

Reorganization (“Plan”) and requests relief that is not authorized by the Plan. Mr. Kim filed the request with the Court without first submitting the request to the Finance Committee as mandated by Annex A to the Settlement Facility and Fund Distribution Agreement (“SFA”). Annex A to the SFA requires Foreign Claimants who believe that their country of residence is not correctly categorized to submit the request for re-categorization to the Finance Committee. Such a request may be submitted to this Court only if the Finance Committee or the Debtor’s Representatives or the CAC do not agree to re-categorization. Because the request for re-categorization has not been submitted to the Finance Committee in accordance with the requirements of Annex A to the SFA, this Court does not have jurisdiction over the request and the Motion for Re-Categorization must be denied.

In addition, the relief requested violates the Plan’s terms: Annex A to the SFA makes clear that if there is a re-categorization, it applies only prospectively and claimants whose claims were paid before the re-categorization may not receive any adjustment in their compensation. Finally, there is no basis – stated or otherwise – for any order addressing the activities of Dow Corning, the Debtor’s Representatives or the CAC with respect to the operations of the SF-DCT. The SFA outlines the respective rights and obligations of these entities with respect to

claims processing operations, and there is no claim that any of these entities has not complied with the terms of the SFA.¹

The grounds for this Response are set forth more fully in the accompanying Memorandum.

Dated: April 24, 2014

Respectfully submitted,

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¹ Pursuant to § 4.09(c)(v) of the SFA, Dow Corning may file a motion or take any other appropriate actions to enforce the obligations in the Plan.

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

IN RE:

DOW CORNING,

REORGANIZED DEBTOR



**CASE NO. 00-CV-00005-DPH
(Settlement Facility Matters)**

Hon. Denise Page Hood

**MEMORANDUM OF LAW IN SUPPORT OF RESPONSE
OF DOW CORNING CORPORATION TO "MOTION FOR
RE-CATEGORIZATION OF KOREA" FILED BY YEON HO KIM**

STATEMENT OF ISSUES PRESENTED

1. Should the Court enforce the terms of Annex A to the Settlement Facility and Fund Distribution Agreement (“SFA”) to require Mr. Kim to submit to the Finance Committee a request for an adjustment to the compensation category of Korea for purposes of determining the applicable compensation for Korean claimants before requesting relief from the Court?
2. Does an adjustment to the compensation category of a country pursuant to the terms of Annex A to the SFA apply only to claimants whose claims are paid in the year of re-categorization and thereafter or may such an adjustment also apply retroactively to claimants whose claims have already been paid?

STATEMENT OF CONTROLLING AUTHORITY

Annex A to the Settlement Facility and Fund Distribution Agreement, § 6.05(h)

INTRODUCTION

Yeon Ho Kim, counsel to certain Korean claimants, has filed a Motion for Re-Categorization of Korea (“Motion for Re-Categorization”) requesting the Court to adjust the compensation category of Korea for purposes of determining the applicable compensation for Korean claimants. Mr. Kim filed the request with the Court without first submitting the request to the Finance Committee as mandated by Annex A to the Settlement Facility and Fund Distribution Agreement (“SFA”). Motion for Re-Categorization at 2-3, Apr. 7, 2014, ECF No. 965. Annex A to the SFA sets forth the procedures for re-categorization of countries for purposes of determining the level of compensation. These procedures require Foreign Claimants who believe that their country of residence is not correctly categorized to submit the request for re-categorization to the Finance Committee. A request for re-categorization may only be submitted to this Court if the Finance Committee, the Claimants’ Advisory Committee (the “CAC”) or the Debtor’s Representatives do not agree to re-categorization. Ex. 2 (SFA, Annex A), § 6.05(h).

ARGUMENT

I. Annex A To The SFA Requires Foreign Claimants Requesting An Adjustment To The Compensation Category Of Their Country Of Residence To Submit Such A Request To The Finance Committee Before Requesting Relief From The Court.

