UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 95-20512**
DOW CORNING CORPORATION,	§	
	§	**(Chapter 11)**
	§	
DEBTOR	§	**Hon. Denise Page Hood**
	§	

MEMORANDUM IN SUPPORT OF AMENDED AND RENEWED MOTION TO LIMIT PARTICIPATION IN SETTLEMENT PROGRAM BY NON-MATCHED NOTICE OF INTENT FILERS

Dow Corning Corporation ("Dow Corning" or "DCC") respectfully submits this Memorandum in Support of its *Amended and Renewed Motion to Limit Participation in Settlement Program by Non-Matched Notice of Intent Filers* ("NOI Motion").

BACKGROUND AND SUMMARY

Under section 501(b) of the Bankruptcy Code and Rule 3005 of the Federal Rules of Bankruptcy Procedure, a co-debtor to a creditor may file a claim in the name of such creditor where such creditor fails to timely file a proof of claim ("POC") for a claim on which such co-debtor may be co-liable with the debtor. In the Dow Corning bankruptcy case certain entities (the "Co-Debtors") that could be co-liable with Dow Corning on claims relating to breast implants, other implant products, or products containing raw materials manufactured or sold by Dow Corning filed claims pursuant to Bankruptcy Rule 3005 ("Rule 3005 Claims") on behalf of individuals who could have filed implant-related POCs against Dow Corning.

Some of the Rule 3005 Claims named specific individuals on whose behalf the Co-Debtor was filing – typically individuals who had sued both DCC and the Co-Debtor in an implant-related lawsuit. Some of the Rule 3005 Claims did not name

specific individuals but instead were filed on behalf of "unknown" claimants who met specific characteristics and conditions that define and limit both the creditors (*i.e.*, implant claimants) and the specific claims for which such Rule 3005 Claims were filed (the "Non-Individual 3005 Claims"). The Rule 3005 Claims thus preserved carefully identified rights and claims of known and unknown claimants who satisfied criteria set out in the 3005 Claims but who had failed to timely file POCs on their own behalf.

The Plan Documents define the procedure that individuals (creditors) covered by a Rule 3005 Claim may use to "take over" the claim. Specifically, Annex A to the Settlement Facility and Fund Distribution Agreement ("SFA") provides that "Claimants who did not timely file a Proof of Claim in the Case *but on whose behalf a Proof of Claim has been timely filed pursuant to Bankruptcy Rule 3005* . . . may file a notice of intent with the Court as provided in Bankruptcy Rule 3005 to act on her or his own behalf with respect to such Claim . . . Such Claimant will thereby have *all rights as specified in the 3005 filing*..." SFA, Annex A § 2.02(b) (emphasis added). Thousands of individual claimants filed Notices of Intent ("NOIs") expressing their "intent" to take control of a claim that had allegedly been preserved by one of the Rule 3005 Claims.[1]

It was, of course, important to determine which NOI Creditors satisfied the criteria set forth in the Rule 3005 Claims and who were thus entitled to submit claims to

[1] The Court's June 10, 2004 Order approving "Procedures for Matching and Evaluating NOI Filings" included within the definition of NOI claimants those individuals who filed Proofs of Claim *after* the confirmation date (November 30, 1999) and before the August 30, 2004 deadline for filing NOIs. In addition, although DCC believed that the Confirmation Order barred individuals who made NOI filings *before* the confirmation date from participating in the Plan unless they complied with the specified filing procedures in Paragraph 10 of the Confirmation Order, DCC and the CAC agreed that these Paragraph 10 NOI claims should receive the same treatment under the Plan as all other NOI filers. *See* Exhibit B (letter from Maureen Craig April 28, 2006). Accordingly, reference herein to "NOI Creditors" or "NOI Filers," includes claimants who (i) filed a timely NOI, or (ii) filed a POC after the confirmation date and before the August 30, 2004 deadline for NOI filing, or (iii) made a filing within the scope of Paragraph 10 of the Confirmation Order but did not subsequently file a POC in accordance with the Confirmation Order.

the SF-DCT for evaluation. Dow Corning thus instituted a procedure pursuant to which it sought to match the NOI Creditors with Rule 3005 Claims. As a result of that procedure, Dow Corning was able to match approximately 1,775 NOIs to Rule 3005 Claims based on name or social security number.

Some of the NOI Creditors who did not match by name or social security number may nevertheless have claims that are preserved by Non-Individual Rule 3005 Claims. Given the terms of the Non-Individual Rule 3005 Claims, it was necessary to create a protocol to enable the Claims Administrator to "match" NOI Creditors to Rule 3005 Claims and determine which claims were preserved by the Non-Individual Rule 3005 Claims. On February 11, 2004 Dow Corning filed its *Motion of Dow Corning Corporation to Establish Procedure to Assist the Claims Administrator to Identify and Match Notices of Intent to Rule 3005 Claims in Accordance with Amended Joint Plan* ("NOI Procedures Motion"). The NOI Procedures Motion proposed a principled yet simple procedure to identify the eligible NOI Creditors consistent with the terms of the Plan, the Bankruptcy Code, and the Bankruptcy Rules. The Tort Claimants' Committee ("TCC") responded with the startling proposition that the plain and controlling requirements of the Plan, the Bankruptcy Code, and the Bankruptcy Rules were somehow "abandoned" and that all NOI Creditors should be allowed into the process *regardless* of whether an actual Rule 3005 Claim was filed on their behalf or whether their claims fit the terms of any particular Rule 3005 Claim. *See* Response of Tort Claimants Committee to Motion of Dow Corning Corporation to Establish Procedure to Assist the Claims Administrator to Identify and Match Notices of Intent to Rule 3005 Claims in Accordance with Amended Joint Plan, dated March 8, 2004.

