

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:
DOW CORNING CORPORATION,

Debtor.

HON. DENISE PAGE HOOD

Case Nos.

99-CV-75924-DT
99-CV-76214-DT-
99-CV-76215-DT-
00-CV-70029-DT-

MOTION FOR REHEARING AND REQUEST FOR STAY

COMES NOW THE NEVADA CLAIMANTS, appellants in case no. 99-CV-75924-DT (Nevada Claimants), and cross appellants/appellees in cases no. 99-CV-70029-DT (Proponents), 99-CV-76214-DT (Dow Chemical) and 99-CV-76215-DT (Corning, Inc.), by and through counsel, who request a rehearing of their appeal in this case on the grounds that this honorable court's November 13, 2000 Opinion (Opinion) demonstrates a palpable defect by which the Court and the parties have been misled and which justifies the affirmation of all portions of the bankruptcy court's 1999 order confirming the Amended Joint Plan of Reorganization (Plan), to wit:

The Opinion demonstrates that this court was misled by plan proponents into believing that the claims of the Nevada Claimants against Dow Chemical, a non-debtor, were not extinguished by the Plan, but rather that they could be litigated within the confines of the

Litigation Facility. Dow Corning, on November 21, 2000 (after the Opinion was entered on the docket) wrote this court and in effect admitted that it misled the court regarding the crucial third party release/injunction matter and that the Plan, as Proponents interpret it, completely extinguishes the Nevada Claimants' pending claims against Dow Chemical, a non debtor. There can be no question but that the court's apprehension of the plan's release and third party injunction provisions on November 13, 2000 was therefore flawed, to wit: this court's Opinion (and the resulting November 13 orders) was based upon this court's mistaken belief that the Nevada Claimants could present their claims against Dow Chemical within the confines of the Litigation Facility. The Opinion further evidences that fundamental to this court's reasoning, in reversing the bankruptcy court's ruling on the third party release and injunction issues, was this court's belief that it could so reverse without extinguishing the Nevada Claimants' claims against Dow Chemical, a non-debtor. Now that Dow Corning has belatedly written this court and explained its view of its plan, the reasoning in the Opinion as applied to the facts of this case shows much less disagreement between this court's and the bankruptcy court's reasoning on the third party release/injunction issues. The Opinion and all applicable related orders should therefore be corrected to affirm the bankruptcy court's Order Confirming Plan in all regards.

Nevada Claimants also request that this court stay its November 13, 2000 judgment confirming in part and reversing in part the bankruptcy Court's Order Confirming Amended Joint Plan of Reorganization pending resolution of this Motion.

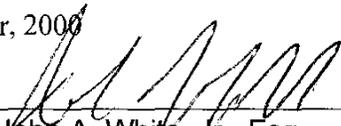
In support of this motion, Nevada Claimants rely on Bankruptcy Rule 8015, Local Rule 7(g), Bankruptcy Rule 8017(a), upon the files and records in this case, and upon the below points

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and authorities.

Respectfully Submitted this 24th day of November, 2000


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POINTS AND AUTHORITIES

I. Standards applicable to Motions for Rehearing.

Local Rule 7(g) and Bankruptcy Rule 8015 govern this motion. Local Rule 7(g) provides, among other things that

(3) **Grounds** Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

In In The Matter Of: Coventry Commons Associates, 155 B.R. 446, 449

(U.S.D.C.E.D.Mich, S.D., 1993); the court on rehearing reversed its original order, which had affirmed confirmation of a chapter 11 plan,. It pointed out that a party must have raised an issue in its briefs to warrant reconsideration and stated the Standard of Review as follows:

Federal Rule of Bankruptcy Procedure 8015, which governs motions for rehearing, is silent as to the appropriate standards for granting such relief. However, Rule 8015 was derived from Federal Rule of Appellate Procedure 40, which provides in part:

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended

In addition, Eastern District of Michigan Local Rule 7.1(h) sets forth the grounds for motions for rehearing or reconsideration and provides, in pertinent part, that:

The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

In In Re: Winders, Debtor. (The Shawnee State Bank, v. First National Bank Of Olathe)

202 B.R. 512, 517 (USDC Kansas, 1996) (citations omitted), the court stated:

When the district court is acting as an appellate court in a bankruptcy case,

Bankruptcy Rule 8015 provides the sole mechanism for filing a motion for rehearing. Rule 8015 is silent as to the standard for granting a rehearing, but granting a motion for reconsideration is within the discretion of the court whose order is subject to the motion. This Court, in its discretion, will reconsider its previous order to determine if there is an intervening change in the controlling law or it becomes necessary to remedy a clear error of law or to prevent obvious injustice. The Court cautions at the outset that, although "clear error" and "preventing injustice" are valid grounds for reconsideration, a party seeking reconsideration must not use this vehicle as a means to re-litigate issues previously decided by the Court. Motions to reconsider should be granted where: (1) "the Court has patently misunderstood a party," (2) the court "has made a decision outside the adversarial issues presented . . . by the parties," (3) the court has "made an error not of reasoning but of apprehension," or (4) there is a "controlling or significant change in the law or facts since the submission of the issue to the Court."

