UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

REPLY IN SUPPORT OF DOW CORNING'S
CROSS-MOTION TO DISMISS THE KOREAN CLAIMANTS' APPEAL

Dow Corning Corporation ("Dow Corning") submits this Reply in support of its Cross-Motion for Reversal of Decision of SFDCT Regarding Korean Claimants ("Motion for Reversal"). The Korean claimants concede that this Court does not have jurisdiction over adverse decisions of the Claims Administrator, which are reviewable only by the Appeals Judge pursuant to Section 8.05 of Annex A of the Settlement Facility and Fund Distribution Agreement ("SFA"). Response to Dow Corning's Cross Motion ("Response" or "Resp.") at 2-3. They assert, however, that Dow Corning has misconstrued their Motion in two respects. First, they contend that their Motion does not seek review of an adverse claims decision but, rather, "a new interpretation of the [Plan's] substantive eligibility criteria, as to which they have a right of appeal pursuant to section 5.05 of the SFA." *Id.* Second, they contend that Section 8.05 applies only to decisions on claims of individual claimants, and that because the decision they challenge applies to a number of claimants, it is outside Section 8.05's reach. *Id.* at 2.

The Korean claimants are wrong on both counts. Claimants do not have the right to seek Plan interpretations. That right under the Plan is lodged exclusively in the Debtor's Representatives, the Claimants' Advisory Committee ("CAC") and, in certain limited circumstances, the Claims Administrator. Moreover, the challenged decision does not purport to make a new interpretation of substantive eligibility criteria. It simply determines that the Plan's

threshold substantive eligibility criteria of Proof of Manufacturer "POM") may not be satisfied by Affirmative Statements that assert incorrect information as the basis for the lack of supporting medical records establishing POM. In addition, there is nothing in Section 8.05 that purports to limit its scope to decisions affecting only individual claimants. The Motion, accordingly, must be dismissed for lack of jurisdiction and failure to state a claim pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

A. Claimants Have No Right, Under The Plan, To Seek A New Interpretation Of Substantive Eligibility Criteria

The SFA and Exhibit A to the Stipulation and Order Establishing Procedures for Resolution of Disputes Regarding Interpretation of the Amended Joint Plan (dated June 11, 2004) (the "June 11 Order," Ex. A hereto) set forth the procedures for the resolution of disputes regarding Plan interpretation. Section 5.05 of the SFA requires the Claims Administrator to obtain the consent of the Debtor's Representatives and the CAC with respect to the interpretation of substantive eligibility criteria, and to consult with them and obtain their advice and consent regarding any additions or modifications to guidelines for the submission of claims. It further provides that the Debtor's Representatives and the CAC are authorized to provide joint written interpretations and clarifications to the Claims Administrator, upon which the Claims Administrator is authorized to rely. In addition, in the event of a dispute between the Debtor's Representatives and the CAC, the Claims Administrator may resolve the issue or file a motion with the Court for resolution. Pursuant to Section 5.05, "[t]here shall be no modification of any substantive eligibility criteria . . . or in Annex A through the appeals process or otherwise, except as expressly provided in this Section 5.05 and in Section 10.06 herein." Cross-Motion, Ex. B (SFA), § 5.05.[1]

[1] Section 10.06 of the SFA is not implicated by the Korean Claimants' Motion. It authorizes amendments to the SFA to resolve ambiguities, make clarifications or interpretations or correct manifest errors with the

The June 11 Order implements these provisions of the SFA. Under Section 2.01(c) of the June 11 Order, if the Claims Administrator determines that an issue with respect to the interpretation or application of Annex A of the Claims Resolution Procedures requires the input of the Debtor's Representatives and the CAC (each a "party" or, collectively, the "parties"), the Claims Administrator is required to notify them and solicit their input. Ex. A, § 2.01(c)(1). If they agree as to the resolution of the issue, the Claims Administrator is required to apply their agreement to the issue in question. *Id.* If the parties are unable to agree, the Claims Administrator may, but is not required to, resolve the issue. *Id.* § 2.01(c)(4). In the event the Claims Administrator makes a determination, either party may file a motion seeking Court resolution of the issue. *Id.*, § 2.01(d)(1). In the event the Claims Administrator opts not to decide the issue, the parties are required to file cross-motions seeking Court resolution. *Id.*, § 2.01(d)(2).