Dow Corning and the TCC embarked on negotiations intended to develop guidelines to evaluate the cost to the Settlement Fund of allowing NOI Creditors to participate in the settlement regardless of whether they met the requirements of the Plan and the underlying Rule 3005 Claims. The parties reached an agreement, and by Order dated June 10, 2004 (the "NOI Procedures Order"), the Court approved the "Procedures for Matching and Evaluating NOI Filings" (the "Procedures"), as annexed to the NOI Procedures Order. A copy of the NOI Procedures Order, together with the Procedures, is annexed hereto as Exhibit A.

Pursuant to the Procedures, the SF-DCT was to screen NOIs that had not been matched by name or social security number to determine if the SF-DCT could, nevertheless, match the claim either by name or by determining that the NOI fell into one of the categories of unnamed claimants covered by a Rule 3005 Claim filed by a Co-Debtor that was a participant in the Revised Settlement Program ("RSP Rule 3005 Claims"). *See* Procedures ¶ 1. The SF-DCT advised the Debtor's Representatives (the "DRs") and the Claimants' Advisory Committee (the "CAC") of the NOI Creditors it had identified as matching to an RSP Rule 3005 Claim.

The Procedures then described how the SF-DCT was to quantify the claims of the remaining NOI population – the "Non-Matched NOI Filers." For the most part, most of the Non-Matched NOI Filers would have to qualify, if at all, by satisfying the criteria set forth in the Non-Individual 3005 Claims. Although a few Co-Debtors had filed Non-Individual 3005 Claims, the most encompassing were those filed by The Dow Chemical Company ("Dow Chemical"). Dow Chemical filed four Rule 3005 Claims that preserve only the *disease* claims of individuals with a Dow Corning Breast Implant or a breast implant made with Dow Corning gel (the "Dow Chemical Rule 3005 Disease

Claims"). Dow Chemical defined "Disease" as "autoimmune disease, scleroderma, systemic disorders, joint swelling, chronic fatigue, or any other medical symptom allegedly arising from a Breast Implant (or Raw Materials, as set out in a second Dow Chemical Non-Individual Rule 3005 Claim), but excluding any claims of non-systemic injury, including but not limited to contracture, disfigurement or rupture." If Non-Matched NOI Filers have Disease claims, those Disease claims – and *only* those Disease claims *(i.e.,* not rupture, explant, or expedited claims) – may have been preserved by a Dow Chemical Rule 3005 Disease Claim. Non-Matched NOI Filers who do not have a Disease claim have *no* eligible claims because they do not match any Rule 3005 Claim.

This Court recognized in the NOI Procedures Order that "DCC has the right to object to any claim or any category of claim that it believes is not eligible under the terms of the Plan or Confirmation Order and to seek enforcement of the terms of the Plan." *Id.* at 1. As provided in the Procedures, Dow Corning reserved the right to object to the inclusion of Non-Matched NOI Filers in the settlement program but agreed to waive the right to object if the aggregate settlement payments to those NOI filers as calculated by the SF-DCT would not exceed $25 million. The NOI Procedures Order termed the $25 million amount the "aggregate value trigger." This was the amount Dow Corning had set forth in a settlement *offer* as the *sine qua non* of its agreement not to pursue its motion to enforce the terms of the Plan and Bankruptcy Rules.

The SF-DCT calculations predict that the aggregate settlement payments with respect to the *non-Disease* claims of Non-Matched Filers (*i.e.,* claims that could not be covered by *any* Rule 3005 Claim, including the Dow Chemical Rule 3005 Disease Claims) will exceed $25 million. The condition to Dow Corning's offer not to pursue its objection to the NOI Creditors has thus not been satisfied. Accordingly, Dow Corning

has filed the NOI Motion and this Memorandum seeking an Order that Non-Matched NOI Filers can participate in the SF-DCT only to the extent permitted by a Rule 3005 Claim so that the Non-Matched NOI Filers may receive a distribution only for a qualified Disease claim and not for any explant, rupture, or expedited release claim.