Because First National does not advert to any points of law or fact overlooked or misapprehended in Court's earlier order, its motion must be denied. "A petition for rehearing was not designed to be a 'crutch for dilatory counsel, nor, in the absence of a demonstrable mistake, to permit reargument of the same matters.'" Upon review of the record it is apparent that First National has not raised any "points of law or fact which . . . the court has overlooked or misapprehended." Nor has it met its burden to show that the Court has clearly erred or that reconsideration is necessary to prevent manifest injustice.

II. Argument

A. Generally

In English speaking countries, tradition has had it since roughly the time of the Magna Charta that when someone is wronged, she can sue the wrongdoer under the theory of her choice, and, if wronged by several persons, she can sue the wrongdoer of her choice under the theory of her choice. That she is in a minority, that the majority seeks some other redress or no redress at all, is never determinative of her rights'. "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and

¹"The lords of England converged upon Runnymede centuries ago to demand the Magna Charta of King John. The power of the sovereign was divided. Thereafter, the Western legal system, evolved to cherish and delicately depend upon divided authority with an independent judiciary available to resolve the claims of the weakest members of our society." *In re Knepp*, 229 B.R. 821 (Bankr.N.D.Ala, 1999)

public excitement." *Chambers v. State of Florida*, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716 (1940). Certainly the wrongdoer being sued has no right to dictate that she sue someone else or use a different theory of liability. Her case against her defendant of choice stands or falls on its own merits. Likewise, tradition also has it that the person accused of wrongdoing can defend the lawsuit under a theory of his own choosing². And, if he loses and a money judgment is entered against him, the wrongdoer has numerous ways of avoiding its payment, one of the more modern of which is discharging the judgment in bankruptcy. Confirmation of a defendant's chapter 11 plan of reorganization operates as a discharge of all of his properly scheduled debts. 11 U.S.C. §1141. This paragraph sets forth black letter law, with which no one seriously disagrees.

B. Overview of so called different approaches to the third party release/injunction matter (shows significance of misapprehension).

Though the fact intensive nature of the reasoning in these cases makes it difficult if not dangerous to draw clear lines, of late, two circuits have inclined toward an exception to the foregoing and allowed a wrongdoer to avoid paying judgments rendered against him where 1) a joint wrongdoer files for bankruptcy, 2) the judgment debtor wrongdoer contributes some of his own assets to enhance the estate of the bankrupt wrongdoer, and 3) the great majority of claimants are too weak or too ignorant or too tired to continue asserting their fundamental rights as to the third party wrongdoer, have no rights under the laws of their states against the third party wrongdoer, or have by their negligence waived their rights against the bankrupt wrongdoer³. The other four circuits to consider the matter have upheld the traditional right of an

² Apropos to this case is *Mahlum v. Dow Chemical*, 114 Nev. 1468, 970 P.2d 98 (Nev. 1998). in which the Nevada Supreme Court agreed that Dow Chemical had wronged Mrs. Mahlum, and required Dow Chemical to pay her damages.

³ The Second and Fourth Circuits have approved permanent post-confirmation third-party injunctions without the affected creditor's consent. *Menard-Sanford v. Mabey* (In re A.H. Robins Co.), 880 F.2d 694, 700-02 (4th Cir.), cert. denied, 493 U.S.959 (1989); *MacArthur Co. v. Johns-Manville Corp.* (In re Johns-Manville Corp.), 837 F.2d 89, 92-94 (2d Cir. 1988), cert. denied, 493 U.S. 959 (1989).

injured party to sue her wrongdoer. Two of those circuits require the consent of the claimants before the third party will be permanently released⁴. And two of them seem to prohibit post-confirmation third party releases altogether⁵. The underlying reason for this difference stems largely from differing views of the role of the judiciary in the lawmaking process and, relatedly, the willingness of those courts to disregard the preclusive effect of § 524(e) and to extend god-like powers to the bankruptcy courts by way of expansive reading of their equitable powers under in § 105(a).

Though in logic, this "judge made" exception could apply in any of the bankruptcy chapters, the courts have apparently limited it to cases where the joint wrongdoer files for relief under chapter 11. And none of those cases, whether in the Second Circuit, Fourth Circuit, or otherwise, have allowed the extinguishment of third party claims under the circumstances of this case.

This court's November 13 opinion shows that this court in effect adopts a version of the Robin's exception (that if a third party non-debtor wrongdoer injures enough people to qualify for the "special circumstances" exception to the general rule mentioned in the first paragraph above, and contributes significant assets to the debtor wrongdoer's estate, the third party wrongdoer gets a discharge if such a discharge is necessary to protect the debtor wrongdoer's discharge⁶.) However, in keeping with the fact intensive nature of these cases, this court clearly

4 The Seventh and District of Columbia Circuits have approved permanent post-confirmation injunctions enjoining actions against third parties, where those creditors consent to the relief. See *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993); *In re AOV Indus.*, 792 F.2d 1140, 1153 (D.C. Cir. 1986). See also the bankruptcy court's December 21, 1999 Opinion.

