Case No.: 18-1040

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS

Interested Parties – Appellants

v.

DEBTOR'S REPRESENTATIVES; DOW SILICONES CORPORATION;

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE

Defendants – Appellees.

Brief of Appellants Korean Claimants

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Korean Claimants filed Motion for the Settlement Facility to Locate Qualified Medical Doctor of Korea with the District Court on December 22, 2004. (RE77)

Korean Claimants filed Motion for Reversal of SFDCT Decision Regarding Korean Claimants on September 26, 2011. (RE810)

Dow Silicones Corporation and Debtor's Representatives filed Cross Motion to Dismiss Motion for Reversal of SFDCT Decision on October 13, 2011. (RE816)

The Claims Administrator filed Cross Motion to Dismiss Motion for Reversal of SFDCT Decision on November 3, 2011. (RE820)

Korean Claimants filed Motion for Re-Categorization for South Korea on April 7, 2014. (RE969)

Dow Silicones Corporation, Debtor's Representatives and Claimants' Advisory Committee filed Joint Motion for Mootness of Korean Claimants' Motions on April 24, 2015. (RE1020)

The hearing for Joint Motion for Order of Mootness of Motions filed by Korean Claimants was held on December 10, 2015.

Korean Claimants filed Motion for Recognition and Enforcement of Mediation on December 14, 2016. (RE1271)

The District Court issued Order Granting Joint Motion to Render Moot Motions filed by Korean Claimants on December 28, 2017.

The Finance Committee filed Motion for Order to Show Cause with respect to Yeon Ho Kim on January 10, 2018. (RE1352)

Korean Claimants filed Cross Motion for Entry of Order to Show Cause with respect to the Finance Committee on January 17, 2018. (RE1357)

The District Court issued Order for Yeon Ho Kim on behalf of Korean Claimants to Show Cause why he should not be Sanctioned and Held in Contempt on January 26, 2018. (RE1368)

Korean Claimants filed Motion for Joinder and Joint Hearing held on March 22, 2018 on January 30, 2018. (RE1371)

Korean Claimants filed Motion for Exclusion of Dow Silicones Corporation, Debtor's Representatives and Claimants' Advisory Committee from Korean Claimants' Cross Motion for Entry of Order to Show Cause with respect to the Finance Committee on February 3, 2018. (RE1378)

The District Court did not hear Motion for Recognition and Enforcement of Mediation even if Korean Claimants' Motion for Recognition and Enforcement of Mediation was closely interwinded with Korean Claimants' Motions for Reversal of SFDCT Decision Regarding Korean Claimants and for Re-Categorization for South Korea.

The basis that the District Court Granted Motion for Order of Mootness

regarding Korean Claimants' Motions was that SFDCT granted what Korean Claimants sought in those Motions thus Motions became moot. Korean Claimants do not agree. It is evident that Korean Claimants filed Motion for Recognition and Enforcement of Mediation.

The Motion for Recognition and Enforcement of Mediation is pending the District Court without any projected schedule for hearing.

The reason for the Finance Committee to propose mediation to Korean Claimants in June 2012 was to settle Korean Claims pending SFDCT. Therefore, the District Court should have heard Motion for Recognition and Enforcement of Mediation before it issued Order Granting Joint Motion to Render Moot Motions for Reversal of SFDCT Decision Regarding Korean Claimants and for Re-Categorization for South Korea. The District Court did not hear.

Korean Claimants did not have a chance to be heard fully in the District Court. Accordingly, Korean Claimants request this Appellate Court to provide an oral argument for Korean Claimants.

II. STATEMENT OF JURISDICTUION

The United States District Court Eastern District of Michigan has jurisdiction over the Amended Joint Plan of Reorganization of Dow Corning Corporation effective on June 1, 2004("the Plan") to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents (the SFA and the Claims Resolution Procedures).

On December 28, 2017, the District Court issued an Order that Joint Motion by Dow Silicones Corporation and Debtor's Representatives and Claimants' Advisory Committee is Granted, Korean Claimants' Motion for Re-Categorization is Moot and Dismissed, Korean Claimants' Motion for Reversal of SFDCT Decision Regarding Korean Claimants is Moot regarding the "Hold" issue and Denied as to any request to review the substantive decision made by the Claims Administrator, Dow Silicones Corporation's Cross Motion to Dismiss Motion for Reversal of SFDCT Decision and the Claim Administrator's Cross Motion to Dismiss Motion for Reversal of SFDCT Decision are Granted, Korean Claimants' Motion for SFDCT to Appoint/Hire a Qualified Medical Doctor is Moot as to previous claims already evaluated by a QMD and Denied as to appointing or hiring a new QMD.

Korean Claimants filed this appeal in a timely manner. The Order of the District Court is a final order which cannot be contested in the District Court. Therefore, the United States Court of Appeals for the Sixth Circuit has jurisdiction over this appeal.

III. STATEMENT OF ISSUES

Korean Claimants do not want to contest the Order of the District Court regarding Motion for STDCT to locate Qualified Medical Doctors of Korea (RE77). Korean Claimants have no value in disputing with SFDCT for the matter of availability of a qualified medical doctor in Korea.