Under these clear provisions, only the Debtor's Representatives, the CAC and, in certain limited circumstances, the Claims Administrator may file a motion seeking an interpretation of the Plan's substantive eligibility criteria Plan provisions. This Court has confirmed that the Plan does not give that right to claimants. *In re Settlement Facility Dow Corning Trust, Rosalie Maria Quave*, No. 07-CV-12378 at 5-6 (E.D. Mich. Mar. 31, 2008) ("[O]nly the Debtor's Representatives and the CAC [are authorized] to file a motion to interpret a matter under the SFA. There is no provision under the SFA or the Procedures which allows a claimant to submit an issue to be interpreted before the Court.").

The Korean claimants contend that this Court has jurisdiction over their appeal pursuant to section 5.05 of the SFA, because they seek a new interpretation of substantive eligibility criteria. They acknowledge that "[a]ny appeal that involves a new interpretation of the

---

written agreement of Dow Corning and the CAC. Cross-Motion, Ex. B (SFA), § 10.06. Any other amendments or modifications to the SFA require Court approval.

substantive eligibility criteria must be submitted to the Debtor's Representatives and the [CAC]." Resp. at 2. They contend, however, that they were relieved from doing so, "because the Debtor's Representatives manifested their opinion on Motion for Reversal through DC Cross Motion." *Id.*

The claims determination as to which the Korean claimants take issue, however, does not involve a new interpretation of substantive eligibility criteria but, rather, the application of the most fundamental criterion for eligibility under the Plan – proper Proof of Manufacturer.[2] Any appeal, accordingly, could be brought only before the Appeals Judge, not this Court. Moreover, even if the Korean claimants' appeal did raise an issue of "Plan interpretation" (which it does not), the issue would have to be raised in accordance with the clear procedures of the Plan and the June 11 Order. Korean claimants cannot argue that their Motion seeks a Plan interpretation while at the same time eschewing the process required for obtaining such an interpretation.

The Korean claimants' further argument, that "an appeal [*i.e.*, submission of an issue concerning substantive eligibility criteria] to the Debtor's Representatives and the [CAC] is not exhaustive," and that "[a] claimant who disagrees with the rulings of the Debtor's Representatives and the [CAC] may appeal to the Court because the rulings will be issued not by the Appeals Judge but by the Debtor's Representatives and the [CAC]," *id.* at 3, reflects a fundamental misunderstanding of the Plan's appeals process. Under Section 8.05 of Annex A to the SFA, "[c]laimants who disagree with the rulings of the Claims Administrator may appeal to the Appeals Judge." Cross-Motion, Ex. C (SFA Annex A), § 8.05. The Appeals Judge is to

[2] It bears noting that, even though the Korean claimants assert in their Response that their Motion seeks a new interpretation of substantive eligibility criteria, nowhere in either document do they state what that supposedly new interpretation of substantive eligibility criteria is. What it might be can scarcely be imagined given the unassailable nature of the Claims Administrator's decision declining to accept as Affirmative Statements that were found to be false as POM, refusing to give further benefits to claimants who previously received benefits on the basis of these false Affirmative Statements, declining to approve new claims submissions without other acceptable POM, and refusing to process claims supported by altered documents. Whether the Claims Administrator has the power to make such a decision does not raise an issue of substantive eligibility criteria, but of the application and implementation of existing criteria as to which there is no right of review.

"apply the guidelines and protocols established in . . . to the [SFA]," *id.*, but in doing so may not modify any substantive eligibility criteria, *id.* As set forth in the Cross-Motion, a claimant who is not satisfied with the decision of the Appeals Judge has no right of appeal to this Court. That is what "final and binding" means.[3] This appeals process is wholly independent of the Plan interpretation process outlined in Section 5.05 and the June 11 Order. An appeal to the Appeals Judge does not "transform" a decision into a Plan interpretation issue. A Plan interpretation issue is raised only if the Debtor's Representatives, CAC or Claims Administrator identify such an issue and invoke the procedures in the June 11 Order.