5 The Ninth and Tenth Circuits prohibit third-party releases altogether. See *Resorts Int'l Inc. v. Lowenschuss* (*In re Lowenschuss*), 67 F.2d 1394, 1401-02 (9th Cir. 1995), cert. denied, 517 U.S. 1243 (1996); *Lansing Diversified Properties-II v. First Nat'l Bank & Trust Co.* (*In re Western Real Estate Fund Inc.*), 922 F.2d 592, 601 (10th Cir. 1990); *American Hardwoods Inc. v. Deutsche Credit Corp.* (*In re American Hardwoods Inc.*), 885 F.2d 621, 625-26 (9th Cir. 1989).

6 At p. 77 of the Opinion, this court, possibly in dicta, adds another possible criteria, not found in any of the cases, being that protection of the debtor wrongdoer's discharge by enjoining suits against the third party wrongdoer is proper where it will enable the debtor wrongdoer to contribute to the profits of the third party wrongdoer.

thought that the plan below allowed the Nevada Claimants to pursue their claims against the wrongdoer, Dow Chemical, and that requiring the Nevada Claimants to present these claims within the confines of the Litigation Facility was not too high a price for them to pay.

Now, by its letter to the court dated November 21, attached hereto as Exhibit A and incorporated herein (herein the "gotcha" letter), proponents finally show this court the true effect of the Plan below, being to extinguish entirely the Nevada Claimants' claims against the third party wrongdoer. As that letter clearly shows, those claims will no longer exist if the third party release/injunction provisions in the plan below are affirmed. Now, proponents show this court that not only are they asking this court to apply the, at a minimum, debatably valid *Robins* for the first time to a confirmed plan in this circuit, but also to radically expand that doctrine to extinguish perfectly valid claims now pending in federal court against solvent non-debtors in a circumstance where the bankruptcy court found that there is no possibility that their judgments against the third party wrongdoer will diminish the assets of the debtor wrongdoer's estate.

C. Fundamental problem with all third party release/injunction cases.

The bankruptcy court below found, in a conclusory statement which is as much a conclusion of law as a finding of fact that the releases are "essential to reorganization pursuant to this Plan." (see Finding No. 22). The "pursuant to this plan" language is what turns this into more of a conclusion of law rather than a true finding of fact. In all of these non-debtor release cases, there is never any evidence proffered or any finding that without non-debtor releases the debtor will not be able to reorganize and will have to liquidate. So the releases really have nothing to do with "reorganization" and preserving the business operation in one piece; they only concern how the money flows around and ultimately gets distributed. Thus, "necessary to reorganization" really just means necessary to do this particular deal, because the debtor insisted

on it, under the protection of exclusivity, and the committees finally caved in so they could start getting some payment. This, of course, places "necessary to reorganization" solely in the hands on the negotiating parties and creates an incentive for any key party with independent liability exposure to always make non-debtor releases into a deal-breaker negotiating point. If that's what it takes to make the non-debtor releases necessary to reorganization, then there are absolutely no limits to the cases in which non-debtor releases can become "necessary" at the hands of the primary negotiating parties, and that's precisely why we've seen such an explosive proliferation in non-debtor release litigation in the past 10-12 years. At least the *Robins* court was dealing with a rather clean slate, as the third party being released in that case was not a 50% owner of the debtor being discharged, as is the case here.

Furthermore, by confirming the plan without the releases, the bankruptcy judge below clearly and by definition qualified and limited his own finding on this important issue, i.e., if releases from all claimants were necessary, how could he have confirmed the plan? He did it by finding that the plan did not require claimants who had not voted for the plan to release the third party, i.e. the releases of those who voted for the plan were the only releases necessary to this plan. This becomes important on rehearing, not to reargue the case, but because crucial to this court's apprehension of the plan was the understanding that the particular releases required in this case by this plan were fair under all the circumstances. Now, it is clear that this court, acting as a court of equity and, therefore, most concerned about issues of fairness, was mistaken regarding this crucial fact. The release of those not voting for the plan was not in exchange for their right to present their claims against the third party to the Litigation Facility, as this court and any other reasonable common law court would assume, but rather the third party claims were extinguished. There is simply no way that this court, or any other appellate court, can now

disregard this finding of fact by the bankruptcy court. The releases of those not voting for this plan were not necessary to this plan. That is what the bankruptcy judge found.

D. A court of equity cannot in good conscience give the plan its stamp of approval now that it apprehends that the Nevada Claimants' claims against one of the world's richest corporations are extinguished by the Plan.