ARGUMENT

I. DOW CORNING HAS THE RIGHT TO OBJECT TO NON-MATCHED NOI CLAIMS BECAUSE THE $25 MILLION THRESHOLD HAS BEEN EXCEEDED

Under the NOI Procedures Order, DCC has the right to object to non-Disease claims of Non-Matched NOI Filers because the aggregate value of such claims as calculated by the SF-DCT through the process outlined below exceeds $25 million. *See* Order at 1. The Procedures required the SF-DCT to provide the CAC and the DRs with the following information for non-"Matched NOI Filers" in Classes 5, 6.1 or 6.2:

> a summary of the number and type of claims in each class, what option has been selected, the results of comparing the information submitted to the requirements of the Rule 3005 Claims, and the aggregate costs to the Settlement Facility if the claims are allowed at the selected levels. The Settlement Facility shall review the claims submitted for obvious points of disqualification and eliminate these claims from the calculations provided to the parties.

Procedures at ¶ VI. Dow Corning reserved all rights to object to NOI Filers if:

> either (i) the District Court determines that permitting participation by such claimants would have a material impact on payments to timely claimants, or (ii) the total aggregate settlement payments calculated for such claimants exceeds $25 million.

Id. at ¶ VIII.[2] Pursuant to the NOI Procedures Order, on May 30, 2006 the SF-DCT

[2] The NOI Procedures Order states "because DCC has agreed to such an amount, the Court will enter the $25 million amount as the 'aggregate value trigger' at this time. If the aggregate value exceeds $25 million, the Court will review the amount at that time." Dow Corning has the unquestionable right to enforce the terms of the Plan, and, as a settlement offer, voluntarily agreed to waive such rights if the total aggregate payment was below $25 million (or, if "the District Court determines that permitting participation by such claimants would have a material impact on payments to timely claimants"). There is no provision in the Plan that restricts the rights of Dow Corning to object to these attempted claims in

issued its report to the CAC and the DRs. The Claims Administrator found: "If Expedited Release and Paragraph 10 claims are included, *I believe the value of the Non-Matched filings will be approximately $35 million." See* Exhibit C (to be filed under seal by separate motion), May 30, 2006 Report of Claims Administrator David Austern (emphasis added). This analysis includes only the value of rupture, explant, and expedited release claims; it does not include the value of any Disease claims. If expedited release claims are not included, the value as reported by the Claims Administrator for the mid-range estimate is $32.1 million; if Paragraph 10 claims are also excluded, the value is $30 million.

Of course, the potential costs of allowing such Non-Matched NOI Filers into the settlement cannot be determined with exactitude. While the Claims Administrator concluded that he believed the value would be $35 million, his report also referenced higher and lower alternative values; the higher estimate was $45.9 million and the low estimate was $28.6 million. Thus, even under the SF-DCT's "low estimation," the cost of allowing the Non-Matched NOI Filers to receive non-Disease payments would exceed $25 million.[3]

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any way for any reason. To construe the Order in such a way as to limit DCC's rights would constitute an impermissible Plan amendment. The Bankruptcy Code prohibits the unilateral modification of the confirmed and substantially consummated Plan by Court order or otherwise. *See* 11 U.S.C. § 1127(b). *See also In re Berryman Products, Inc.*, 183 B.R. 463, 467 (N.D. Tex. 1995) (finding improper bankruptcy court order which permitted insurer to bring avoidance causes of action when reorganized debtor retained right under confirmed plan to initiate such causes of action); *Walnut Assoc. v. Saidel*, 164 B.R. 487, 495 (E.D. Pa. 1994) ("A reservation of jurisdiction beyond what is necessary to effectuate the plan of reorganization is beyond the power of the bankruptcy court. . .. The bankruptcy court cannot obtain that power merely by inserting a provision in the plan or order of confirmation reserving jurisdiction, nor can the bankruptcy court reserve such jurisdiction by issuing an order."); *In re Blackwelder Furniture Co. of Statesville, Inc.*, 31 B.R. 878, 882-83 (Bankr. W.D. N.C. 1983) (finding that bankruptcy court did not have the authority to reinstate after-acquired property security interest if the plan did not itself operate to do so, as the practical effect of such an order would be an inappropriate modification of the plan without conforming to the requirements for a post-confirmation modification set forth in 11 U.S.C. § 1127).

[3] The analysis properly includes a valuation of all categories of non-Disease claims held by all NOIs. Expedited claims must be valued because they are not covered within the scope of the Dow Chemical

Thus, the calculations presented by the SF-DCT confirm that the aggregate amount exceeds the $25 million threshold under the terms of the NOI Procedures Order.[4] The Procedures provide that the CAC and DCC "shall confer in good faith to consider alternatives to resolve the pending objections, failing which they can prosecute the pending objection to Rule 3005 Claims within 60 days of receiving the relevant information from the Settlement Facility." Procedures at ¶ VIII. Dow Corning and the CAC have so conferred but have been unable to reach an agreement. Dow Corning thus files the NOI Motion and this Memorandum to enforce the Plan and require that Non-Matched NOI Filers be allowed to pursue only those claims preserved by the underlying Rule 3005 Claim.[5]

Rule 3005 Disease Claims, which only covered Disease claims. The aggregate valuation must include the so-called "Paragraph 10" claims, who are individuals who filed or were deemed to have filed timely NOIs. These NOI Creditors are on the same footing as any other NOI claimant. Even if the Paragraph 10 claims and expedited claims are excluded, however, the value of the remaining NOIs still meets the aggregate value threshold. As stated by the Claims Administrator, *even if "Expedited Release and Paragraph 10 claims are excluded from the estimation, I believe the value of the unmatched filings will be approximately $30 million*." Exhibit C at 4 (emphasis added).

