CV-10510 at 3 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Dale Reardon*, No. 07-CV-14898 at 3 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Mary O'Neil*, No. 00-00005 at 4(E.D. Mich. Mar. 31, 2008) ("The Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Rosalie Maria Quave*, No. 07-CV-12378 at 6 (E.D. Mich. Mar. 31, 2008) (granting Dow Corning's motion to dismiss appeal "since Ms. Quave has no right to appeal the Appeals Judge's decision.").

Claimants' appeal to this Court is barred by the Plan. Dow Corning's Cross-Motion to dismiss the Korean Claimants' appeal (styled as a Motion for Reversal), accordingly, must be granted. Moreover, the Korean Claimants have not appealed to the Appeals Judge and, therefore, have not exhausted their Plan remedies. They are entitled to a determination by the Appeals Judge, subject to the internal procedures of the SF-DCT, and may pursue that option at any time if they feel they have been wronged. What they are not entitled to is a review by this (or any other) Court of any adverse claims decision by the SF-DCT, the Claims Administrator or the Appeals Judge.[1]

[1] For the same reasons, this Court must grant Dow Corning's Cross-Motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Because the Plan does not authorize the Korean Claimants to appeal adverse claims decisions to this Court, and there is no allegation of an injury that may be redressed by this Court, the Court lacks jurisdiction over the Motion for Reversal. In addition, if the Motion for Reversal were construed as a complaint (which it clearly is not), it fails to state a claim. The substance of the pleading, regardless of its form, amounts to a general grievance with the refusal of the Claims Administrator and the SF-DCT to accept materials that they have concluded – based on standard internal quality management procedures – are inaccurate, unreliable or otherwise not in compliance with the Plan's requirements.

B. Even If The Claims Administrator's Decision Were Reviewable On The Merits, It Not Only Was Correct But Compelled By The Plan

The SFA requires all settling personal injury claims to be processed in accordance with the Claims Resolution Procedures outlined in Annex A to the SFA. Ex. B (SFA), § 5.01(a). The SFA provides, *inter alia*, that it and Annex A "shall establish the exclusive criteria for evaluating, liquidating, allowing and paying Claims," and that "[o]nly those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment, except to the extent that the Reorganized Dow Corning accepts Claims through the individual Proof of Manufacturer Review . . ., as specified at Schedule I, Part I.F." *Id.*[2]

The SFA gives the Claims Administrator "discretion to implement such additional procedures . . . as necessary to process the Settling Breast Implant Claims in accordance with the terms of this Settlement Facility Agreement and the Claims Resolution Procedures." *Id.*, § 5.01(b). It authorizes and obligates the Claims Administrator "to institute procedures to assure an acceptable level of reliability and quality control of Claims and to assure that payment is distributed only for Claims that satisfy the Claims Resolution Procedures." *Id.*, § 5.04(b). It also gives the Claims Administrator the authority, and imposes upon her the obligation, "to institute claim-auditing procedures and other procedures designed to detect and prevent the payment of fraudulent Claims." *Id.*, § 5.04(a)(i). Moreover, if the Claims Administrator concludes that there has been intentional abuse of the Claims Resolution Procedures (or fraud), the SFA requires her to deny the claim. *Id.*, §5.04(a)(iii).

The Settlement Program and Claims Resolution Procedures set forth guidelines for the review, evaluation and resolution of settling personal injury claims, which the Claims Administrator is required to administer pursuant to the SFA. Ex. C (SFA, Annex A) at A-1.

[2] The Claims Administrator is responsible for determining "whether Claims are eligible based upon the eligibility criteria set forth in Annex A and shall process the Claims according to the terms and conditions set forth in Annex A." Ex. C (SFA), § 6.04.

Section 2.01 provides that the claims of all settling personal injury claimants are to be resolved under the terms of the Claims Resolution Procedures. Under these Procedures, a claimant must submit required forms and documentation. *Id.*, § 4.01. The Claims Administrator is required to "institute procedures to assure consistency of processing and of application of criteria in determining eligibility and to ensure fairness in processing of Claims and appeals and to ensure an acceptable level of reliability and quality control of Claims." *Id.*, § 7.01(c).