It took the bankruptcy judge below some 4 years before he finally determined that he was not going to put his name to an order confirming a plan which extinguished those third party claims unless the claimant had consented by voting for the plan. This busy court has only a fraction of that time to consider the same issue. One can, if sufficient No-Doz is available, read and re-read the proponent's plan without understanding that the Nevada Claims against Dow Chemical are extinguished. That language is buried near the end of one of the longest sentences ever to grace the English language. See paragraph 8.3 of the plan (page 26). Nonetheless, proponents have, after this court ruled, finally made the unconscionably and intentionally obtuse and complex language in their plan crystal clear. They no longer feel the need to attempt to conceal or sugarcoat and now casually and gleefully gloat by way of their November 21st "gotcha" letter, supra, that the Nevada claims are extinguished. Extinguishment of the Nevada Claims against a party who grievously injured them without any compensation flowing to the Nevada Claimants even though their claims against the third party wrongdoer have been deemed valid by the highest court of their state cannot be sustained by any court and particularly any court of equity.

E. *Robins* distinguished (as pertains to extinguishment of Nevada Claims)

As indicated above, even in the doubtful event that the Sixth Circuit adopts the *Robins* approach to these third party releases, it is highly unlikely that it will allow the extinguishment of the Nevadans' claims against the solvent non-debtor, Dow Chemical. *Robins* did not do this

except as to those claimants who, by reason of having not filed timely claims in the *Robins* bankruptcy, were forced to turn to alternate defendants, such as *Robins'* directors, attorneys, insurance carriers. *Robins*, supra, p. 701. Those were the only claimants subject to the *Robins* post-confirmation bar, all other claimants having been barred by reason of now discredited⁷ Rule 23 class action principles. See *Robins*, p. 700. Further, the district court in *Robins* had found these claims to be of little value. *Robins*, p. 701, fn. 6. Finally, in *Robins*, Aetna, the principal third party defendant, did not control the debtor and did not, as here, have the power to create "special circumstances" out of thin air⁸. This is far from the case here, where all of the Nevada Claimants filed timely claims against the debtor, where none of the Nevada Claimants were subjected to a mandatory class action bar, where the third party wrongdoer is an affiliate of the wrongdoer debtor (11 U.S.C. 101(2)(A)), and where the Nevada Supreme Court had not only determined their claims to be valid, but had actually upheld a jury award against Dow Chemical, the non-debtor, in the amount of \$38,654 in past compensatory damages, and \$3,915,000 in future compensatory damages.⁹ Mr. Mahlum received a compensatory award for his wife's injuries of \$200,000 in future damages. The jury also awarded \$10,000,000 in punitive damages against Dow Chemical, which punitive damage award was set aside on appeal.

F. This court's reasoning is too similar to that of the bankruptcy court to warrant reversal of the bankruptcy court.

No doubt the plan's extinguishment of the Nevada Claims against Dow Chemical, claims which had been found to be valid by the Nevada Supreme Court, weighed heavily on the

⁷*Ortiz v Fibreboard*, 527 U.S. 815 (1999)

⁸ The court can take judicial notice of the obvious attempt of the shareholders in this case to create a fact pattern that mirrors the *Robins* case. Aetna had no such power over *Robins*.

⁹ It is noted here that the Opinion may be misleading at page 82, in indicating that the Mahlum court had set aside the punitive damage award. The Nevada Supreme Court set aside the punitive damage award only as to Dow Chemical. Mrs. Mahlum was free to press her claim for punitive damages against Dow Corning, depending on the outcome of the bankruptcy. Mahlum, supra, p. 109.

bankruptcy court. Ultimately, the bankruptcy judge refused to add his name to such a cruel and un-American result. It is unthinkable that the Sixth Circuit will do so, and nothing in its earlier opinions intimates otherwise. It is submitted that had this court known that the Nevada Claims were extinguished, it would have affirmed rather than reverse on the third party release issues.

G. Sixth Circuit has not adopted the *Robins* approach to third party releases.

As the Sixth Circuit explained in *Dow (Lindsey) I*, 86 F3d 482 (1996) and *Dow (Lindsey) II*, 113 F3d 565 (1997), the bankruptcy court did not err in enjoining third parties from interfering with the administration of the debtor's estate. With plan confirmation, however, all necessary administration of the Case is over, for otherwise the court cannot make the finding required by 11 U.S.C. §1129(a)(11), that the plan is feasible. If, for example, the pre-confirmation settlements with the insurance companies were conditioned on confirmation of a plan which released the third parties, those provisions of those settlements are void unless they were approved during the plan confirmation process, after all parties were extended the rights attendant to that process, or, as was done in *Johns Manville*, supra, prior to confirmation. The purpose of the administrative process in any bankruptcy is to determine the assets and liabilities of the debtor's estate, not to bind the estate and its creditors to an illegal plan or to render the plan confirmation process meaningless, as would be the case if all important decisions precede confirmation. Four years was long enough for that administrative process to last. No action against the third parties can now interfere with the assets of the debtor's estate. The Sixth Circuits' concerns are no longer applicable. The bankruptcy court, which approved the insurance settlements, would not have approved the Plan were the case not fully administered in all significant aspects. It made a specific finding that the plan was feasible. This is not to say that administration of an estate cannot continue after confirmation, but rather, and simply, that all