B. Section 8.05 Appeals Are Not Limited To Decisions On Individual Claims

The Korean claimants argument that that the August 22, 2011 decision of the Claims Administrator is outside the scope of Section 8.05 because it is "abnormal in nature," Resp. at 3, does not change the analysis. To the extent this argument is predicated upon the decision "relat[ing] to a new interpretation of eligibility criteria," *id.*, it is simply wrong. The decision does not apply a new interpretation of eligibility criteria. It simply rejected claims that the Claims Administrator determined were unacceptable under the plain terms of the Plan. To the extent the Korean claimants' argument is predicated upon the decision's reach, it is not supported by the plain language of Section 8.05. Nothing in that provision purports to limit its scope to decisions affecting only a single individual claimant. In fact, to do so would result in a multitude of burdensome, inefficient and unnecessarily duplicative appeals[4]

[3] The Korean claimants' contention that "Section 5.05 of SFA expects the Court to consider the interpretation of eligibility criteria," Resp. at 3, ignores Section 5.05's plain language. Under Section 5.05, if the Debtor's Representatives and the CAC agree on the interpretation of substantive eligibility criteria, the Claims Administrator is entitled to rely upon that agreed interpretation. In the event they do not agree, Section 5.05 authorizes the Claims Administrator to apply to the District Court for consideration of the matter. It does not give any claimant such a right.

[4] The decision on its face reflects the Claims Administrator's intent that it be applied broadly to those Korean claimants represented by Mr. Kim who submitted Affirmative Statements in support of their POMs. *See* Mot., Ex. J.

CONCLUSION

For the foregoing reasons and those set forth in its Memorandum in support of its Cross-Motion to Dismiss the Korean Claimants' Appeal, Dow Corning respectfully requests that the Court grant Dow Corning's Cross-Motion and dismiss the Korean Claimants' appeal.

Dated: November 7, 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

All but one of the instances of purported misconduct by the Claims Administrator set forth on page 4 of the Korean claimants' Response relate to the August 22 decision and, accordingly, is not reviewable by this Court. The only one that does not concerns the SF-DCT's alleged failure to establish separate processing for Class 6.2 claims in accordance with Section 7.02(d) of Annex A to the SFA. The Korean claimants contend that this alleged failure delayed approval of their POMs, causing most of the Korean claimants to lose their chance to file rupture claims before the June 2007 rupture deadline. The short answer is that the SF-DCT does process Class 6.2 claims separately. Moreover, the processing of the Korean claimants' claims was delayed, not because of any failure to process separately, but because the documentation they submitted to support their claims was unreliable and the SF-DCT needed to translate a large number of their medical records from Korean into English in order to process and audit the claims. *See* Mot., Ex. C (Claims Administrator's Nov. 25, 2008 email to Mr. Kim); *id.*, Ex. H (Dec. 2, 2010 email from the Claims Administrator to Mr. Kim). In addition, nothing prevented the Korean claimants from submitting their rupture claims while approval of their POMs was pending.

The Korean claimants' additional complaint that the Claims Administrator is pressuring them into accepting the Class 6.2 Payment option, *see* Resp. at 5, is misguided. As the Claims Administrator's letter of August 22, 2011 makes clear (Resp., Ex. J), she was trying to help a large number of the Korean claimants who may be adversely affected by her decision on POMs by pointing out that they may be eligible to participate in the Class 6.2.3 Payment Option, which would provide them a payment of $600 with a limited POM. There was nothing coercive about her statement.

The Korean claimants' further complaint that SF-DCT employees routinely discriminate against Class 6.2 claimants, Resp. at 5, is unsupported and unsupportable.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2011 true and correct copies of the following were served via electronic mail or first-class mail upon the parties listed below:

REPLY IN SUPPORT OF DOW CORNING'S CROSS-MOTION TO DISMISS THE KOREAN CLAIMANTS' APPEAL.

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

November 7, 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

DEBTOR'S REPRESENTATIVES
Douglas Schoettinger
DCC Litigation Facility, Inc.
2200 W. Salzburg Road
P.O. Box 2089, Mail DCLF
Midland, MI 48686
doug.schoettinger@dowcorning.com

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

Kevin W. Scroggin
Dow Corning Corporation
2200 West Salzburg Road
Mail Stop CO1314 / P.O. Box 994
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

MOVANT
Yeon-Ho Kim
Yeon-Ho Kim International Law Office
Trade Center Building, Suite 4105
159 Samsung-dong, Kangnam-ku
Seoul 135-729, Korea
yhkimlaw@unitel.co.kr

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

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