Therefore, Korean Claimants want to narrow the scope of this Appeal to two Motions Rendered Moot and Dismissed by the District Court; (1) Motion for Re-Categorization (RE965) and (2) Motion for Reversal of SFDCT Decision Regarding Korean Claimants (RE810).

The issue regarding Motion for Re-Categorization is whether re-categorization of countries shall apply proactively, regardless of when changed economic conditions for adjustment of countries were met, so the decision of the Claims Administrator that beginning from calendar year January 2015, South Korea was re-categorized to Category 2 and Korean Claimants are eligible for revised

payment category, Class 6.1 payments, from January 2015, is a correct interpretation of the SFA. Korean Claimants contest that re-categorization of countries for South Korea shall apply from the year that changed economic conditions of South Korea were met for adjustment of countries or at least from the year that Korean Claimants filed Motion for Re-Categorization with the District Court.

The issue regarding Motion for Reversal of SFDCT Decision Regarding Korean Claimants is whether the decision of the Claims Administrator that canceled 1,762 claims on POM approvals on the basis of Affirmative Statement, which had been notified to Korean Claimants through Notice of Status letters, complies with the SFA and that lifted "Hold" Korean Claims which had been placed due to Affirmative Statements of implanting physicians submitted by Korean Claimants and processed the approved 1,762 claims on an individual basis rendered moot Motion for Reversal of SFDCT Decision Regarding Korean Claimants.

IV. STATEMENT OF CASE

Korean Claimants submitted 1,815 POM claim forms to the Settlement Facility – Dow Corning Trust ("SFDCT") from 2004-2008 and received Notice of Status letters that 1,762 POM claims have been approved by August 4, 2009.

Out of 1,815 POM claims, 1,488 Claimants submitted POM claims on the basis of Affirmative Statement of implanting physicians (Motion for Reversal of SFDCT Decision, RE810, Page ID #12317).

Korean Claimants who submitted POM claims on the basis of Affirmative Statement acquired Affirmative Statements from their own implanting physicians as follows;

"The undersigned physician attests that the above patient received breast implant surgery from our hospital and the product used for surgery is a Dow Corning product *Basis: The medical records at that time were destroyed because a ten year period of keeping medical records passed by. However, this hospital only used Dow Corning products during a period of this operation thus the product used for the above patient can be attested as a Dow Corning product[Date][Signature of implanting physician]." (Motion for Reversal of SFDCT Decision, RE810, Pg ID #12288)

This paragraph in Affirmative Statement was to meet requirements for providing the basis of conclusion and the description of what steps were taken by an implanting physician to secure the types of proof outlined in subparagraphs 1,2 (hospital records and medical records containing implant package label) of B.5, Part I of Schedule I of Annex A to SFA and why those

records are not available. Affirmative Statement was drafted by the attorney for Korean Claimants through his discussions with and suggestions from the Claims Administrator, Wendy Huber, and a member of the Tort Committee, Dianna Pendleton-Dominguez, who was active during confirmation hearing (Motion for Reversal of SFDCT Decision, RE810, Pg ID #12286-12290).

On August 14, 2009, the Claims Administrator, Davis Austern, sent an e-mail to the attorney for Korean Claimants as follows;

"With respect to the POM claims you sent, a few observations: We have performed a POM review on 1,815 claims you have submitted. Of these, 1,488 (82%) were based on affirmative statements, a hugely greater number than any other group of claims submitted to us. Nonetheless, we have approved POM for 1,742 of the claims, an approval rate of 97% or approximately 8% higher than the average POM approval rate for all claims submitted to the Facility. (By the way, 274 of the 1,762 approved claims do not have a Claim Form and we will need such a form before further review of these claims) For your records, we show you have also submitted 1,504 Disease Claim Forms, 1,504 Rupture Forms, and 498 Explant Forms. In addition to 1,762 approved POM claims, there are 66 additional claims pending translation. We have approved all but 53 of the affirmative statement basis POMs—after spending one year reviewing them. These 53 claims had certain inconsistencies in the claim files. We did not

"take back" the "acceptable" POM determination but we did write to you and request additional information before proceeding with their further review (i.e., disease review). We need further explanation for these claims—and don't forget, we need claim Forms for 274 of the POM approved claims noted above." (Motion for Reversal of SFDCT Decision, RE810, Pg ID#12317).

On August 22, 2011, the Claims Administrator, Ann Phillips, sent a letter to the attorney for Korean Claimants as follows;

"We can no longer accept your statements that all Korean medical records were destroyed after a ten year period. Note also that for claimants who have yet to file a claim form, no Affirmative Statements will be accepted as proof of manufacture. Of 1,762 Claimants who filed claim forms, any claimant previously paid based solely on an Affirmative Statement is not eligible for further benefits, including Premium Payments. A list of those claimants will be sent by the Quality Management Department shortly. Claims where a determination has/will be made that documents have been altered will be removed from processing. Claimants in Class 7, who were implanted outside the date range, do not meet the minimum standards for an eligible Class 7 claim and are therefore not eligible for a review. As an alternative, for those claimants on the attached list the Plan allows for a Limited Proof of Manufacturer Expedited Payment Option. Some claimants may be eligible to participate in the

Class 6.2.3 Payment Option which provides for a $600 payment for limited proof of manufacturer. In fairness to you and your clients, please be informed that we intend to consult with Korean attorneys or with Korean government officials concerning the mis-statements you have made to the SFDCT, as well as your submission of certain medical records which, as you know, we now have proof that the records were altered."(Motion for Reversal of SFDCT Decision, RE810, Pg ID#12330).