aspects of the administration necessary to confirmation are by definition accomplished at or prior to confirmation. The reasoning of the *Robins* court showed a fundamental lack of understanding of this basic bankruptcy principle and has led to much mischief. *Robins*, supra, p. 701. It is common for adversary proceedings to continue after confirmation and for plans to provide for the different effects of the various possible resolutions of those adversary proceedings. For example, if four years was not enough time for the bankruptcy court to determine what part of the joint insurance policies belonged to the estate and what part belonged to the third parties, the plan, to be confirmed, would have had to provide for an increase or a decrease in payments to claimants depending on the ultimate resolution of the insurance matters. The plan below did not do this, for the reason that that part of the administration of this estate had been concluded. This is essentially what happened in *Johns-Manville*, supra, where the issue came up with regard to a sale rather than confirmation of a plan, that court finding that the debtor's insurance policies were property of the estate under 11 U.S.C. § 541 and that the court had jurisdiction to prevent others from interfering with or taking that property under 11 U.S.C. §363(f) (sale of estate property free and clear of lien). However, though it may well take a while for a bankruptcy court to separate out and protect property of the estate from property of the third party wrongdoer, no one in this case is alleging that Dow Chemical's assets, once separated from the Debtor's assets, are property of this estate.

H. Miscellaneous matters.

Without intending to limit their rights to develop these and other matters of a similar nature at a later date, the Nevada Claimants note the following: At p. 4 of the Opinion, the court notes an issue of the "cap on punitive damages". The Plan eliminates punitive damages altogether. It does not cap them. At p. 8, it is noted that only a few of the 14,795 claimants are

affected by the release/injunction issues. At p. 9, it is noted that the Official Committee of Tort Claimants did not represent the interests of the Nevada Claimants. At p. 40, the quote from the *Potasky* case (222 B.R. at 826), S.D. Ohio 1998). is misleading because here, Dow Chemical created its own "legal environment". The same applies at p 46, i.e. Dow Chemical here created its own "special circumstances." At p 56, there is no evidence that the debtor needs the insurance policies to reorganize, just that it needs them for this plan. At p 67, distinguishing *Telectronics* (Nos. 99-3476 to 99-3480, 2000 WL 995161 (6th Cir. July 19, 2000)) on the grounds that this is a bankruptcy action begs the question of whether bankruptcy judges have powers that know no limits. Are we going to let Article I judges do whatever they want, while holding Article III judges to the law, all on the grounds of bankruptcy? Where in the constitution does it say that it is to be disregarded whenever bankruptcy is invoked? At p 77, the primary question in bankruptcy is not whether the debtor can earn profits for its shareholders, but whether the debtor can pay its debts. At p 82, no punitive damage award against Dow Corning was set aside. Also at p 82, the Nevada Claimants presented below numerous instances of where courts have awarded punitive damages against Dow Corning.

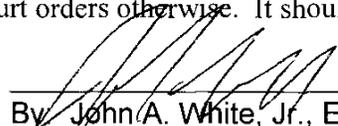
III. Conclusion

It is clear from its "gotcha" letter that Dow Corning has tricked this court into viewing the plan as not extinguishing the rights of the Nevada Claimants against Dow Chemical. This was done by oral argument and by brief, where the proponents pointed out how the Nevada Claimants still have all their rights to be paid in full by bringing suit in the nameless "Litigation Facility". Those statements and those arguments were false and misleading, and obviously misled this court. The clear import of those arguments and those briefs is that the Nevada Claimants maintained their rights against Dow Chemical, albeit those rights were required to be

adjudicated in the litigation facility. NOW, after judgment is entered, we find that the Plan is going far beyond the rule of either *Robins* or *Johns Manville*, and presumably we will soon find out that the proponents will seek to insulate the Opinion from appellate review by implementing the plan and relying on the mootness doctrine to avoid review.

It is respectfully requested that rehearing be granted and that the bankruptcy court's order confirming plan be affirmed in all regards.

A stay pending determination of this motion is also requested. This Motion raises significant issues. Though paragraph 7.2.1 of the plan provides that the plan does not become effective if an appeal is pending on the third party release/injunction issues, paragraph 7.3 provides that either the proponents or the shareholders may waive this condition. If transfers under the plan are made, and the Plan implemented while this Motion is under consideration, it may be impossible for this court to determine the instant Motion, even if it determines to issue the requested Corrected Opinion and orders. Bankr.R. 8017(a) provides that the judgments of this court are only stayed for 10 days, unless the court orders otherwise. It should so order here.