The "threshold eligibility criteria for all settling claimants" is acceptable Proof of Manufacturer, *i.e.*, that the claimant had a Dow Corning breast implant. *Id.*, § 5.01 (f); *see id.*, §§ 4.02(b); 6.02(b)(i), (ii); 6.02(e)(ii); 6.02(e)(iv)(a)(1), (2); 6.05(b)(iii); 6.05(b)(iii), 6.05(c)(ii), 6.05(c), 6.05(d)(i), 6.05(e)(ii). "The Claims Administrator has an obligation, as specified at Section 5.01, to determine that there is acceptable proof of a Dow Corning implant according to Schedule I to this Annex A." *Id*, § 4.02(b). "All Breast Implant Claimants must submit acceptable proof of a Dow Corning Breast Implant to receive benefits. The standards of acceptable proof of a Dow Corning Breast Implant are set forth at Schedule I, Part I to [the] Claims Resolution Procedures." *Id.*, § 6.02(b)(ii).

Schedule I to Annex A of the Claims Resolution Procedures sets forth the types of proof required to establish acceptable POM. Affirmative Statements from the implanting physician attesting that the claimant was implanted with a Dow Coring implant are acceptable if contemporaneous hospital records of the surgeon's report of the surgery are not available, but the affirmative statement, to be acceptable, must provide the basis for the conclusion that the claimant received a Dow Corning implant and explain why the contemporaneous records are not available and the steps taken to secure the proof. Ex. C (Annex A), Schedule I, Part I.B.5. The SF-DCT is authorized to accept affirmative statements that the surgeon used only Dow Corning products during a defined period and the claimant seeking to use such an affidavit provides

credible medical records demonstrating that she had implantation surgery by that surgeon during the specified time frame. *Id.*

The Affirmative Statements submitted by the Korean claimants, predicated upon the purported destruction of medical records in Korea after 10 years (a predicate that Mr. Kim asserted but later admitted was false), were found by the Claims Administrator to be inaccurate. Accordingly, they do not satisfy Plan requirements for demonstrating the threshold eligibility requirement for claims approval. The Plan is clear and unambiguous. In the absence of an acceptable POM, a claim cannot and does not satisfy Plan requirements for claims approval and must be rejected.[3] Accordingly, based on the information set forth in the Motion for Reversal, the Claims Administrator could not approve the Korean Claimants' POMs, and if those POMs do not satisfy Plan eligibility requirements (as the Claims Administrator concluded), then the Claims Administrator was required by the Plan to deny the Korean Claimants' claims. *See* Ex. B (SFA), §5.04(a)(iii).

CONCLUSION

For the foregoing reasons, Dow Corning respectfully requests that the Court grant Dow Corning's Cross-Motion to dismiss the Korean Claimants' appeal.

[3] That the former Claims Administrator purportedly approved the form of the Affirmative Statements at a meeting in January 2004, *see* Mot. at 1-2, does not warrant a different result. The Korean Claimants have failed to proffer any cognizable evidence to support their assertion that such approval was given. Even more significantly (and for obvious reasons), the Korean Claimants do not purport to suggest that the Claims Administrator approved such Affirmative Statements with knowledge that they were inaccurate.

Dated: October 13, 2011

Respectfully submitted,

DICKSTEIN SHAPIRO LLP

By: /s/ Deborah E. Greenspan

Deborah E. Greenspan
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006-5403
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
GreenspanD@dicksteinshapiro.com

Debtor's Representative and Attorney for
Dow Corning Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PROPOSED ORDER GRANTING DOW CORNING'S
CROSS-MOTION TO DISMISS THE KOREAN CLAIMANTS' APPEAL

The Court has considered Dow Corning Corporation's Cross-Motion to Dismiss the Korean Claimants' Appeal (Styled as "Motion for Reversal of Decision of SFDCT Regarding Korean Claimants"), and the Court finds and concludes that the Cross-Motion is meritorious and should be granted.