[4] Great time and effort was committed to the SF-DCT's analysis. The SF-DCT engaged Analysis Research Planning Corporation ("ARPC") to assist in this process. ARPC collected and analyzed the NOI Survey responses and data from the SF-DCT and the MDL-926 claims office. ARPC applied a conservative approach: In determining an aggregate value for the claims, ARPC assumed that approximately 83% of the Non-Matched NOI Filers would never file a claim for benefits, would have only low value claims, would ultimately have some or all their claims rejected or would eventually match to an RSP Rule 3005 Claim and, thus, be excluded. In addition, the estimates are founded upon current approval rates based on experiences to-date at the SF-DCT, even though current audits on quality control procedures indicate that approval rates are likely to be higher in the future. If that view is true, the estimates would understate the value of the Non-Matched NOI claims.

[5] The original deadline for filing the NOI Motion was July 31, 2006. After initial discussions between the CAC and DRs, the Court entered an Agreed Order extending the deadline for Dow Corning to renew its motion to August 30, 2006.

II. A NOTICE OF INTENT CLAIMANT CAN ASSERT ONLY THE CLAIM PRESERVED BY THE RULE 3005 CLAIM

A. Bankruptcy Rule 3005 and The Claims Filed Thereunder Limit The Claims of NOI Creditors To Those Claims The Co-Debtors Could Assert Against Dow Corning

1. Rule 3005 Limits Co-Debtor Claims To Those For Which It "Is or May Be" Co-liable with the Debtor

Under the Bankruptcy Code and Bankruptcy Rules, a Co-Debtor may file a claim in the name of such creditor if such creditor fails to timely file a proof of claim. Bankruptcy Code § 501(b) states that "[i]f a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim." Bankruptcy Rule 3005(a), which implements section 501(b), provides:

> **(a) Filing of claim.** If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution.

FED. R. BANK. P. 3005(a).[6]

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[6] Prior to 2005, the wording of the Rule was as follows:

> **(a) Filing of Claim.** If a creditor has not filed a proof of claim pursuant to Rule 3002 or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable, execute and file a proof of claim in the name of the creditor, if known, or if unknown, in the entity's own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

Amendments to the rule deleted a reference to filing claims on behalf of unknown creditors. As the 2005 Advisory Committee Note says: "[t]he amendment conforms the rule to § 501(b) by deleting language providing that the co-debtor files proof of the claim in the name of the creditor." FED. R. BANKR. P. 3005, Advisory Committee Note. The deleted language was in the Rule when Dow Chemical filed its 3005 claims. As noted in commentary, "the [3005] claim may be filed in the name of the co-debtor in the event the creditor's name is unknown." 9 Collier on Bankruptcy ¶ 3005.02 (15th ed. rev. 2006). Further, "[a]lthough the 2005 amendments to Rule 3005(a) eliminated any reference to unknown creditors (along

The Rule allows an entity that may be liable with the debtor (*e.g.*, an alleged joint tortfeasor) to assure that the debtor's estate bears its share of the debt to the common creditor (*e.g.*, a tort claimant), thus concomitantly reducing the claim against the co-debtor, by filing a proof of claim on that creditor's behalf when the creditor does not file her own claim. Section 501(b) and Rule 3005(a) limit the universe of entities eligible to file a Rule 3005 claim to co-debtors. Thus, an entity may file a Rule 3005 claim *only* with respect to claims for which it could be co-liable with the debtor, and there is no authority that would allow an entity to file other claims under Rule 3005(a). If a Rule 3005(a) claim is filed by an entity that is not co-liable with the debtor on a particular claim, the claim may be stricken. And, once that had been done, the creditor, having missed the bar date, would be ineligible to participate in the case with respect to such a claim. *See In re Ricks,* 253 B.R. 734, 742 n.33 (Bankr. M.D. La. 2000) ("The exception provided by Rules 1019(3), 3003, 3004 and 3005 do not eliminate the requirement of a proof of claim, however. Rule 1019(3), 3004 and 3005 merely eliminate the requirement that a creditor file the proof of claim.").

These principles limited Dow Chemical to filing only Disease claims under Rule 3005 because although Disease claims may have been asserted against Dow Chemical, Dow Chemical never manufactured breast implants and had no reason to believe that it could somehow be held liable for rupture or explant claims. Therefore, Dow Chemical was not a Co-Debtor with respect to rupture or explant claims and thus was not eligible to file, and therefore did not file, a Rule 3005 Claim with respect to such claims.

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with any requirement that the claim be in the name of the creditor), the failure to similarly amend Rule 3005(b) makes it clear that the rule still allows filing on behalf of unknown creditors." *Id.* at n.2.

