

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In Re:

Settlement Facility Dow Corning Trust.

**Case No. 00-00005
Honorable Denise Page Hood**

**ORDER GRANTING JOINT MOTIONS TO DISMISS APPEAL
AND
DENYING MOTION FOR COURT ORDER DIRECTING SETTLEMENT
FACILITY TO ISSUE REPLACEMENT CHECK OR IN THE
ALTERNATIVE TO PAY SETTLEMENT FUNDS WITH INTEREST**

I. BACKGROUND

This matter is before the Court on a Joint Motion filed by the Reorganized Debtor Dow Corning Corporation (“Dow Corning”)¹ and the Claimants’ Advisory Committee (“CAC”) (jointly, “Movants”) (Doc. No. 1001) for an order dismissing Claimant Susan Gaines’ Motion for a court order directing the Settlement Facility-Dow Corning Trust (“SF-DCT”) to issue a replacement check, or, in the alternative, to pay interest because of late issuance of the check, or, in the alternative, to set aside the SF-DCT’s finding of a settlement (Doc. No. 988). The Movants consider Gaines’ Motion as an appeal from the Claims Administrator’s decision. The Movants argue

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

that Gaines' motion is moot because a replacement check was issued and that the Court lacks authority to review the remaining request to pay interest due to the delay in the payment.

Claimant, formerly known as Susan Lynn Kitko, filed a motion to issue a replacement check for missing settlement funds, or in the alternative, to enter a judgment with pre-judgment interest against the SF-DCT for failing to pay settlement funds, or in the alternative, to set aside the SF-DCT finding of settlement of claims and to direct the SF-DCT to review a full disease claim. (Doc. No. 988, Gaines Motion) On December 15, 2006, Claimant states she received an "unsolicited" Disease Cash-Out Payment Letter from the SF-DCT, as well as an "unsolicited" check in the amount of \$3,000. Claimant asserts she never accepted the settlement check because she never cashed the check. In 2006 or 2007, Claimant indicates she was informed by the SF-DCT that her claim was "ineligible for a full disease review" because the SF-DCT did not receive back the unendorsed settlement check in the amount of \$3,000. Claimant's counsel requested an Error Correction Review on July 25, 2013 before the SF-DCT. The SF-DCT issued a denial to the Error Correction Review on August 29, 2013.

On May 28, 2014, Claimant wrote a letter to the SF-DCT requesting the re-issuance of the cash-out check. Claimant did not receive a response and on October

7, 2014, Claimant issued a demand for the re-issuance of the cash-out check. Claimant asserts she did not receive the payment. This motion was thereafter filed by Claimant on November 13, 2014. In a Notice filed December 9, 2014, Claimant asserts that she received the reissued check on December 1, 2014 from the SF-DCT, which she cashed. (Doc. No. 1002, Notice, ¶4) Claimant asserts that interest is due to her because of the delay in payment. *Id.* at ¶4. She also seeks payment for mailing costs Claimant incurred in mailing materials to the SF-DCT and the Court. *Id.* at ¶6. Claimant seeks a judgment in the amount of \$1,912.11. *Id.* at ¶7.

The Claims Administrator for the SF-DCT submitted a declaration indicating that Claimant's Silicone Material ("Class 7") claim form for a disease payment was received by the SF-DCT on November 18, 2004. (Doc. No. 1001, Ex. 4, Phillips Decl., ¶4) The SF-DCT offered Class 7 claimants to receive an immediate "cash out" payment instead of waiting several years to potentially receive a disease claim payment. *Id.* at ¶5. To reject the payment, the claimant was required to notify the SF-DCT of the rejection; otherwise, it was assumed the claimant accepted the offer. *Id.* The SF-DCT sent the Disease Cash-Out Payment settlement check to Claimant on December 15, 2006; the check was never returned to the SF-DCT. *Id.* at ¶¶6-7. The accompanying December 15, 2006 letter indicated that Claimant accepted the Disease Cash-Out Payment and fully settled her Class 7 claim. *Id.*

Claimant requested a reconsideration of the SF-DCT's finding on July 25, 2013. *Id.* at ¶9. The Claims Administrator denied Claimant's request on August 29, 2013. *Id.* at ¶10. The Appeals Judge upheld the Claims Administrator's decision on November 1, 2013. *Id.* at ¶12. The Claimant thereafter requested re-issuance of the settlement check, which was reissued by the SF-DCT on November 17, 2014. *Id.* at ¶¶13-14.