On September 26, 2011, Korean Claimants filed Motion for Order of Reversal of SFDCT Decision with the District Court to seek the following measures: (1) SFDCT failed to establish separate processing for 6.2 Class (2) The Claims Administrator did not keep promises made to Korean Claimants through the counsel (3) SFDCT violated the expectations of the rights of 1,762 Claimants who already received notification letters of POM approval and the expectations or the rights of 660 Claimants who already received the payments and are waiting for premium payments just in case (4) Affirmative Statements of Korean Claimants were not fabricated because they were signed by the implanting physicians and the form of Affirmative Statement had been approved by the Claims Administrator (5) SFDCT abused power and authority because the Claims Administrator canceled all of 1,762 Claimants who received notification letters of POM approval resulting that even the Claimants who

never submitted documents older than a ten year period are subject to the cancellation of POM approval (Motion for Reversal of SFDCT Decision, RE810, Pg ID#12298).

Korean Claimants argued in that Motion that Korean Claimants seek the correction of misconduct of the Claims Administrator, the abuse of power, and the breach of the SFA by failing to establish separate processing of 6.2 Class, other than ruling as to claim files which were submitted for reviewing eligibility criteria, and the restructuring of employees of SFDCT who were routinely discriminating Class 6.2 Claimants including Korean Claimants.

On October 13, 2011, Dow Silicones Corporation filed Cross Motion to Dismiss Korean Claimants' Motion for Reversal of SFDCT Decision (Cross Motion to Dismiss the Korean Claimants' Appeal, Styled as "Motion for Reversal of SFDCT Decision Regarding Korean Claimants." RE816, Pg ID#12686-12687).

On November 3, 2011, the Claims Administrator, David Austern, filed Cross Motion to Dismiss Motion for Reversal of SFDCT Decision (Cross Motion to Dismiss Motion for Reversal filed by Yeon-Ho Kim, RE820, Pg ID#13610-13611).

Around June 2012, the Finance Committee proposed the attorney for the Korean Claimants, Yeon Ho Kim, to settle Korean claims pending SFDCT by mediation. A mediation conference was held at an alternative dispute resolution center in Washington DC on August 10, 2012. The attorney for Korean Claimants and the Finance Committee agreed to settle Korean Claims pending SFDCT that SFDCT should pay five million dollars to Korean Claimants and Korean Claims pending SFDCT should be settled. The attorney for Korean Claimants and the Finance Committee agreed verbally in that mediation conference and shook hands and left. Following the conference, the Finance Committee delivered a written agreement reflecting the verbal agreement to the attorney for Korean Claimants. The attorney for Korean Claimants signed on it and sent it back to the Claims Administrator. So the written agreement was executed (Motion for Recognition and Enforcement of Mediation, RE1271, Pg ID#19277-19338).

However, the Finance Committee did not pay five million dollars. Korean Claimants demanded the Finance Committee to respect the settlement agreement on several occasions. The Claims Administrator responded that Dow Silicones Corporation did not authorize it. The attorney for Dow Silicones Corporation and the Debtor's Representatives responded to the attorney for Korean Claimants that the Finance Committee and the Claims Administrator never reported about mediation and Dow Silicones Corporation would never

approve the mediation result (Motion for Recognition and Enforcement of Mediation, RE1271, Pg ID#19337).

On April 7, 2014, Korean Claimants filed Motion for Re-Categorization (Motion for Re-Categorization of South Korea, RE965, Pg ID#16262-16332).

Korean Claimants discovered that a per-capita GDP of South Korea exceeded sixty (60) percents of a per-capita GDP of the United States of America. Pursuant to Annex A to the SFA, Korean Claimants filed Motion for adjustment of countries.

Korean Claimants sought in that Motion an order of the following measures: (1) The Finance Committee should revise Schedule III to include South Korea in Category 2 countries and print the new Schedule III for reference to similar class action cases by Korean citizens in the US Courts (2) SFDCT should pay the balance of payments up to 60 percents over 35 percents of Domestic Amount for Applicable Compensation Level to all of Korean Claimants who have already received compensation (3) SFDCT should apply 60 percents of Domestic Amount for Applicable Compensation Level to Korean Claimants who have not received compensation yet (4) Dow Silicones Corporation and Claimants' Advisory Committee should not influence on SFDCT to give

administrative disadvantages to Korean Claimants while processing Korean Claims just because of Re-Categorization of Countries (Motion for Re-Categorization, RE995, Pg ID#16265).

On December 4, 2014, the Claims Administrator, Ann Phillips, sent an email to the attorney for Korean Claimants that SFDCT decided re-categorization for South Korea to be granted from Category 3 to Category 2 beginning from January 2015.