Rule 3005(b) allows a creditor on whose behalf a Rule 3005 Claim is filed to file a notice of intent to act on her own behalf with respect to that particular Rule 3005 Claim. Rule 3005(b) provides that such creditor who files the notice "shall be substituted" for the Co-Debtor as the claimant with respect to the Rule 3005 Claim. By the plain and controlling terms of the Bankruptcy Rules, an NOI filer is only "substituted for the obligor with respect to *that claim*," FED. R. BANKR. P. 3005(b) (emphasis added), – *i.e.,* the claim that has been preserved – but cannot be substituted for other claims that were not preserved in the Rule 3005 Claim. *See In re Jones*, 238 B.R. 338, 344 (Bankr. W.D. Mich. 1999) ("A non-filing creditor with notice does not lose any rights in bankruptcy where a debtor files a proof of claim on its behalf. Such a creditor does not obtain a right to file an otherwise untimely claim simply because the debtor has provided for the creditor by filing a claim for the creditor in an amount which the creditor contests."). Thus, if a Rule 3005 Claim does not preserve a specific claim (*e.g.,* a non-Disease claim) on behalf of an individual who failed to file her own timely POC, then that individual cannot be "substituted" for the Co-Debtor with respect to such a non-preserved claim by filing an NOI under Rule 3005(b).

2. All Rule 3005 Claims in This Case Are Limited By the Scope of Co-Liability of the Co-Debtor

Several Co-Debtors filed timely Rule 3005 claims in this case. There is no dispute about the Rule 3005 Claims to the extent they identified individuals on whose behalf the Co-Debtor filed that Rule 3005 Claim. Rather, the issue here concerns the claims that fall under Non-Individual 3005 Claims (*i.e.*, claims that did not identify individuals by name but instead articulated characteristics or conditions that define and limit the individuals on whose behalf such Rule 3005 Claims were filed). No Non-Individual 3005 Claim is broad enough to cover every person who failed to timely file a

POC and wants to use a Rule 3005 Claim as a vehicle to assert any and all implant-related claims in this case. *See* Exhibit D (chart summarizing Rule 3005 Claims).

A Dow Chemical Rule 3005 Disease Claim (number 0579935-00) is the most pertinent Rule 3005 Claim here because it covers Claimants that "have or may be entitled to assert a Claim against the Debtor or any Trust allegedly arising from or related to a Breast Implant asserting damages on account of Disease and are entitled to participate in this Chapter 11 Case and any distributions made pursuant to a plan of reorganization." *See* Exhibit E.[7] "Disease" is defined as "autoimmune disease, scleroderma, systemic disorders, joint swelling, chronic fatigue, or any other medical symptom allegedly arising from a Breast Implant, but excluding any claims of non-systemic injury, including but not limited to contracture, disfigurement or rupture." *Id.* at ¶ A. The Dow Chemical Rule 3005 Disease Claim defines "Claim" as:

> all claims, demands, suits, causes of action, proceedings or any other rights or asserted rights to payment heretofore, now or hereafter asserted against the Debtor or any Trust, based upon or in any manner allegedly arising from a Breast Implant and *asserting damages on account of Disease*.

Id. at ¶ C (emphasis added). Thus, this Dow Chemical Rule 3005 Claim covers individuals (1) with a Dow Corning Breast Implant and (2) who are entitled to assert a Disease claim. It expressly excludes non-Disease claims, such as rupture. As explained above, Dow Chemical purposefully limited its Rule 3005 Disease Claims to preserve only claims alleging disease by unknown claimants who had not filed a timely POC

[7] The other Rule 3005 Claims are more limited and quite specific as to the types of claims covered. For example, a Rule 3005 Claim filed by Baxter Healthcare Corporation and Baxter International ("Baxter") applies to claimants who (i) registered for the MDL and (ii) asserted claims against Baxter related to breast implants, but (iii) had not, as of December 17, 1996, sued Baxter in a lawsuit that also named Dow Corning or involved breast implants manufactured by Heyer-Schulte with component parts supplied by Dow Corning. *See generally* Exhibit D.

because Dow Chemical's alleged co-liability with Dow Corning does not extend to rupture or other non-Disease claims.[8]

Since co-liability is the touchstone of a Rule 3005 Claim and any related NOI, it is not possible for an NOI Filer to "match" a Rule 3005 Claim if the NOI Filer asserts a claim beyond the scope of the co-liability that could legally have been asserted in the Rule 3005 Claim itself. Thus, Non-Matched NOI Filers with a Breast Implant are entitled to "be substituted for" a Disease claim under the terms of the Dow Chemical Rule 3005 Disease Claim but are *not* entitled to "be substituted for" rupture, explant, or expedited release claims for the simple reason that Dow Chemical, which was not a Co-Debtor with respect to those claims, did not file a 3005 Claim with respect to those claims *because it was ineligible to file a 3005 Claim with respect to those claims*.