The Amended Joint Plan of Reorganization (“Plan”) contains detailed criteria defining claims that are eligible for compensation and specifies a claims administration process for the resolution of Settling Personal Injury Claims. Ex. 1 (SFA), §§ 2.02, 4.03, 5.01; Ex. 2 (SFA, Annex A), Art. VI. The SFA provides that “[a]ll Settling Personal Injury Claims shall be reviewed, processed and resolved by the Claims Office” under the supervision of the Claims Administrator, Ex. 1 (SFA), §§ 4.02(a), 4.03(a), and requires all Settling Personal Injury Claims to be processed in accordance with the Claims Resolution Procedures outlined in Annex A to the SFA, *id.* (SFA), § 5.01(a). The SFA also provides that it and Annex A “shall establish the exclusive criteria for evaluating, liquidating, allowing and paying Claims,” and that “[o]nly those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment.” *Id.* (SFA), § 5.01(a).

Under § 6.05(h) of Annex A to the SFA, “[t]he amount payable to Foreign Claimants who qualify for payment shall be a percentage of the Allowed amount specified in the applicable Compensation Schedule. Such percentage shall be computed based on Schedule III to the[] Claims Resolution Procedures.” Ex. 2

(SFA, Annex A), § 6.05(h). Countries are categorized in Schedule III to the

Claims Resolution Procedures based on the following formula:

For purposes of determining the applicable compensation, Foreign Claimants shall be classified based on their country of residence. The categorization of countries shall be based on the following formula: Category 1 — countries with a common law legal system (Australia, New Zealand, Canada, United Kingdom); Category 2 — countries with a per-capita GDP greater than 60 percent of the GDP of the United States, along with countries in the European Union that are not in Category 1; Category 3 — countries with a per-capita GDP of between 30 percent and 60 percent of that of the United States; Category 4 — countries with a per-capita GDP of less than 30 percent of that of the United States. The per-capita GDP is to be determined by the most current version of The World Factbook (United States Central Intelligence Agency).

Id. (SFA, Annex A), § 6.05(h)(i).

Since the Effective Date of the Plan, Korea has been classified as Category 3. *Id.* (SFA, Annex A), Schedule III. Annex A to the SFA provides that if, due to changed economic conditions, the application of the formula outlined in § 6.05(h)(i) of Annex A to the SFA would result in an adjustment to the category in which a country is placed, the Claims Administrator, with the agreement of the Finance Committee, the CAC and the Debtor's Representatives, may adjust the categorization of that country in Schedule III. *Id.* (SFA, Annex A), § 6.05(h)(ii). Section 6.05(h)(ii) provides that:

Foreign Claimants who believe that due to changed economic conditions their country of residence is not correctly categorized in accordance with the terms of subparagraph (h)(i) above may submit to the Finance Committee a request for re-categorization. *If the Debtor's Representatives and/or the Claimants' Advisory Committee and/or the Finance Committee do not agree to re-categorization, the Foreign Claimant may file a motion in the District Court seeking re-categorization.*

Id. (emphasis added).

Annex A to the SFA further provides that “[s]uch adjustments shall occur no more than once per calendar year and any re-categorization shall apply to all Claimants residing in such country whose Claims are *paid in the year of re-categorization or thereafter.*” *Id.* (emphasis added).

Thus, Annex A to the SFA permits re-categorization and provides for the prospective adjustment of payment amounts if a re-categorization is made. Procedurally, a claimant seeking re-categorization must initially submit the request to the Finance Committee. Only if the Finance Committee, the Debtor's Representatives and the CAC do not agree that the country should be re-categorized, may the claimant “file a motion in the District Court seeking re-categorization”.

II. Mr. Kim Filed The Motion For Re-Categorization With The Court In Violation Of The Procedures Outlined In Annex A To The SFA And Therefore The Motion For Re-Categorization Should Be Denied.

In the Motion for Re-Categorization, Mr. Kim states that “[t]he Korean Claimants realized through experiences . . . that neither the Debtor’s Representatives nor the Claimants’ Advisory Committee will agree to the Finance Committee’s proposal for re-categorization of Korea requested by the Korean Claimants. The unanimous consent of three parties to the request for re-categorization of Korea is far beyond feasibility. Thus the Korean Claimants files this Motion for Re-Categorization of Korea with the Court which must have jurisdiction over it.” Motion for Re-Categorization at 3. Mr. Kim admits that making this request to the Court in the Motion for Re-Categorization before submitting the request to the Finance Committee violates the plain terms of § 6.05(h) of Annex A to the SFA.

