UNITED STATERS DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CROSS-MOTION TO DISMISS THE "MOTION FOR REVERSAL" FILED BY YEON-HO KIM, ESQ. OF A DECISION BY THE CLAIMS ADMINISTRATOR OF THE SETTLENT FACILITY-DOW CORNING TRUST

The Settlement Facility-Dow Corning Trust ("SF-DCT") opposes the Motion for Reversal of a decision of the SF-DCT Claims Administrator regarding claims filed by Yeon-Ho Kim, Esq. on behalf of his clients. Because the Motion for Reversal is an appeal from an adverse decision of the Claims Administrator, the SF-DCT 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 the appeal and for such other and further relief as the Court deems just and proper. The SF-DCT also supports the Cross-Motion filed by Dow Corning Corporation in response to the Motion for Reversal. Pursuant to the Amended Joint Plan of Reorganization, there is no right of appeal from SF-DCT adverse claims decisions. Accordingly, this Court lacks jurisdiction over Mr. Kim's challenge to such a decision.

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

Dated: November 3, 2011

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2011, the foregoing motion, memorandum (and proposed order) has been electronically filed with the Clerk of Court using the ECF system, and same has been mailed via Certified Mail/Return Receipt Requested or via email to the following:

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UNITED STATERS DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

MEMORANDUM IN SUPPORT OF SETTLEMENT FACILITY-DOW CORNING TRUST ("SF-DCT") CROSS-MOTION TO DISMISS THE MOTION FILED BY YEON-HO KIM, ESQ. ("MOTION FOR REVERSAL") AND IN SUPPORT OF DOW THE CORNING CROSS-MOTION TO DISMISS THE MOTION FOR REVERSAL

Settlement Facility-Dow Corning Trust ("SF-DCT"), 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), moves herein to dismiss the "Motion for Reversal of Decision of SFDCT Regarding Korean Claimants" ("Motion for Reversal") filed by Yeon-Ho Kim, Esq., and supports and adopts the Cross-Motion of Dow Corning Corporation ("Motion to Dismiss") to dismiss the Motion for Reversal.

As noted in the Motion to Dismiss as well as the Motion for Reversal, the Motion for Reversal is an appeal from a decision by the SF-DCT Claims Administrator. Appeals from adverse Claims Administrator's decisions, pursuant to the SFA (Annex A, Section 8.05) must be brought, exclusively, before the SF-DCT Appeals Judge. Clearly, the Motion for Reversal, by its terms, is an appeal of the SF-DCT's Claims Administrator's decision regarding the processing of certain claims filed by Yeon-Ho Kim. The Motion for Reversal was in response to an August 22, 2011 letter from the SF-DCT Claims

Administrator advising Mr. Kim that: (1) the SF-DCT would no longer accept Affirmative Statements as Proof of Manufacturer ("POM") from his clients; (2) that his clients who had not submitted a claim form would have to submit other acceptable POM; and (3) his clients who had received benefits on the basis of Affirmative Statements would not be eligible for further benefits, including Premium Payments.

The August 22, 2011 letter was the end result of several years of claim reviews and communications with Mr. Kim regarding the quality of the approximately 1,750 claims filed by Mr. Kim. (One hundred and twenty (120) of those claims remain eligible for review based on claimant records.) The prior SF-DCT acceptance of Affirmative Statements to establish POM for approximately 1,400 of Mr. Kim's clients was due to Mr. Kim's assertion that medical records in Korea were routinely destroyed after ten years, an assertion that Mr. Kim subsequently admitted was false. Mr. Kim, by his own admission, has confirmed that the physicians who signed the Affirmative Statements he filed in support of POM had no "basis for concluding that Dow Corning products were, in fact, used for those patients' implants." Later, Mr. Kim explained to the SF-DCT that he relied upon "Claimant recollection" to determine that his clients had Dow Corning implants.

As a result of the unreliability of the Affirmative Statements he submitted, Mr. Kim was advised that Affirmative Statements for future claims he filed would not be accepted in support of Dow Corning POM.

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." SFA §5.01(b). In addition, 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." SFA §5.04(b). It also gives the Claims Administrator the authority, and imposes upon him or her the obligation, "to institute claim-auditing procedures and other procedures designed to detect and prevent the payment of fraudulent Claims." SFA §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 the Claims Administrator to deny the claim. SFA 5.04(a)(iii).

Specifically, with respect to POM, the "threshold eligibility criteria for all settling claimants" is acceptable Proof of Manufacturer, *i.e.*, that the claimant had a Dow Corning breast implant. SFA § 5.01 (f); also, see SFA §§ 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 SFA Section 5.01, to determine that there is acceptable proof of a Dow Corning implant according to Schedule I to this Annex A." SFA §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." SFA §6.02(b)(ii).

The SF-DCT Claims Administrator's previous decision to accept Affirmative Statements for Mr. Kim's clients was predicated upon Mr. Kim's argument that routinely medical records in Korea are destroyed after 10 years. Subsequently, the SF-DCT

discovered that Mr. Kim, apparently with some deliberation, had misled the SF-DCT with respect to this destruction practice. For instance, when certain of Mr. Kim's clients' claims were submitted for Disease review, according to SF-DCT practice, Mr. Kim was asked to submit medical records to establish the extent of the claimants' injuries, if any. Miraculously, notwithstanding Mr. Kim's earlier assertions with respect to medical records, Mr. Kim submitted medical records that were substantially more than ten years old. Stated differently, Mr. Kim routinely submitted medical records more than ten years old in order to establish proof for Rupture, Explant and/or Disease benefits. Following scores of such submissions and after further discussions with Mr. Kim, SF-DCT approval of the Affirmative Statements for Mr. Kim's clients was withdrawn.

During the past seven years, successive Claims Administrators have attempted to accommodate the alleged idiosyncratic nature of Korean medical records retention policies. Similar accommodations, on occasion, have been provided to United Kingdom and German claimants, particularly with respect to the paucity of operative reports to establish eligibility for Rupture benefits, and specifically when such reports are compared to far longer reports typical of United States operative reports. However, when the SF-DCT discovers it has been misled as to a foreign country's medical practices, the Claims Administrator has no choice but to review the credibility of the statements that have been relied upon to establish foreign medical practices.

The Dow Corning 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 the claim must be rejected. Accordingly, based on the information contained herein, and certain admissions set forth in the Motion for Reversal, the Claims Administrator could not approve the POMs submitted by Mr. Kim. In addition, 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 Mr. Kim's clients' claims. *See* Ex. B (SFA), §5.04(a)(iii).

CONCLUSION

For the foregoing reasons, SF-DCT respectfully requests that the Court grant its Motion to dismiss the Motion for Reversal and supports the Dow Corning's Cross-Motion to dismiss the Motion for Reversal.

Dated: November 3, 2011

Respectfully submitted,

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