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
	§	

RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO AMEND ANNEX A TO THE SETTLEMENT FACILITY AND FUND DISTRIBUTION AGREEMENT TO ADOPT AN ADDITIONAL PROOF OF MANUFACTURER PROTOCOL

Dow Corning Corporation ("Dow Corning") respectfully submits this *Response To Motion Of Claimants' Advisory Committee To Amend Annex A To The Settlement Facility And Fund Distribution Agreement To Adopt An Additional Proof Of Manufacturer Protocol.*

The Claimants' Advisory Committee ("CAC") filed the *Motion Of Claimants' Advisory Committee To Amend Annex A To The Settlement Facility And Fund Distribution Agreement To Adopt An Additional Proof Of Manufacturer Protocol* ("CAC Motion to Amend") in conjunction with its Response to the *Motion To Deem Pre-1971 Silicone Gel Breast Implants Dow* ("Motion to Deem") filed by the law firm of Houssiere, Durant & Houssiere, LLP ("Houssiere"). Adopting much of the flawed logic of the Motion to Deem while ignoring all of the controlling legal principles and Amended Joint Plan of Reorganization ("Plan") provisions as did Houssiere, the CAC Motion to Amend unilaterally requests that this Court enter an order that medical records or "other documentation" that states a claimant was implanted with a silicone gel breast implant

between 1963 and 1970 and that does not contain any identifying or contradictory information "shall be deemed to be acceptable proof of a Dow Corning silicone gel breast implant." CAC Motion to Amend at 1.

Apparently recognizing that the Motion to Deem was flawed and procedurally invalid, as Dow Corning has already described in its Response to the Motion to Deem, the CAC feels compelled to file its own motion. The CAC Motion to Amend, however, seeks the same inappropriate and unauthorized relief by unilaterally asking this Court to simply "order" that the Plan now be amended – without Dow Corning's consent and, indeed, over its objections. As stated in Dow Corning's Response to the Motion to Deem, and as set forth below, the Court cannot grant such relief, and it is of no import that the CAC now seeks this unilateral "amendment" instead of Houssiere.[1]

The CAC's request violates a fundamental principle of the negotiated, confirmed and now substantially consummated Plan – any such amendment that would result in making an ineligible claim eligible requires the prior written consent of the CAC *and* Dow Corning by the plain and unalterable language of the Plan. *Settlement Facility and Fund Distribution Agreement* § 10.06. Ignoring such language and imposing such a non-consensual amendment to the Plan's terms would violate a fundamental tenet of bankruptcy law: a plan of reorganization cannot be modified by the Court after substantial consummation. Were it otherwise, *neither* side (in this, or any other

[1] Dow Corning will not repeat at length the arguments it made in its Response to the Motion to Deem but adopts them herein in response to the Motion to Amend.

bankruptcy case) could ever find finality or certainty in a settlement or confirmed plan of reorganization, and the Court would set a precedent for endless motion practice by any parties who wish to reshape the Plan's core payment eligibility requirements. The CAC Motion to Amend must therefore be denied because it blatantly asks this Court to do, on its own, what the Plan and settled bankruptcy law clearly do not permit – amend the confirmed and substantially consummated Plan without the agreement of both Plan Proponents and begin to undo the hard-fought, complex bargain struck between the parties in the bankruptcy case. Even worse, the CAC's request for relief is predicated on a selective miscitation of the governing Plan language. As shown in Section I-A of the Argument below, the CAC's brief quotes only half of the text of Section 10.06 of the Settlement Facility Agreement, implying that the Plan can be modified. Incredibly, the remaining text of Section 10.06 – which the CAC replaces with an ellipsis – clearly provides that the Plan "shall *not*" be modified without Reorganized Dow Corning's consent, among other things.

In any event, as shown in Dow Corning's Response to the Motion to Deem, numerous non-Dow Corning implants were used before 1971. Section IIA of the Argument below provides illustrative examples of implants submitted to the SF-DCT that cannot be Dow Corning because they predate Dow Corning's entry in the market or because they clearly can be identified as the type and composition of another manufacturer.

Argument

I
The Court Cannot Amend The Confirmed And Substantially Consummated Plan To Broaden Eligibility Criteria At The Unilateral Request Of The CAC.