However, the Claims Administrator denied the application of re-categorization to Korean Claims approved earlier than January 2015, even if South Korea's per capita GDP exceeded sixty percents of that of the United States from the year of 2009, and furthermore, even if Korean Claimants filed Motion for Re-Categorization with the District Court on April 4, 2014.

As a result, Korean Claimants lost over a million dollars which was a difference of Class 6.1 payments and Class 6.2 payments because SFDCT suddenly mailed a bulk of checks (481 checks in total) of Class 6.2 payments to the attorney for Korean Claimants in December 2014. The Claims Administrator was wise from the perspective of Dow Silicones Corporation that she sent checks of Class 6.2 payments for 481 Korean Claimants to the attorney for Korean Claimants by the

Federal Express on December 20, 2014 right before she granted re-categorization for South Korea in the email of December 4, 2014 that the re-categorization was effective from January 1, 2015.

On March 7, 2015, Korean Claimants filed Motion for Extension of Deadline of Class 7 Korean Claimants. The Motion was dismissed. Korean Claimants appealed. The Appeal was dismissed.

On April 24, 2015, Dow Silicones Corporation, Debtor's Representatives and Claimants' Advisory Committee filed Joint Motion for Order of Mootness of Motions filed by Korean Claimants (Suggestion of Mootness Regarding Motions filed by Korean Claimants, RE1020, Pg ID #17020-17056).

On December 10, 2015, a hearing for Motion for Order of Mootness Regarding Motions of Korean Claimants was held.

On December 14, 2016, Korean Claimants filed Motion for Recognition and Enforcement of Mediation (Motion for Recognition and Enforcement of Mediation, RE1271, Pg ID#17277-19338).

On December 28, 2017, the District Court issued the Order Granting Joint

Motion of Dow Silicones Corporation, Debtor's Representatives, and the Claimants' Advisory Committee (Order Granting Joint Motion to Render Moot Motions filed on behalf of Korean Claimants, RE1347, Pg ID#21590-21599).

The Order ruled, "Based on the submissions by the Movants, as requested by the Korean Claimants, the Korean Claimants were re-categorized and that the re-categorization applies to all pending Korean Claims effective in 2015. The December 4, 2014 email from the Claims Administrator states that "your request for re-categorization is granted", "Beginning in calendar year January 2015, South Korean is re-categorized to Category 2." (*Id.*) The email further states that the "re-categorization shall apply to all Claimants residing in such country whose Claims are paid in the year of re-categorization or thereafter" (*Id.*) It appears now that the Korean Claimants argue that revised payment category should apply retroactively to all Korean Claims. However, the Korean Claimants do not submit any support for such a retroactive application. The Korean Claimants do not have the authority under the Plan to seek a redrafting of the Plan or seek an interpretation of the Plan…Any new request by the Korean Claimants to interpret the Plan and the SFA to retroactively apply the re-categorization to previously paid Korean Claims cannot be considered by the Court."

The Order ruled regarding Motion for Reversal of SFDCT Decision, "After reviewing the submissions of the parties, the Court finds that the Motion for Reversal has rendered moot because the SFDCT lifted the 'Hold' placed on the submitted Korean Claims. The Claims Administrator stated that after review and investigation, "the SFDCT and the Finance Committee determined to lift the 'hold' previously placed by the Quality Management Department on Mr.Kim's claims that rely on Affirmative Statements as Proof of Manufacturer and that – consistent with the obligations of the Plan – the SFDCT could review claims individually to determine whether they satisfy the Claims Resolution Procedure". The SFDCT notified the Korean Claimants of its decision on January 17, 2014. If the Korean Claimants are now arguing that the Court should reverse any decision made by the Claims Administrator on the substance of any claim, as opposed to an order reversing the Claims Administrator's placement of an 'hold' on a certain claim, the Court must look to the Plan to determine whether it has such authority. .... The Court finds that any relief sought by the Korean Claimants as to any substantive decision on any Korean Claim made by the Claims Administrator is denied." (RE1347, Pg ID #21597)

V. SUMMARY OF ARGUMENT

Korean Claimants argue that re-categorization of countries for South Korea

should apply from the year of 2010, even of 2009, because South Korea's per-capita GDP became greater than sixty percents of per-capita GDP of the United States from 2010 est. in the 2014 World Factbook (published by the United States Central Intelligence Agency) and the decision of the Claims Administrator that re-categorization for South Korea shall be effective from January 2015 is a misinterpretation of the SFA resulting that over a million dollars were lost by Korean Claimants and instead were saved by SFDCT. The Claims Administrator was negligent in her duty for adjustment of countries under the SFA and in addition, the Claims Administrator did not interpret the SFA that re-categorization for South Korea shall apply from the year that changed economic conditions of South Korea were met for adjustment of countries, which was 2009, because South Korea's per-capita GDP became greater than sixty percents of the United States' per-capita GDP in 2009, or re-categorization for South Korea shall apply at least from the year that Korean Claimants filed Motion for Re-Categorization, which was 2014, because Korean Claimants filed Motion for Re-Categorization on April 7, 2014 with the District Court.