II. ANALYSIS

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

The Settlement Facility-Dow Corning Trust ("SF-DCT") implements the claims of those claimants who elected to settle their claims under the Settlement Program of

the Plan. (Plan, § 1.131) The SF-DCT was established to resolve Settling Personal Injury Claims in accordance with the Plan. (Plan, § 2.01) The SFA and Annex A to the SFA establish the exclusive criteria by which such claims are evaluated, liquidated, allowed and paid. (SFA, § 5.01) The process for resolution of claims is set forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01) Section 5.05 of the SFA provides that Dow Corning and the CAC may submit joint interpretations and clarifications regarding submissions of claims to the Claims Administrator. (SFA, § 5.05) The Court may approve an amendment to the SFA after notice and hearing as directed by the Court. (SFA, § 10.06) Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) There is no provision under the Plan or the SFA which allows a claimant to submit an issue to be interpreted by the Court or to amend the Plan.

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

right to appeal directly to the Appeals Judge. The Plan provides that “[t]he decision of the Appeals Judge is final and binding on both Reorganized Dow Corning and the claimant.” (SFA, Annex A, § 6.02(vi))

Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). Section 1127(b) is the sole means for modification of a confirmed plan which provides that the proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of the plan. 11 U.S.C. § 1127(b). “In interpreting a confirmed plan courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors.” *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). “An agreed order, like a consent decree, is in the nature of a contract, and the interpretation of its terms presents a question of contract interpretation.” *City of Covington v. Covington Landing, Ltd. P’ship*, 71 F.3d 1221, 1227 (6th Cir. 1995). A court construing an order consistent with the parties’ agreement does not exceed its power. *Id.* at 1228.

Based on the Claims Administrator’s Declaration, the check was reissued upon Claimant’s request. This renders Claimant’s motion to reissue the check as moot. An action will become moot when the requested relief is granted or no live controversy remains. *See, Thomas Sysco Food Serv. v. Martin*, 934 F.2d 60, 62 (6th Cir. 1993).

An actual controversy must exist at all stages of review and not simply on the date the action is initiated. *Id.*

In addition, the Plan's language is clear and unambiguous that the decision of the Appeals Judge is final and binding on the claimants and the Reorganized Dow Corning. The Plan provides no right of appeal to the Court. The Court also has no authority to review Claimant's request to order the SF-DCT to pay interest and costs. The Court does not have the authority under the Plan to set aside the SF-DCT and the Appeals Judge's finding that Claimant settled her Class 7 claim. In any event, as admitted by Claimant in her Notice, she cashed the reissued settlement cash-out check.

Accordingly,

IT IS ORDERED that Claimant Susan Gaines' Motion for a court order directing the Settlement Facility-Dow Corning Trust to issue a replacement check, or, in the alternative, to pay interest because of late issuance of the check, or, in the alternative, to set aside the SF-DCT's finding of a settlement [No. 988] is DENIED.

IT IS FURTHER ORDERED that the Joint Motions to Dismiss Appeal [**No. 1001**] and Appeal Reply [**No. 1003**] are GRANTED. Any motion or appeal by Claimant Gaines as to her claim before the SF-DCT is DISMISSED.

/s/ Denise Page Hood
DENISE PAGE HOOD
Chief United States District Judge

DATED: December 12, 2018

CERTIFICATE OF SERVICE/MAILING

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

Dated: December 12, 2018

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