Mr. Kim’s subjective and baseless belief that he will be unable to obtain the necessary approval for re-categorization does not allow him to circumvent the procedures required by Annex A to the SFA. *See Yenyoy v. Fairmount Foods Co.*, 661 F.2d 935 (6th Cir. 1981) (“Appellants have included in their complaint only a bare allegation that resort to the [administrative] procedure would have been futile. The bare allegation of futility contained in the complaint is not sufficient to excuse the appellants' failure to attempt to utilize the [administrative] procedure of the

collective bargaining agreement.”); *see also Doe v. Dublin City Sch. Dist.*, 453 Fed. Appx. 606, 609 (6th Cir. 2011) (“The burden of demonstrating futility or inadequacy rests on the party seeking to bypass the administrative procedures.”). These procedures are simple and clear. They are required by the Plan and they promote efficiency: the Claims Administrator, the Finance Committee and the parties will have the opportunity to review the data and respond to the request. The criteria for re-categorization are objective and such a request can be addressed promptly by the Finance Committee, the Debtor’s Representatives and the CAC. There is no basis to bypass the mandatory procedure and initiate litigation over an issue that may easily be addressed through the administrative process spelled out in Annex A to the SFA. Thus, the Motion for Re-Categorization violates the requirements of the Plan and should be denied for lack of jurisdiction.

III. The Relief Requested In The Motion For Re-Categorization Is Unwarranted And Is Not Permitted Under The Plan.

The Motion for Re-Categorization requests that this Court order (1) the Finance Committee to adjust the compensation category of Korea for purposes of determining the applicable amount of compensation for eligible Korean claimants, (2) the Settlement Facility-Dow Corning Trust (“SF-DCT”) to pay additional sums to Korean claimants who have already been paid and (3) the “parties”, including Dow Corning Corporation (“Dow Corning”) and the CAC, “not to influence [the]

SF-DCT to give administrative disadvantages to the Korean Claimants” while their claims are being processed. *See* Motion for Re-Categorization at 4.

Even if the Motion for Re-Categorization were properly filed in this Court, the relief requested is both unwarranted and in violation of the Plan. First, Annex A to the SFA makes clear that in any re-categorization, the change in compensation level for qualified claimants applies only prospectively. Ex. 2 (SFA, Annex A), § 6.05(h)(ii) (“[A]ny re-categorization shall apply to all Claimants residing in such country whose Claims are paid in the year of re-categorization or thereafter.”). Mr. Kim’s request that the Court order additional retroactive compensation to Korean claimants who were paid before any request for re-categorization must be denied because it is not authorized by the Plan.

Second, to the extent the Motion for Re-Categorization seeks an order directed at the roles or actions of Dow Corning, the Debtor’s Representatives or the CAC, the request must be denied. The SFA outlines the roles and responsibilities of each of these entities. *See* Ex. 1 (SFA), § 4.09(c) (outlining the purpose and function of the Debtor’s Representatives and the CAC for purposes of claims processing). Each of these entities must and will continue to fulfill their obligations and abide by the requirements of the SFA in discharging their duties. There is no basis for any suggestion that additional judicial guidance is required to

ensure that these entities abide by the terms of the SFA and, therefore, the request for such an order must be denied.

CONCLUSION

For the foregoing reasons, Dow Corning respectfully requests that the Court deny the Motion for Re-Categorization.

Dated: April 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all counsel of record.

Dated: April 24, 2014

By: /s/ Deborah E. Greenspan

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

IN RE:

DOW CORNING,

REORGANIZED DEBTOR



**CASE NO. 00-CV-00005-DPH
(Settlement Facility Matters)**

Hon. Denise Page Hood

**PROPOSED ORDER DENYING “MOTION FOR
RE-CATEGORIZATION OF KOREA” FILED BY YEON HO KIM**

The Court has considered Dow Corning Corporation’s Response to “Motion for Re-Categorization of Korea” Filed by Yeon Ho Kim (Doc. No. 965 in 00-CV-00005-DT), and the Court finds and concludes that the Motion for Re-Categorization of Korea should be denied.

ACCORDINGLY, it is hereby ORDERED that the Motion for Re-Categorization of Korea is DENIED.

Dated: _____

DENISE PAGE HOOD
United States District Judge