After the filing of the Motion for Re-Categorization of Korea by Korean Claimants, SFDCT mailed 481 checks of Class 6.2 payment (3,500 dollars) to the attorney for Korean Claimants by the Federal Express (using the Federal Express for sending a check to a claimant is abnormal in practices of SFDCT) on December 20, 2014. The Claims Administrator erred that re-categorization

for South Korea is effective from January 2015. The District Court approved the decision of the Claims Administrator. The conclusion of the District Court is a misinterpretation of the SFA and the Claims Resolution Procedures.

Korean Claimants argue that the Order of the District Court that Granted Joint Motion Rendered Moot Motion for Reversal of SFDCT Decision is based upon a misinterpretation of the SFA in that POM approvals that had been given Notices of Status letters are irrevocable whether or not POM approvals were on the basis of Affirmative Statement of implanting physicians and the decision of the Claims Administrator that lifted "Hold" Korean Claims and processed the POM approved 1,762 claims on an individual basis shall not render Motion for Reversal of SFDCT Decision Regarding Korean Claimants moot and the decision of the Claims Administrator that canceled 1,762 claims on the basis of Affirmative Statement is contradiction with the SFA and the Order of District Court that approved the decision of the Claims Administrator should be reversed by this Appellate Court.

VI. ARGUMENTS

1. Re-Categorization shall apply from the year that changed economic conditions of South Korea were met for adjustment of countries or at

least from the year that Korean Claimants filed Motion for Re-Categorization with the District Court

The Standard of review for this argument is de novo review of legal error.

The District Court ruled, "It appears now that Korean Claimants argue that the revised payment category should apply retroactively to all Korean Claims."(Order Granting Joint Motion to Render Moot Motions filed on behalf of Korean Claimants, RE1347, Pg ID#21594)

Korean Claimants did not argue that revised payment category should apply retroactively to all Korean Claims. Korean Claimants argued that revised payment category should apply from the year that changed economic conditions of South Korea were met, which was 2009, or at least from the year that Korean Claimants filed Motion for Re-Categorization with the District Court, which was 2014. The Claims Administrator notified Korean Claimants that revised payment category should apply from January 2015.

The District Court phrased, "apply retroactively", but Korean Claimants did not argue in that way.

Subsection (h) Compensation, Section 6.05 Foreign Claimants, Article VI Settlement Options of Dow Corning Settlement Program and Claims Resolution Procedures (Annex A to Settlement Facility and Fund Distribution Agreement)

specifies;

> **(h)** ***Compensation.*** The 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 these Claims Resolution Procedures. The percentage of payment is based on the Claimant's country of residence.
>
> > **(i)** ***Categorization of Countries.*** 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).
> >
> > **(ii)** ***Adjustment to Categories.*** The Claims Administrator, with the agreement of the Claimants' Advisory Committee and the Debtor's Representatives, may adjust the categorization of countries in Schedule III if, due to changed economic conditions, the application of the formula specified at subparagraph (h)(i) above would result in the placement of any country in a category different than that specified on the then current version of Schedule III. Such 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. 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.

The Claims Administrator, with the agreement of the Claimants' Advisory Committee and Debtor's Representatives, may adjust the categorization of countries if changed economic conditions warrant the placement of any country in a category different than that of Schedule III. Such adjustments shall occur only once per calendar year and any re-categorization shall apply to all Claimants residing such country whose Claims are paid in the year of re-categorization or thereafter.

On the other hand, Foreign Claimants may submit a request for re-categorization (Korean Claimants submitted it by an email to the Finance Committee first). If Debtor's Representatives and/or Claimants' Advisory Committee and/or the Finance Committee do not agree to re-categorization, Foreign Claimants may file a motion with the District Court.

The SFA entrusted the Claims Administrator to adjust re-categorization of countries due to changed economic conditions. The Claims Administrator has never done it since June 1, 2004, the effective date of Dow Corning Reorganization Plan. The Claims Administrator was negligent in adjusting countries although the Cow Corning Reorganization Plan contemplated sixteen years for the Settlement Facility to review Settling Claimants' Claims.

If the Claims Administrator had adjusted re-categorization of countries, South Korea could have been re-categorized into Category 2 – countries with a per-capita GDP greater than 60 percents of a per-capita GDP of the United States, along with countries in the European Union that are not in Category 1, because South Korea's per-capita GDP exceeded sixty percents of a per-capita GDP of the United States in 2010 pursuant to the 2014 World Factbook (United States Central Intelligence Agency). For the purpose of classification, a per-capita GDP was and in the future shall be determined by data contained in the World Factbook (Motion for Re-Categorization, RE965-6, Pg ID#16319).

Because the Claims Administrator was negligent in adjustment of countries,

Korean Claimants filed this Motion for Re-Categorization on April 7, 2014.