ACCORDINGLY, it is hereby ORDERED that:

The Cross-Motion is GRANTED in all respects.

Dated: _____

_____
DENISE PAGE HOOD
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	**CASE NO. 00-CV-00005-DT**
	§	**(Settlement Facility Matters)**
DOW CORNING CORPORATION,	§	
	§	**HON. DENISE PAGE HOOD**
REORGANIZED DEBTOR	§	

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2011 true and correct copies of the following were served via electronic mail or first-class mail upon the parties listed below:

CROSS-MOTION TO DISMISS THE KOREAN CLAIMANTS' APPEAL (STYLED AS "MOTION FOR REVERSAL OF DECISION OF SFDCT REGARDING KOREAN CLAIMANTS")

MEMORANDUM IN SUPPORT OF DOW CORNING'S CROSS-MOTION TO DISMISS THE KOREAN CLAIMANTS' APPEAL (STYLED AS "MOTION FOR REVERSAL OF DECISION OF SFDCT REGARDING KOREAN CLAIMANTS").

DICKSTEIN SHAPIRO LLP

By: /s/ Deborah E. Greenspan
Deborah E. Greenspan
1825 Eye Street, N.W.
Washington, DC 20006
Tel.: 202-420-3100; Fax: 202-420-2201
GreenspanD@dicksteinshapiro.com

DEBTOR'S REPRESENTATIVE AND
ATTORNEY FOR DOW CORNING CORPORATION

LOCAL COUNSEL:
Lamont E. Buffington, Esq.
Garan Lucow Miller, P.C.
Woodbridge Place/1000 Woodbridge Street
Detroit, MI 48207-3192
lbuffington@garanlucow.com

October 13, 2011 service parties:

DOW CORNING CORPORATION
Susan K. McDonnell
V.P., General Counsel and Secretary
Dow Corning Corporation
2200 W. Salzburg Road
Auburn, MI 48611
sue.mcdonnell@dowcorning.com

CLAIMANTS' ADVISORY COMMITTEE
Dianna L. Pendleton-Dominguez
Law Office of Dianna Pendleton
401 N. Main Street
St. Marys, OH 45885
Dpend440@aol.com

Ernest H. Hornsby
Farmer, Price, Hornsby & Weatherford, L.L.P.
100 Adris Place
Dothan, AL 36303
ehornsby@fphw-law.com

Sybil Niden Goldrich
256 South Linden Drive
Beverly Hills, CA 90212
sybilg58@aol.com

Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of the Americas
New York, NY 10036
jtrachtman@kramerlevin.com

DEBTOR'S REPRESENTATIVES
Douglas Schoettinger
DCC Litigation Facility, Inc.
2200 W. Salzburg Road
Midland, MI 48686
doug.schoettinger@dowcorning.com

Eudio Gil
The Dow Chemical Company
2030 Dow Center / B1 So./Office 115
Midland, MI 48674
egil@dow.com

Kevin W. Scroggin
Dow Corning Corporation
2200 West Salzburg Road
Midland, MI 48686-0994
kevin.scroggin@dowcorning.com

David H. Tennant
Nixon Peabody LLP
Clinton Square, Suite 1300
Rochester, NY 14604
dtennant@nixonpeabody.com

John Donley
Kirkland & Ellis
300 North LaSalle
Chicago, IL 60654
john_donley@kirkland.com

SHAREHOLDER COUNSEL
Laurie Strauch Weiss
Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York, NY 10103-0001
lstrauchweiss@orrick.com

FINANCE COMMITTEE
The Hon. Frank Andrews
145 Lonesome Road / P.O. Box 410
Hunt, TX 78024
fa1@hctc.net

Ann M. Phillips, Claims Administrator
Settlement Facility-Dow Corning Trust
3100 Main Street, Suite 700
Houston, TX 77002
APhillips@sfdct.com

Professor Francis E. McGovern
Duke University School of Law
P.O. Box 90360
Durham, NC 27708-0360
mcgovern@faculty.law.duke.edu

David T. Austern
CRMC
3110 Fairview Park, Suite 200
Falls Church, VA 22042-0683
daustern@claimsres.com