The CAC asks this Court to read out of the Plan the fundamental requirement for making an amendment such as proposed here – namely, that both Dow Corning and the CAC must consent. This absolute and unalterable requirement, purposefully written into the Plan to specifically forbid the kind of result the CAC seeks, is inexplicably ignored by the CAC.

A. Section 10.06 Specifically *Prohibits* Re-Writing The Plan To Create A New Form Of Proof Without Dow Corning's Consent.

The CAC asks this Court to amend Annex A to the Settlement Facility and Fund Distribution Agreement ("Settlement Facility Agreement") on the supposed grounds that Section 10.06 of the Settlement Facility Agreement authorizes such action after notice and hearing but without the consent of both the Debtor's Representative and the CAC. *See* CAC Motion to Amend at 7. Somewhat incredibly, the CAC does so by quoting *only the first half* of that provision:

> [t]his Agreement may be amended to resolve ambiguities, make clarifications or interpretations or to correct manifest errors contained herein by an instrument signed by the Reorganized Dow Corning and the Claimants' Advisory Committee. All other amendments, supplements, and modifications shall require approval of the Court after notice to the Reorganized Dow Corning, the Shareholders, and the Claimants' Advisory Committee and such other notice and hearing as the Court may direct . . .

See CAC Motion to Amend at 7 *(quoting Settlement Facility Agreement* § 10.06). When the entire text of § 10.06 is read, it is clear that the CAC has deliberately left out the controlling language prohibiting Plan amendments without Reorganized Dow Corning's consent (the omitted portion is in bold):

> [t]his Agreement may be amended to resolve ambiguities, make clarifications or interpretations or to correct manifest errors contained herein by an instrument signed by the Reorganized Dow Corning and the Claimants' Advisory Committee. All other amendments, supplements, and modifications shall require approval of the Court after notice to the Reorganized Dow Corning, the Shareholders, and the Claimants' Advisory Committee and such other notice and hearing as the Court may direct ***provided that without the prior written consent of the Reorganized Dow Corning and the Claimants' Advisory Committee the Agreement shall not be amended, supplemented or modified if such amendment, supplement, or modification would, directly or indirectly: (i) increase the liquidation value or settlement value of any Claim,* or the amount or value of any payment, award or other form of consideration payable to or for the benefit of a Claimant, including, without limitation, any cash payment or other benefits provided to a Claimant, (ii) affect the validity, requirement for or effectiveness of any release of the Released Parties, or any of them, (iii) increase the amount or change the due date of any payment to be made by the Debtor to the Settlement Facility pursuant to the Plan or the Funding Payment Agreement, (iv) affect the right of the Settlement Facility to receive payments pursuant to the Insurance Allocation Agreement, or (v) cause the Trust to no longer qualify as a Qualified Settlement Fund.**

Settlement Facility Agreement § 10.06 (bolded text omitted from CAC citation; other emphasis added). These terms could not be clearer – before the Court can consider any amendment that would increase the settlement value of a claim, both the CAC and Dow Corning must consent. Obviously, any amendment that would result in making an ineligible claim eligible would have the effect of increasing the settlement value of the

claim, and therefore requires the prior written consent of the CAC and Dow Corning. Dow Corning has not given its consent to the CAC's requested amendment to the carefully constructed Proof of Manufacturer requirements (for the simple reason that Dow Corning was not, in fact, the sole manufacturer of silicone gel breast implants before 1971), and thus there is no basis to undo the negotiated deal and amend the confirmed Plan.

The CAC's references to the history of Plan negotiations does not change this irrefutable fact.[2] The CAC asserts that in Plan negotiations "the issue of pre-1971 implant proof was not raised or discussed, so it is fair to state to the Court that the issue was not rejected outright by Dow Corning when the Plan was drafted. Indeed, it was just not considered." Motion to Amend at 11. First, this argument is simply illogical, essentially boiling down to the claim that *the Tort Committee* did not consider the issue at the time the Plan was being negotiated, and since they did not consider or raise the issue, then somehow Dow Corning did not "reject it." Clearly, the CAC cannot speak to whether or not Dow Corning considered the issue.[3] More importantly, the argument is

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[2] Likewise, the CAC's argument that the "burden of proof" should not be higher for settling claimants than for claimants in litigation is irrelevant. *See* CAC Motion to Amend at 9-10. The heavily negotiated and approved settlement contained in the confirmed Plan defines in great detail the eligibility and other criteria for settling claimants. The product identification requirements mandate an *affirmative* showing of proof of a Dow Corning implant. To argue that a particular claimant may be better off in litigation with respect to one particular issue or another misconstrues the nature of this or any settlement. All settlements involve trade-offs, and the parties negotiated a deal that was agreed to and approved.