The 2014 World Factbook indicates; (Motion for Re-Categorization, RE965-2, Pg ID#16279, RE965-3, Pg ID#16291)

For South Korea;

GDP - per capita (PPP):
$32,800 (2012 est.)
country comparison to the world: 43
$32,300 (2011 est.)
$31,400 (2010 est.)
note: data are in 2012 US dollars

For the United States;

GDP - per capita (PPP):
$50,700 (2012 est.)
country comparison to the world: 14
$50,000 (2011 est.)
$49,500 (2010 est.)
note: data are in 2012 US dollars

Pursuant to the 2014 World Factbook, South Korea's per-capita GDP was greater than sixty percents of the United States' per-capita GDP in 2010 est. because $31,400 divided by $49,500 equals 0.63(63%), and in 2011 est. because $32,300 divided by $50,000 equals 0.64(64%), and in 2012 est. because $32,800 divided by $50,700 equals 0.64(64%). It is evident that South Korea's per-capita GDP became greater than sixty percents of the United States' per-capita GDP from 2009 and thereafter. (Actually, South Korea's per-capita GDP

exceeded sixty percents of the Unites States' per-capita GDP in 2009 since the 2014 World Factbook cut at 2010)

However, the Claims Administrator granted re-categorization for South Korea on December 4, 2014 and determined that revised payment category shall apply from January 2015. The 481 checks mailed by SFDCT to Korean Claimants in December 20, 2014 were affected because revised payment category by SFDCT did not apply from 2014.

Had the Claims Administrator adjusted categorization of countries ever since the effective date of the Dow Corning Reorganization Plan, June 1, 2004, all of Korean Claimants could have received revised payments of Class 6.1 from 2009 or at least 2010 because changed economic conditions of South Korea for adjustment of countries were met from 2009 or at least from 2010 by the data of the 2014 World Factbook.

Furthermore, revised payment category which was granted by the Claims Administrator shall apply from 2014 because Korean Claimants filed Motion for Re-Categorization with the District Court on April 7, 2014.

But the District Court interpreted the SFA that revised payment category for South Korean shall not apply retroactively so the decision of the Claims Administrator was correct in applying from January 2015.

The sentence in Subsection (h)(ii) Compensation, Section 6.05 Foreign Claimants, Article VI Settlement Options of Dow Corning Settlement Program and Claims Resolution Procedures (Annex A to the SFA), "Any re-categorization shall apply to all Claimants residing in such country whose Claims are paid in the year of re-categorization or thereafter" should be interpreted that the sentence shall apply only when the Claims Administrator adjust categorization of countries voluntarily. The sentence shall not apply when Foreign Claimants who believe that due to changed economic conditions their country of residence is not correctly categorized submit to the Finance Committee a request for re-categorization or when Foreign Claimants filed Motion for Re-Categorization with the Court.

In the latter case, the timing that changed economic conditions for adjustment of countries were met or at least the timing that Foreign Claimants submitted/filed for re-categorization must be a criteria for when the Claims Administrator apply revised payment category from.

Therefore, re-categorization shall apply from the year that changed economic conditions of South Korea for adjustment of countries were met, which was 2009, or at least from the year that Korean Claimants filed Motion for Re-Categorization, which was 2014.

The conclusion of the District Court that Korean Claimants argue that revised payment category shall apply retroactively and the decision of the Claims

Administrator that revised payment category shall apply from January 2015 is correct is a misinterpretation of the SFA.

2. Notification of POM approvals by SFDCT is Irrevocable

The Standard of review for this argument is not only de novo review of legal error but also clearly erroneous review of finding of facts.

SFDCT sent Notices of Status letters for POM approvals to Korean Claimants who submitted Affirmative Statements of implanting physicians and notified each of them that their POM submissions were approved. In total, 1,762 Claims were approved on the basis of Affirmative Statement.

On August 14, 2009, the Claims Administrator, David Austern, acknowledged as follows; (Motion for Reversal of SFDCT Decision Regarding Korean Claimants, RE810-6, Pg ID#12317)

> With respect to the POM claims you sent, a few observations: We have performed a POM review on 1,815 claims you have submitted. Of these, 1,488 (82%) were based on affirmative statements, a hugely greater number than any other group of claims submitted to us. Nonetheless, we have approved POM for 1,762 of the claims, an approval rate of 97% or approximately 8% higher than the average POM approval rate for all claims submitted to the Facility. (By the way, 274 of the 1,762 approved claims do not have a Claim Form and we will need such a form before a further review of these claims.) For your records, we show you have also submitted 1,504 Disease Claim Forms, 1,504 Rupture Forms, and 498 Explant Forms.

On August 22, 2011, the Claims Administrator, Ann Phillips, determined as follows; (Motion for Reversal of SFDCT Decision Regarding Korean Claimants, RE810-10,PgID#12330)

We can no longer accept your statements that all Korean medical records were destroyed after a ten year period.

Note also that for claimants who have yet to file a claim form, no Affirmative Statements will be accepted as proof of manufacture. Of the 1742 claimants who filed claim forms, any claimant previously paid based solely on an Affirmative Statement is not eligible for further benefits, including Premium Payments. A list of those claimants will be sent by the Quality Management Department shortly. Claims where, a determination has/will be made that documents have been altered will be removed from processing.

Claimants in Class 7, who were implanted outside the date range, do not meet the minimum standards for an eligible Class 7 claim and are therefore not eligible for a review.

As an alternative, for those claimants on the attached list the Plan allows for a Limited Proof of Manufacturer Expedited Payment Option. Some claimants may be eligible to participate in the Class 6.2.3 Payment Option which provides for a $600.00 payment for limited proof of manufacture.