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EXHIBIT A

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the Litigation Facility." (Emphasis added.) These statements should be clarified because, as noted above, under the Plan, "[the primary treatment provided under the Plan for Claimants in Class 5 is the opportunity for a claimant to litigate the claim against the Litigation Facility," not the Debtor and the non-debtors. Opinion at 81 (emphasis added).

is actually channeled to and will be handled by the Litigation Facility as the sole defendant. A copy of this letter has been sent to each party of record.

Finally, the discussion of the Nevada claimants' arguments (Opinion at 78-81) might likewise be misread to mean that litigation against Dow Chemical is still possible in Nevada with respect to Released Claims under the Plan. For the reasons discussed above, such litigation, if any, will be against the Litigation Facility, and not against Dow Chemical.

The Opinion and Judgment issued on November 13, 2000 affirm the Bankruptcy Court's November 30, 1999 confirmation of the Plan and reverse the Bankruptcy Court's December 21, 1999 Opinion to the extent that it limited the Plan's third party release and injunction provisions to those claimants who voted in favor of the Plan. Opinion at 5, 167. The Opinion and the accompanying Judgment hold that under the terms of the Plan, further litigation against the Debtor and its Shareholders is not permitted with respect to the Debtor's silicone products. Instead, all litigation must be brought against the Litigation Facility.¹ See Opinion at 49-50, 81. In so holding, the Opinion is fully consistent with the Plan (see Disclosure Statement, p. 85), the approved Litigation Facility Agreement (§ 2.03) and the approved Case Management Order (¶ 6), all of which provide as to future litigation involving Dow Coming products that "the [Litigation] Facility is the defendant in place of Dow Corning and the Shareholders." Case Management Order, ¶ 6(e).

We respectfully ask the Court to conform these statements to avoid any confusion in the future.

The three statements that might cause confusion in light of the holding of the Opinion are:

Respectfully submitted,
SHEINFELD, MALEY & KAY, P.C.
By: 
George H. Staples
ATTORNEYS FOR DOW CORNING CORPORATION

First, in distinguishing the *Telectronics* case, the Opinion (at 68) says:

claimants under the Amended Joint Plan will only release the Shareholders if they choose to settle their claims with the Settlement Facility. The Claimants in this bankruptcy action, have a recourse against the Shareholders should they choose to litigate their claims in the Litigation Facility.

As the Court notes repeatedly in the Opinion, the Plan releases and enjoins all claims against the reorganized Debtor and the Shareholders - along with claims against certain other third parties - but allows claims involving the Debtor's products to be channeled to and fully litigated and paid in the Litigation Facility. Thus, claims involving the Debtor's products are not released if a claimant chooses the litigation option, but recourse for these claims is only against the Litigation Facility, Inc. No claims may be brought against the reorganized Debtor or the Shareholders.

Second, on page 46 of the Opinion, the following statement appears: "The Plan provides for claims against the Debtor and the non-debtors to be channeled to the Litigation Facility if the claimants choose not to enter into the Settlement Facility. The release and injunction provisions do not apply to claimants who choose to bring their claims against the Debtor and the non-debtors via

cc: All Counsel of Record (see attached list)

39842.6

¹ Technically, claims "against the Litigation Facility" are brought against DCC Litigation Facility Inc., which will be the defendant in all litigation under the Joint Plan.

companies, the district court's finding that there was a "limited fund" from which the class action members could be paid from was not supported by the record. *Id.* at *8. The Sixth Circuit's main concern was that the class members had no recourse, at all, against the parent companies, who may have sufficient assets to pay any damages, if the parent companies were released under the settlement agreement. Here, the claimants under the Amended Joint Plan will only release the Shareholders if they choose to settle their claims with the Settlement Facility. The Claimants in this bankruptcy action, have a recourse against the Shareholders should they choose to litigate their claims in the Litigation Facility. Any claims litigated in the Litigation Facility would be paid in full. The evidence before the bankruptcy court shows that the cap imposed on the Litigation Facility is more than sufficient to cover any successful claims against the Litigation Facility. The Sixth Circuit's due process concerns regarding the parent companies in *In re Teletronics* are not present under the Amended Joint Plan. The Sixth Circuit's decision in *In re Teletronics* does not apply to the bankruptcy action before this Court.

1. Conclusion re Release and Injunction Provisions

Reviewing *de novo* the Bankruptcy Court's legal conclusion expressed in its December 21, 1999 Opinion that it had no jurisdiction to issue an injunction, for the reasons set forth above, the Court finds that the Bankruptcy Court erred in its conclusion. However, under a clearly erroneous standard, the Bankruptcy Court did not clearly err in its findings of fact regarding the release and injunction provisions in its November 30, 1999 Findings of Fact and Conclusions of Law because the findings were supported by the record before the Bankruptcy Court. The Court reverses the Bankruptcy Court's legal conclusion regarding the release and injunction provisions expressed in its December 21, 1999 Opinion, for the reasons set forth above. The Court affirms the Findings of Fact and Conclusions of Law and the