B. The Plan Unambiguously Limits NOI Filers to Only Those "Rights as Specified" in the Rule 3005 Claim

The Plan Documents specifically address the treatment of NOI Creditors:

> (i) Filing of Notice of Intent. Claimants who did not timely file a Proof of Claim in the Case *but on whose behalf a Proof of Claim has been timely filed pursuant to Bankruptcy Rule 3005* ("Rule 3005 Claim or Claimant") may file a notice of intent with the Court as provided in Bankruptcy Rule 3005 to act on her or his own behalf with respect to such Claim ("Notice of Intent"). Notwithstanding Bankruptcy Rule 3005, a Rule 3005 Claimant will be entitled to file the Notice of Intent on or before 90 days after the Effective Date. Such Claimant will thereby have *all rights as specified in the 3005 filing* and be subject to all deadlines applicable to Claimants who are deemed registered under (a) above. The Claims of Rule 3005 Claimants who do not timely file a Notice of Intent shall be disallowed.

SFA, Annex A, Section 2.05(b)(i) (emphasis added). This provision adopts the standards of the Bankruptcy Rule but extends the time period for filing an NOI to 90

[8] Dow Chemical also filed a 3005 Claim covering disease claims of raw materials claimants that is otherwise identical in material respects to the 3005 Disease Claim covering breast implants. *See* Exhibit D.

days after the Effective Date. The Plan thus expressly and unambiguously confirms that NOI Creditors shall have only the rights *as specified* in the Rule 3005 Claim filing.

It is well-settled that "a confirmed plan is a contract. Once a plan is confirmed, it is binding upon the debtor and all claimants dealt with thereunder. . . . The plan and order of confirmation fixes the rights of the parties." *In re Wrenn*, 178 B.R. 792, 796 (W.D. Mo. 1995) (citations omitted) (denying motion to amend POC to treat creditor's claims as secured, finding that creditors "rights were defined and limited by the Plan" and the creditor "cannot now attempt to elevate the status of a part of its claim"). Thus,

> [o]nce a plan is confirmed, neither a debtor nor a creditor may assert rights that are inconsistent with its provisions. Absent fraud, parties must be able to rely on the confirmed plan. A strong policy favors enforcement of the plan of reorganization because too many rights of too many interests have relied on the finality of the confirmation order.

Id. The Plan clearly defines and limits the rights of the NOI Creditors and this provision cannot be changed.

C. NOI Filers Cannot Amend the Claims Filed by the Co-Debtors

Even if Rule 3005 did not limit NOI Creditors to the claims that could have been and were, in fact, preserved, *and even if* the confirmed Plan in this case itself did not expressly limit NOI filers to the rights as already specified in the timely filed Rule 3005 Claims in this case, general principles of bankruptcy law would prohibit the addition of claims for rupture, explant or expedited relief to the Dow Chemical Rule 3005 Disease Claims under the guise of "amendment."

Courts agree that bar dates must be protected to facilitate orderly reorganization. Thus, courts have concluded that claimants cannot amend POCs in such a way as to undermine or circumvent the bar date. *In re Enron Corp.*, 298 B.R. 513

(Bankr. S.D.N.Y. 2003); *In re Best Refrigerated Exp., Inc.*, 204 B.R. 44, 47 (Bankr. D. Neb. 1996) ("bankruptcy courts are not required to permit late amendments which are primarily used as a back-door route to secure bar-date extensions.").[9]

Thus, claimants cannot use a post-bar date amendment to a proof of claim to file what is in reality a new claim. A post-bar date amendment can be valid only if it (i) corrects a defect of form in the original claim; (ii) simply describes the original claim with greater particularity; or (iii) pleads a new theory of recovery on the facts set forth in the original claim. *See In re Enron Corp.*, 419 F.3d 115, 133 (2d Cir. 2005); *In re Gurley*, 235 B.R. 626, 633 (Bankr. W.D. Tenn. 1999). As the court stated in *In re Chavis,* 160 B.R. 804 (Bankr. S.D. Ohio 1993), *aff'd*, 47 F.3d 818 (6th Cir. 1995):

> Courts consistently distinguish between an amendment of a timely filed claim and the filing of a new claim. . . . Amendments to claims should be freely permitted absent contrary equitable concerns. … *Amendments filed after the claims bar date, however, should be scrutinized closely to ensure that the amendment is genuine rather than the assertion of an entirely new claim.*

Id. at 805 (citations omitted, emphasis added). Applying that logic, "many courts have cautioned that post bar date amendments must be scrutinized 'to assure that there [is] no attempt to file a new claim under the guise of an amendment.'" *In re Interco Inc.*, 149 B.R. 934, 937 (Bankr. E.D. Mo. 1993) (*quotation omitted*). *See also In re Bondi's Valu-King, Inc.*, 126 B.R. 47, 50 (N.D. Ohio 1991) (amendment that is "merely a guise for filing an

[9] "A bar order in a chapter 11 case serves the important purpose of enabling the parties in interest to ascertain with reasonable promptness the identity of those making claims against the estate and the general amount of the claims, a necessary step in achieving the goal of successful reorganization." *In re Spiegel, Inc.*, 337 B.R. 816, 819 (Bankr. S.D.N.Y. 2006). *See also In re Enron Corp.,* 328 B.R. 75, 86 (Bankr. S.D.N.Y. 2005) (bar date is "critically important" to administration of successful Chapter 11 case, does not function "merely as a procedural gauntlet" but as "an integral part of the reorganization process" and is thus "likened to a statute of limitations which generally must be strictly observed.") (citations omitted).