The decision of August 22, 2011 by the Claims Administrator actually canceled the approved POM for 1,762 claims. The Order of the District Court clarified, "The Movants respond that the Claims Administrator has canceled the POM approvals of these claims."(Order Granting Joint Motion to Render Moot, RE1347, Pg ID#21595)

Korean Claimants with approved POM for 1,762 claims received Notices of Status letters from SFDCT that their POM submissions were approved.

Section 10.01 Irrevocability, Article X General Provisions of the SFA specifies;

10.01 ***Irrevocability.*** The Settlement Facility is irrevocable. None of the Released Parties, present or future, or their successors in interest may hold any beneficial interest in, or have any reversion to, the income or corpus of the Settlement Facility.

The Settlement Facility is irrevocable. The Clause should be interpreted that not

only the existence and the substance of the Settlement Facility are irrevocable but the operation and the procedures of the Settlement Facility, which include the evaluation of claims and the notification to Claimants, are also irrevocable.

The SFDCT reviewed and evaluated POM submissions of 1,762 claims on the basis of Affirmative Statements and mailed Notices of Status letters for POM approvals to Korean Claimants. The decision that SFDCT approved POM claims for 1,762 claims is irrevocable.

The decision of August 22, 2011 by the Claims Administrator that SFDCT actually canceled 1,762 claims that rely on Affirmative Statement is in contradiction with the SFA. The District Court did not consider the irrevocability of the Settlement Facility in the Order Granting Joint Motion to Render Moot the Motion for Reversal of SFDCT Decision Regarding Korean Claimants.

However, the District Court found in the Order that Korean Claimants agreed that the "hold" placed on Korean Claims was lifted and that SFDCT has since and continued to process Korean Claims.

This finding of facts is clearly erroneous. Korean Claimants never agreed as above.

SFDCT placed "hold" on Korean Claims around December 2010 (Motion for

Reversal of SFDCT Decision, RE810-09, Pg ID#12326).

The Claimants Administrator determined to cancel 1,762 claims on the basis of Affirmative Statements on August 22, 2011.

The Finance Committee proposed mediation to settle Korean Claims pending SFDCT in June 2012. The Finance Committee and Korean Claimants agreed to settle Korean Claims pending SFDCT with a payment of five million dollars in August 10, 2012.

The attorney for Korean Claimants demanded execution of the mediation result to the Claims Administrator and the Special Master on numerous occasions. He requested the attorney for Dow Silicones Corporation and the Debtor's Representative why the Finance Committee did not execute the mediation result.

While the correspondences regarding the mediation result were exchanged between the members of the Finance Committee and Yeon Ho Kim, Korean Claimants never agreed that "hold" placed on Korean Claims was lifted and that SFDCT has since and continued to process Korean Claims.

The District Court found additionally that Motion for Reversal has been rendered moot because SFDCT lifted the "hold" placed on the submitted Korean Claims.

This finding of facts is also clearly erroneous.

Korean Claimants sought in Motion for Reversal of SFDCT Decision as follows; (Motion for Reversal, RE810, Pg ID#12298)

(a) The decision that SFDCT can no longer accept affirmative statements that medical records were destroyed after ten year period shall be reversed (b) The decision that SFDCT cannot accept affirmative statements as proof of manufacturer for claimants who have yet to file a claim form shall be reversed (c) The decision that any claimant of the 1,762 claimants who filed claim forms and who were previously paid based solely on affirmative statement is not eligible for further benefits including premium payments shall be reversed (d) The decision that SFDCT will remove the claims where a determination will be made that documents have been altered from processing shall be reversed (e) SFDCT shall not cancel POM approvals for 1,762 claimants and shall expedite the claims processing to pay explant, rupture and disease compensation by establishing separate processing for Class 6. 2 claimants (f) SFDCT shall not enforce Korean claimants to participate in the Class 6. 2 Payment Option which provides USD600 payment for limited proof of manufacturer (g) SFDCT shall restructure the employees involved in discriminatory measures including Quality Management Department of SFDCT against Korean claimants and (h) Korean claimants further request the Court to grant all other just relief to prevent SFDCT from disposal of the files of Korean claimants in biased view.

The decision that the Claims Administrator lifted "hold" placed on Korean Claims was not relevant with the relief sought in Motion for Reversal of SFDCT Decision Regarding Korean Claimants. The decision of the Claims Administrator was not to counter Motion for Reversal of SFDCT Decision. The decision of the Claims Administrator was made simply because SFDCT finished investigation into Affirmative Statements submitted by Korean Claimants. It was nothing more than an internal administrative decision of SFDCT.

The fact that the Finance Committee proposed mediation to settle Korean Claims pending SFDCT is the vivid evidence that the decision that the Claims Administrator lifted "hold" placed on Korean Claims was not the relief that Korean Claimants sought in Motion for Reversal of SFDCT Decision. The Finance Committee offered to pay five million dollars to settle Korean Claims pending SFDCT to Korean Claimants who were disputing over whether Affirmative Statements of implanting physicians were fabricated.

3. Dismissal of Motion for Reversal of SFDCT Decision without ruling on Motion for Recognition and Enforcement of Mediation will Justify Abuse of Power by the Claims Administrator

The Standard of review for this argument is an abuse of discretion.