Confirmation Order. The Nevada Claimants filed briefs taking two positions on the release and injunction issue: 1) that any injunction enjoining tort claimants who enter the Plan's Settlement Facility to release non-debtor third-parties, is not fair and is not the law; and 2) even with the provision that non-accepting tort claimants can choose to enter the Litigation Facility the third party release is not justified. The Nevada claimants agree with the Bankruptcy Court's December 21, 1999 Best Interest of Creditors Opinion that the release required as a condition to receiving settlement funds does not apply to claimants who did not vote for the plan; the release provision of the Plan is not part of the Bankruptcy Court's authority in equity; Section 105(a) is not authority for the Bankruptcy Court's injunctive powers, and the injunction provision violates 11 U.S.C. § 524(e).

As discussed above, the Bankruptcy Court does have authority under § 105(a) and various sections of the Bankruptcy Code to issue an injunction in favor of third-party non-debtors, especially in an unusual circumstances case such as exists in this bankruptcy. The Plan provides for claims against the Debtor and the non-debtors to be channeled to the Litigation Facility if the claimants choose not to enter into the Settlement Facility. The release and injunction provisions do not apply to claimants who choose to bring their claims against the Debtor and the non-debtors via the Litigation Facility. Contributions of assets, including insurance proceeds, meet the index of good faith and in this instance justify the release and injunction as to the Shareholders and the Settling Insurers. *Manville*, 837 F.2d at 91.

3. Class 5: Texas Children's/ACT's Claimants

The Tary Appellants in their response state that if the December 21st opinion of the Bankruptcy Court is smitten, the Bankruptcy Court erred in permanently enjoining the children claimants from

by placing a floor on the bargain agreed to by the majority. Section 1129(b)(7)(A)(ii) ensures that the dissenting claimants receive in payment of their claims no less than they would receive if the debtor were liquidated under chapter 7.

To determine whether a plan is in the best interest of the creditors, a bankruptcy court must review the facts before it by a preponderance of the evidence. *In re Trowarrow Lanes, Inc.*, 183 B.R. 675, 679 (Bankr. E.D. Mich. 1995). The Court finds that under this clearly erroneous standard, the Bankruptcy Court's factual findings on the best-interest-of-creditors issue was supported by the record and the Bankruptcy Court did not clearly err in its findings as more specifically set forth under the parties' arguments below. The parties' individual arguments regarding the best interests of creditors test are addressed herein.

C. Parties' Arguments

1. Class 5 Domestic Claimants

The Amended Joint Plan of Reorganization classified broad insolvent claimants into three classes: Class 5 (Domestic Claimants); Class 6.1 (Foreign Claimants from countries with common law legal systems and/or with GDPs at least 60% of that of the United States); and Class 6.2 (Foreign Claimants from countries who do not have a common law legal system and have GDPs less than 60% of that of the United States).

a. Nevada Claimants

The Nevada Claimants consist of 45 claimants who objected to the proposed Amended Joint Plan. The Nevada Claimants agree that their claims are substantially similar with the other claimants in Class 5 as to their claims against the Debtor. However, the Nevada Claimants argue that their claims are not

substantially similar to the other claimants in Class 5 because the Nevada Claimants have a judgment against Dow Chemical giving them certain rights that the other claimants do not have against Dow Chemical.⁷ They argue that Dow Chemical is now collaterally estopped from relitigating the issue of liability in Nevada. The Nevada Claimants assert that their claims against Dow Chemical cannot be subjected to a *Daubert* hearing. They also maintain that their claim under the classification issue is closely tied to the non-debtor discharge and good faith issues. They argue that either their claims be classified separately or their claims must be treated differently in order to receive "equal treatment" because of their rights against Dow Chemical based on the judgment the Nevada Claimants have against Dow Chemical. The Nevada Claimants also argue that because they have asserted punitive damages, their claims are different from other claimants who do not have punitive damages claims. The Nevada Claimants further argue that the Litigation Fund Facility is underfunded, and, therefore, is not fair.

The Bankruptcy Court found the Nevada Claimants' collateral estoppel argument unpersuasive, noting that new scientific developments do not support the claimants' position that silicon gel causes disease citing the Institute of Medicine Report and the MDL-926 Science Panel Report. *Classification and Treatment Op.*, 244 B.R. at 655, n.9. The Bankruptcy Court also found collateral estoppel was inapplicable to proper classification under § 1122(e) because the Plan classifies claims against the Debtor, not its Shareholders. 244 B.R. at 655. The Nevada Claimants acknowledge that in future *brexit* implant trials involving Dow Chemical in Nevada Dow Chemical would be entitled to present new scientific evidence revealed since the *Moham* case was tried. Again, the Nevada Claimants also acknowledge that as to the

⁷ See *Moham v. Dow Chemical*, 970 F.2d 98 (Nev. 1998).

Debtor, their claims are substantially similar to the other claimants in Class 5.