untimely new claim" is not permitted); *In re Enron Corp*., 419 F.3d at 133; *In re Friesenhahn*, 169 B.R. 615, 619 (Bankr. W.D. Tex. 1994) ("The principal concern in the assessment of an amendment to a claim is that there not be a *new* claim filed.") (emphasis in original); *In re Integrated Res., Inc.*, 157 B.R. 66, 70 (S.D.N.Y. 1993) (noting that courts must subject post bar date amendments to careful scrutiny to assure that there was no attempt to file a new claim under the guise of amendments).

An amendment to add a non-Disease claim does not satisfy this test. First, such amendment would clearly not correct a "defect." The Dow Chemical Rule 3005 Disease Claims are not "defective" claims in need of curing or "amending" – they were never intended to cover non-Disease claims.[10] Second, such amendment would not describe "with greater particularity" the Dow Chemical Rule 3005 Disease Claims. Rather, it would add new claims to it under the "guise" of amendment. Finally, such amendment would not plead a new theory of recovery on the same set of facts set forth in the original claim. The original claims were filed to preserve unknown Disease claims because of the allegations of Dow Chemical's co-liability for such claims. Those

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[10] Indeed, since they *could not* have covered non-disease claims, not only are they not defective, they are *not capable* of being "amended" to add claims that Dow Chemical could not have preserved. For example, in *In re Ellington,* 151 B.R. 90 (Bankr. W.D. Tex. 1993), an original proof claim was filed in the name of a bank (First Republic) at a time that bank no longer owned any claims against the estate because its assets had already been sold by the FDIC to another bank (NCNB). *Id.* at 95. The court thus found the original proof of claim was not properly filed, and held:

> Absent a claim properly filed *by NCNB* (the owner of the claim), NCNB had no proof of claim to amend. … '[A]n absolute prerequisite to allowance of an amendment is the existence of something filed in the bankruptcy court *capable of being amended.*'

*Id a*t 95 (emphasis in original) (quotation omitted). *See also In re South Atlantic Financial Corp*., 767 F.2d 814, 819 (11th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (before court can permit amendment, something capable of amending must be filed). Just as the amended proof of claim in *In re Ellington* was found to be ineffective because "it had nothing to amend," so, too, in this case, any "amendment" of a Dow Chemical Rule 3005 Disease Claim would be ineffective since Dow Chemical had no right to file non-Disease claims and, thus, there are no such claims to amend. 151 B.R. at 95.

preserved claims involve factual allegations of disease processes and have proof requirements wholly different from the factual allegations and proof required for rupture or explant claims, which are based on allegations of device failure.

An otherwise Non-Matched NOI Filer whose Disease claim was preserved by a Dow Chemical Rule 3005 Disease Claim cannot amend that claim to assert non-Disease claims because they are separate claims that involve entirely different facts and proof, and an effort to file a rupture, explant or expedited claim under the "guise" of an "amendment" to the Dow Chemical Rule 3005 Disease Claims taken over by the NOI claimant would be an impermissible filing of a new claim.

A purported "amendment" that states legal and/or other factual allegations different from those in the original claim is deemed to be an impermissible new claim. *See In re Enron Corp.*, 328 B.R. 75, 86 (Bankr. S.D.N.Y. 2005)(finding claims of market manipulation in the gas markets were not proper amendments of original claims that the debtors manipulated the wholesale electrical markets, reasoning that underlying alleged practices by the debtors in the two markets were different and the legal analysis regarding each was different, and concluding amendment "would change the nature of the original Claims by introducing significantly different factual and legal allegations.");[11] *In re Channelinx, Inc.*, 317 B.R. 694 (Bankr. D. S.C. 2004) (amendment after confirmation seeking to recover on fraud, negligent misrepresentation or breach of fiduciary duty theory could not be regarded as amendment to timely filed proofs of claim, which asserted only contract-based claims, but were rather new claims under the

[11] *See also In re Asia Global Crossing, Ltd.*, 324 B.R. 503, 509 (Bankr. S.D.N.Y. 2005) (holding that avoidance claims did not relate back where gravamen of original claims were debtor's officers and directors' diversion of revenues and misallocation of expenses, while avoidance claims focused on six identified instances in which claimant transferred property from its bank accounts to debtor and thus arose from different sets of facts and creditor "must necessarily rely on different evidence to prove its breach of fiduciary duty claims and the avoidance claims").

guise of amendment); *In re Friesenhahn*, 169 B.R. 615, 620-21 (W.D. Tex. 1994) (attempts to add new claims that do not arise out of the same nucleus of facts are not permitted); *In re Pennsylvania Truck Lines, Inc.*, 189 B.R. 331 (Bankr. E.D. Pa. 1995) (contractual indemnity claim unrelated to timely claim for unpaid services rendered to debtor); *In re Lee Way Holding Co.*, 178 B.R. 976, 980 (Bankr. S.D. Ohio 1995) (proposed amendment based on rejection of leases and resulting damages not based on same facts as original claim for rent, maintenance and taxes due); *In re Spiegel, Inc.*, 337 B.R. 816, 820 (Bankr. S.D.N.Y. 2006) (amended statutory claims for contract rejection damages asserted new liabilities and did not plead theory of recovery on same facts as original claim for pre-petition lease obligations and should be disallowed).