[3] It is notable, however, that the Plan does not ignore pre-1971 implants, as the CAC seems to imply; indeed, Schedule I contains particular Unique Product Identifiers for pre-1971 implants. See Annex A, Schedule I, Part I.D.1-2 at 60-61. It also identifies acceptable brand names for product ID purposes, making clear that appropriate records which identify implants implanted from 1963 to 1971 as Cronin are acceptable. *See id.* at 56-57.

wholly irrelevant. The fact that the CAC claims this issue was not raised during Plan negotiations does not mean that the CAC can consider and impose its views on the issue now – after the Plan has been agreed to, confirmed and consummated – unilaterally and *without* having to obtain Dow Corning's agreement. Obviously, Dow Corning's consent *would* have been required in the context of consensual Plan negotiations but the CAC apparently feels that such consent is no longer required since the Plan has already been confirmed and implemented.[4] Such an illogical position must fail: it is not only nonsensical but it is barred by the plain language of Settlement Facility Agreement Section 10.06.

Finally, the CAC's references to what was done in the Revised Settlement Program ("RSP") are wholly irrelevant. The argument that "protocols were not rigid or absolute, but were designed to be flexible" in the RSP (CAC Motion to Amend at 2) has no import to this case. Factually, the RSP involved an ongoing process to determine product ID issues while claims were processed, while in this case, product ID issues were addressed up-front in Plan negotiations, and final criteria were agreed to and approved. Further, an Individual Review Program was established to create a process for reviewing certain product ID submissions that the SF-DCT found did not meet the Plan criteria. Fundamentally, however, claims in this case are governed by the rules set

[4] As stated, Dow Corning does not agree with the CAC's requested expansion of what can be acceptable Proof of Manufacturer because Dow Corning was not the only manufacturer of silicone gel breast implants before 1971, and Dow Corning would have had no reason to take a different view back when the Plan was being negotiated.

forth in the Plan Documents of the confirmed bankruptcy Plan, and the CAC's misplaced reliance on another settlement process cannot avoid the plain terms of Section 10.06.

B. The Limitations Of Section 10.06 Of The Settlement Facility Agreement Are Supported By Principles That Prohibit Amendment Of Substantially Consummated Plans.

Section 10.06 must be viewed in the context of well-settled law that Section 1127(b) of the Bankruptcy Code provides that a plan, and related implementation documents, cannot be modified after substantial consummation. *See Joint E. & S. Dist. Asbestos Litig.*,982 F.2d 721, 747-48 (2nd Cir. 1992), *modified on other grounds*, 993 F.2d 7 (2nd Cir. 1993) (rejecting effort to modify provision on payment rights in mass tort bankruptcy); *In re Superior Used Cars, Inc.*, 258 B.R. 680, 688 (Bankr. W.D. Mich. 2001). Those principles of law counsel only more strongly against the CAC's strained reading of Section 10.06, which would write out the entire second half of that Section and broaden the scope of what can be amended without agreement of both Plan Proponents beyond reason.

II.

Even Assuming, *Arguendo*, That This Court Could Amend The Plan Over The Objections Of A Plan Proponent, There Is No Factual Basis To Do So Here And No End To What The Parties Could Then Seek To "Amend" If The CAC's Position Were Adopted

A. There Is No Factual Record Upon Which The Amendment Could Be Supported.

The CAC's Motion to Amend does nothing to cure another fatal flaw that was also present in the Motion to Deem: even assuming, *arguendo*, that the Plan could be amended over Dow Corning's objections, there is no factual record on which to do so. Indeed, the CAC has provided no procedural basis to support the relief it seeks. If the CAC were correct that it or the Debtor's Representatives could unilaterally ask this Court to amend such Plan provisions in the face of the other side's objections, it makes no effort to explain how the Court could properly reach such decisions – for example, whether it could do so on the basis of the movant's assertions, on a disputed factual written record, or after a full trial. Perhaps the CAC believes that solely on the basis of its interpretation of selective exhibits it attaches to its Motion, it can ask this Court to amend the Plan to define a whole new category of Proof of Manufacturer to allow all pre-1971 implants to be "deemed" Dow Corning, even though the CAC knows that Dow Corning already stated its disagreement with that position and advised that it would not accept such a change. *See* Motion to Amend at 9 and Exhibit 13.