The Court agrees with the Bankruptcy Court's conclusion that Dow Chemical would not be collaterally estopped from presenting new evidence in Nevada in future trials against Dow Chemical in light of the Nevada Claimants' concession on that point. Under § 1122(e), it is the nature and character of the claims against the Debtor which must be reviewed and not against third-parties. See *AOY Indus.*, 792 F.2d at 1150-51 ("the focus of the classification is the legal character of the claim as it relates to the assets of the debtor" and "[t]he existence of a claim against a third-party guarantor does not change the nature of a claim vis-a-vis the bankrupt estate and, therefore, is irrelevant to a determination of whether claims are 'substantially similar' for classification purposes"). The Bankruptcy Court did not address the Nevada Claimants' argument that Dow Chemical is collaterally estopped from relitigating its liability if the Nevada Claimants decide to elect litigation under the Joint Plan. However, the collateral estoppel issue may be addressed by way of a motion before the court handling the Nevada Claimants' litigation under the Joint Plan should the Nevada Claimants elect to litigate.

Regarding the *Daubert* issue, claims proceeding against Dow Chemical by way of trial would be governed by the Federal Rules of Evidence, including Rule 702 addressing expert testimony. *Brooks v. American Broadcasting Companies*, 999 F.2d 167, 173 (6th Cir. 1993). The difference between state law evidentiary rules and federal law evidentiary rules under *Daubert* does not go to the question of how a claimant's claim is classified or how a claim is treated within a class. It is the nature of the claim and not how evidentiary rules affect the claim that determines how a claim is to be classified. *AOY Indus.*, 792 F.2d at 1150. As to whether the claim is being treated fairly within the class, the inquiry is whether the claim is subject to the same process to satisfying the claim as the other claims within the class. *In re*

Central Medical Center, Inc., 122 B.R. 568, 575 (Bankr. E.D. Mo. 1990). The evidentiary issues only come into play if the claimant chooses to litigate the claim and at such time those issues may be brought before the trial judge.

The Nevada Claimants' argument that they should be treated differently within Class 5 because of their judgment against Dow Chemical is without merit. The primary treatment provided under the Plan for Claimants in Class 5 is the opportunity for a claimant to litigate the claim against the Litigation Facility. *Classification and Treatment Op.*, 244 B.R. at 660. The secondary treatment is the settlement option. *Id.* at 669. Although settlements are strongly favored and encouraged by law, settlement is merely an option to litigation which the claimant may voluntarily elect. See, e.g., *Frankel v. Kroger Co.*, 670 F.2d 71, 72 (6th Cir. 1982). There is no requirement that settlement offers be proportional within a class in light of the second clause in § 1123(e)(4) which provides that disparate treatment of a claim is permissible if the holder of that claim "agrees to a less favorable treatment." 11 U.S.C. § 1123(e)(4). The requirement under § 1123(e)(4) that all claims be treated equally is satisfied when the class members are subject to the same process for claim satisfaction." *In re Central Medical Center*, 122 B.R. at 575. Under a *de novo* review, the Bankruptcy Court did not clearly err in its conclusion that because the primary treatment provided under the Plan for Class 5 Claimants is the opportunity to elect litigation against the Litigation Facility the equal treatment requirement under § 1123(e)(4) has been met.

The Nevada Claimants contend that they should be treated differently within Class 5 because they are entitled to a claim of punitive damages claims. In its best-interest-of-creditors opinion, the Bankruptcy Court noted that under 11 U.S.C. § 726(e), unsecured creditors are entitled to be paid not just the compensatory damages of their claim, but any exemplary, punitive or multiple damages, before equity is

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Civil Action No. 99-CV-75799

(Appeal from Bankruptcy Ch. 11
Case No. 95-20512)

DOW CORNING CORP.,

Hon. Denise Page Hood

Debtor.

AND RELATED CIVIL NUMBERS

CERTIFICATE OF SERVICE

I the undersigned certifies as follows:

That the undersigned is an attorney practicing law in Reno, Nevada at the firm White Law Chartered, 335 West First Street, Reno, Nevada 89503, and am the bankruptcy counsel for the herein Claimants/Appellants, Class Five Nevada Claimants.

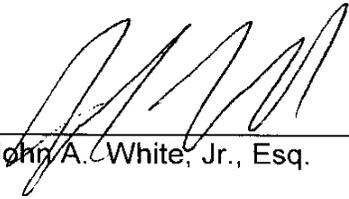
That I personally caused to be served

MOTION FOR REHEARING AND REQUEST FOR STAY

by depositing true and correct copies thereof in the United States mail at Reno, Nevada, in sealed pre-addressed envelopes with postage prepaid, and more specifically,

On November 24, 2000 I directed service by mailing to be accomplished to the persons at the addresses listed on Mailing List Exhibit A attached hereto.

I declare under penalty of perjury that the foregoing is true and correct; executed November 24, 2000 at Reno, Nevada.



John A. White, Jr., Esq.