In *In re Chavis,* the court found that untimely filed claims for taxes for new and different years than covered in the original claim were "not amendments, but rather, newly asserted claims." 160 B.R. at 806. In reasoning fully apt to the present case, the court found this conclusion was supported by the narrow purpose of permitting amendments:

> [a]mendments are proper to correct procedural defects in the original claim; provide greater detail to support the claim or other reasons which directly relate to the original claim. . . Here, the IRS was not attempting to clarify the [original claim] with the [subsequent claim]. Instead, it sought to add new tax liability for 1988. Thus, the [subsequent claim] is best characterized as a new claim and not an amendment to the [original claim.]

Id.[12] *See also In re Gurley*, 235 B.R. at 632 ("[a]n amendment that sets forth a wholly new ground of liability … should not be permitted to relate back to the original filing."). In

[12] In contrast, courts may permit amendments that simply alter a claim amount. For example, in *In re Kolstad*, 928 F.2d 171, 174-75 (5th Cir. 1991) , the debtor had filed a claim under Code section 501(c) and Rule 3004 in the name of the IRS for employment taxes. The IRS amended the claim by increasing the amount but not changing the type of tax in the claim. The court allowed the amendment, but cautioned that "courts that authorize amendments must ensure that corrections or adjustments do not set forth wholly new grounds of liability." *Id*. at 175.

Gurley, the court found late filed requests for payment of administrative expenses by a trustee should be reviewed under the same standard as that applied to late filed proofs of claim, and held that the trustee's request for compensation for his services and expenses was "wholly separate and apart" from his timely filed request for reimbursement of expert witness fees and attorneys fees and expenses. *Id*. The court reasoned the "purported amendment is in fact a new claim, which was not timely filed, and does not relate back to the originally filed request." *Id.*[13]

The mere fact that non-Disease claims and Disease claims may arise from the same underlying implant is irrelevant (indeed, they may not even arise from the same implant). For example, in *In re Houbigant,* 188 B.R. 347, 357-58 (Bankr. S.D.N.Y. 1995), the court found that a claim for breach of a license agreement relating to a purported grant of the right to sell products without restrictions in violation of an exclusivity provision could not be allowed as an "amendment" of a claim for breach of the same licensing agreement arising from failure to sell products and use best efforts to sell at a competitive price. The court reasoned that although both claims "arise from alleged breaches…the conduct, transaction or occurrence at issue in the [first] claim is substantially different from that asserted in the [second] claim. Because the latter is a new claim based on different facts, it will not be allowed as an amendment to the [first] claim." *Id.* at 358. Similarly, in *In re Interco*, creditors had filed timely proofs of claim

[13] *See also In re Friesenhahn*, 169 B.R. at 619 (responsible person penalties were not sufficiently related to personal income taxes to which original claim related, nor did they relate to the same nucleus of facts); *In re International Horizons, Inc,* 751 F.2d 1213, 1216-17 (11th Cir. 1985) (new claim for alleged underpayment that related to disputed (non)recognitions did not relate to original claims for withholding and FUTA taxes although all were generically income tax claims); *In re Milan Steel Fabricators, Inc.*, 113 B.R. 364, 367 (Bankr. N.D. Ohio 1990) (finding amended 1983 tax claim to be new and different from timely claim for similar 1981 taxes); *In re Unroe*, 937 F.2d 346, 349 (7th Cir. 1991) (claim for corporate tax liability new and different from timely filed claim for interest); *In re Lykes Bros. Steamship Co., Inc*., 217 B.R. 304, 313 (Bankr. M.D. Fla. 1997) (amended claim for setoff rights would be secured claim that could not relate back to initial unsecured claim but rather was new claim that was barred by bar date).

for rent and maintenance, but then filed late proofs of claim as amendments seeking to add claims for statutory contract rejection damages. 149 B.R. at 937. Although related to the same leases, the court held that late proofs of claim were "distinctly different," asserting a different measure of damages under different sections of the Code and thus "cannot be construed as amendments to the timely filed proofs of claim." *Id.* at 938.

CONCLUSION

For the reasons stated above, the Court should enter an order directing that (1) only those NOI Creditors who match by name or by strict definition to a timely Rule 3005 Claim can receive distributions under the Plan, (2) NOI Creditors may assert and receive distribution only for those categories of claims authorized by the Rule 3005 Claims upon which the claimant relies, and (3) NOI Creditors who rely on a Dow Chemical Rule 3005 Disease Claim as the basis to assert a claim are limited to Disease claims and may not file or receive distribution for any non-Disease claim.

Respectfully submitted this 30th day of August 2006.

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