In any event, it is clear that the CAC has provided no factual record to support its unilateral request to amend the agreed-to Plan. As noted in Dow Corning's Response to the Motion to Deem, Dow Corning was not, in fact, the only manufacturer of silicone breast implants prior to 1971, so there would be no factual basis to amend the Proof of Manufacturer requirements to allow a mere showing of "documentation" stating that a claimant was implanted prior to 1971 to suffice as Proof of Manufacturer. This is demonstrated by the wealth of evidence in the public record showing that many types of breast implants other than Dow Corning's were used in the United States before 1971, including the Pangman foam implant from 1965 on, Teflon-Silicone implants beginning in 1963, Simaplast brand adjustable implants from 1965 on, and many others.[5]

It is further demonstrated by the results of the Individual Review Program ("IRP") conducted at Dow Corning. As previously discussed in Dow Corning's

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[5] Dow Corning was *never* the sole manufacturer of silicone breast implants. Breast implant procedures with silicone materials occurred as early as 1949 in Japan. *See* Exhibit A (Lalardie, J.P. and Mouly, R., *History of Mammaplasty,* Aesthetic Plastic Surgery 2:167, 173 (1978); Exhibit B (Y. Mutou, *Augmentation Mammaplasty with the Akiyama Prosthesis,* British J. of Plastic Surgery, 22:58 (1970)). Prior to 1971 silicone breast implants were marketed in the United States by various sources, including Edwards (*see* Exhibit C (B. Edwards, M.D., *Teflon-Silicone Breast Implants,* 32 Plastic and Reconstructive Surgery No. 5 (Nov. 1963))), Pangman (*see* Exhibit D (W.J. Pangman II, M.D., *Breast Trauma – Surgical and Psychic,* 44 J. Int. Coll. Surg. 515-22 (Nov. 1965)) and Exhibit E (W.J. Pangman et al, *New Polyplastic Compound for Breast Augmentation*)), Surgitek (*see* Exhibit F (advertisement for Surgitek brand mammary Prosthesis, Perras-Papillion Design in 46 Plastic and Reconstructive Surgery, No. 3 (Sept. 1970))), Simaplast (*see* Exhibit G (advertisement for Simaplast silicon prosthesis in 36 Plastic and Reconstructive Surgery, No. 5 (Nov. 1965))), and Natural Y (*see* Exhibit H (J Middleton MS and McNamara MP, Breast Implant Imaging, Table CD D.1 , at D.9 (2003))). *See also* Dow Corning Response to Motion to Deem, fn.6. The CAC's reliance on excerpts from a Product Reference Book (*see* CAC Motion to Amend at 5 and Exhibit 7) is an example of their misplaced effort to prove a negative – by its own terms the cited document states "This is an *incomplete* chart with only the major manufacturers who sell *in Canada* included." CAC Exhibit 7 (emphasis added). This document thus does not support the CAC's claim that "the chart shows other implant manufacturers first appeared in approximately 1971." CAC Motion to Amend at 5.

Response to the Motion to Deem and the affidavit of Kenneth Montague that accompanied the Response to the Motion to Deem, 190 pre-1971 implants that did not satisfy SF-DCT criteria to be gel-filled Dow Corning implants had so far been submitted for IRP review at Dow Corning. Seventy-nine were accepted as Dow Corning, but 111 were rejected because they clearly were not Dow Corning implants or because the submitted materials were insufficient. For example:

- Mrs. C. received implants consisting of "sponge-like material" surrounded by "wrinkled clear plastic" from Dr. Franklin [sic] in Beverly Hills, California in 1960. *See* Exhibit I, Affidavit Of Kenneth L. Montague In Support Of Response Of Dow Corning Corporation To Motion Of Claimants' Advisory Committee To Amend Annex A To The Settlement Facility And Fund Distribution Agreement To Adopt An Additional Proof Of Manufacturer Protocol ("Montague Aff. In Support of Response to CAC Motion to Amend") at Exh. 1. Dr. Franklyn of Beverly Hills was well-known for having used sponge-like Surgifoam implants covered with plastic sheeting, beginning in the 1950s. *See* Exhibit H, "Breast Implant Imaging," *infra.*, at D.3. Dow Corning never made foam or sponge implants, and it is undisputed that Dow Corning did not begin selling breast implants until November 1963 or early 1964.

- Mrs. H. from England received Simaplast implants in 1971 and an earlier set of implants, claimed to be Dow Corning, in 1968. *See* Exhibit I, Montague Aff. In Support of Response to CAC Motion to Amend, at Exh. 2. But her medical records show that the 1968 implants were of the adjustable type injected with filler during surgical placement, since they were "inserted and filled to 185cc." Dow Corning did not make an adjustable implant until three years later. Mrs. H.'s 1968 implants were most likely Simaplast adjustable gel implants; but they certainly were not Dow Corning.

There is not, and there has never been, a provision in the Plan allowing for proof by inference or speculation. The Plan has always required affirmative proof of a Dow

Corning implant, and there is no basis to change that agreed-to principle now, post-confirmation.

In any event, claimants with pre-1971 implants already have relief and recourse under existing procedures since, in the event that the SF-DCT received a Proof of Manufacturer submission that does not meet the requirements of the Plan, it has the authority to seek Dow Corning's review of such materials under the Individual Review Process, under which Dow Corning has already agreed to accept proof for a large number of these claimants. *See* Dow Corning Response to Motion to Deem at 5.

B. If The CAC's Position Were Correct, The Entire Plan Would Unravel Under The Weight Of Endless "Motions To Amend"

Moreover, if the CAC's assertion that either one of the Plan Proponents can unilaterally ask this Court to amend the negotiated eligibility provisions and settlement criteria of the confirmed Plan and negotiated settlement that it represents over the other's objections, then the door would be wide open to an endless series of motions to amend other provisions of the Plan. Application of the CAC's logic would mean that Dow Corning would have the right to seek amendment of the Plan to disallow all settlement compensation for disease claims in light of scientific evidence that has become available since 1998 when the Plan terms were negotiated. The CAC could come back seeking further amendments to try and make other ineligible claims now eligible or to increase the value of still other claims. Indeed, claimant after claimant could come before this Court and argue that particular facts relevant to their own

claims should be considered to support why they should receive more than the Plan's values afford, undoubtedly supported by "evidence" to bolster such arguments and by assertions that their unique issues were not adequately considered when the Plan was negotiated. Simply put, the path sought by the CAC has no end, which is why it is prohibited by the plain terms of the Plan and by well-settled principles of bankruptcy law.

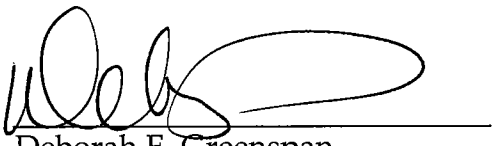
Accordingly, the CAC's request to amend Annex A to the Settlement Facility Agreement to adopt an additional Proof of Manufacturer protocol must be denied.

Conclusion

For the reasons stated herein, the CAC Motion to Amend must be denied.

Respectfully submitted this 18th day of March 2005,

DICKSTEIN SHAPIRO MORIN & OSHINSKY, LLP

By: 
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	§	(Settlement Facility Matters)
DOW CORNING CORPORATION,	§	
	§	HON. DENISE PAGE HOOD
REORGANIZED DEBTOR	§	

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2005 a true and correct copy of the following pleading was served via electronic mail, telecopy, or overnight mail upon the parties listed below:

RESPONSE TO MOTION OF CLAIMANTS' ADVISORY COMMITTEE TO AMEND ANNEX A TO THE SETTLEMENT FACILITY AND FUND DISTRIBUTION AGREEMENT TO ADOPT AN ADDITIONAL PROOF OF MANUFACTURER PROTOCOL.

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