Korean Claimants and the Finance Committee agreed to carry out mediation to resolve disputes raised in Motion for Reversal of SFDCT Decision Regarding Korean Claimants including Affirmative Statement of 1,762 claims that the Claims Administrator canceled POM approvals for.

The Claims Administrator proposed to settle Korean Claims through mediation where the Claims Administrator acted as the representative for SFDCT and the Special Master, a member of the Finance Committee, acted as the sole mediator. Yeon Ho Kim acted as the representative for Korean Claimants.

The position papers were exchanged pursuant to the direction of the mediator. The title of position paper of SFDCT was, "SFDCT Position Paper in response to Motion for Reversal of Decision of SFDCT Regarding Korean Claimants."(Motion for Reversal of SFDCT Decision, RE1271-1, Pg ID#19289)

It is obvious from the title of the Position Paper submitted by SFDCT that the mediation was proposed for resolution of disputes raised in Motion for Reversal of SFDCT Decision Regarding Korean Claimants.

A mediation conference was held at an alternative dispute resolution center in Washington DC on August 10, 2012. Korean Claimants and the Finance Committee reached to a verbal agreement that SFDCT would pay five million dollars to settle Korean Claims pending SFDCT and Korean Claimants would abandon any right from SFDCT. Following the conference, a written agreement drafted by the Finance Committee was delivered to the attorney for Korean Claimants. Yeon Ho Kim signed on it and sent it back to the Claims Administrator. (Motion for Recognition and Enforcement of Mediation, RE1271, Pg ID #19277-19286)

However, the Finance Committee and the Claims Administrator did not respect the settlement agreement. Korean Claimants found later that Dow Silicones Corporation did not authorize it. Korean Claimants filed Motion for Recognition and Enforcement of Mediation on December 14, 2016.

Therefore, Motion for Reversal of SFDCT Decision Regarding Korean Claimants, Motion for Order of Mootness of Motions filed by Korean Claimants, and Motion for Recognition and Enforcement of Mediation were closely interwinded.

The District Court held a hearing for Joint Motion for Order of Mootness of Motions filed by Korean Claimant on December 10, 2015. The District Court did not hear Motion for Recognition and Enforcement of Mediation before the issuance of the Order to Render Moot Motions filed by Korean Claimants. The District Court did not rule on Motion for Recognition and Enforcement of Mediation even if the issues in Motion for Reversal of SFDCT Decision and Motion for Recognition and Enforcement of Mediation were interwinded.

In addition, the District Court did not rule on whether the decision of August 22, 2011 by the Claims Administrator that SFDCT accepts no Affirmative Statements as proof of manufacture and of the 1,762 Claimants who received Notices of Status letters for POM approval, any claimant previously paid based solely on Affirmative Statement is not eligible for further benefits including Premium Payments abused power and authority of the Claims Administrator given under the SFA.

The District Court approved the decision of August 22, 2011 by the Claims Administrator that any submission of POM claim on the basis of Affirmative Statement shall not be accepted by SFDCT and any claimant previously paid

based on Affirmative Statement is not eligible for Premium Payments by dismissing Motion for Reversal of SFDCT Decision Regarding Korean Claimants. The Claims Administrator was not provided with such overreaching power over any Claim under the SFA since the SFA and the Claims Resolution Procedures specify that POM can be approved by an Affirmative Statement and any approved claimant is eligible for Premium Payments. The Claims Administrator interprets the SFA arbitrarily and the District Court approved it by dismissing Motion for Reversal of SFDCT Decision Regarding Korean Claimants.

This is either a misinterpretation of the SFA or an abuse of discretion on the part of the District Court.

In addition, the District Court ruled, "Any claimant who does not agree with decision of SFDCT may seek review under the Individual Review Process or have a right to appeal directly to the Appeals Judge. Korean Claimants have not submitted under the Individual Review Process. Even if they did, any decision by the Appeal Judge is final thus any relief sought by Korean Claimants as to any substantive decision on any Korean Claims made by the Claims Administrator is denied."(Order Granting Joint Motion to Render Moot Motions Filed on behalf of Korean Claimants, RE1347, Pg ID#21596)

This conclusion of the District Court is an abuse of discretion because Korean Claimants do not seek Individual Review of their claims. Korean Claimants

seek reversal of broad decisions of August 22, 2011 by the Claims Administrator. The relief sought in Motion for Reversal of SFDCT Decision Regarding Korean Claimants shall not fall within a jurisdiction of the Appeal Judge.

4. Conclusion

Korean Claimants request this Appellate Court to Reverse the District Court's Order Granting Joint Motion of Dow Silicones Corporation, Debtor's Representative and Claimants Advisory Committee to Render Moot Motions filed on behalf of Korean Claimants, and to Grant Motion for Re-Categorization to the extent that re-categorization for South Korea is effective from 2009 or at least from 2014, and to Grant Motion for Reversal of SFDCT Decision Regarding Korean Claimants.

Date: February 25, 2018

Respectfully submitted,

(signed) Yeon Ho Kim
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For Korean Claimants

APPENDIX

RE.969 Reply to Responses to Motion for Re-Categorization of Korea by Dow Corning and Claimants' Advisory Committee
Page ID #16528-6532

RE.1020 Suggestion of Mootness Regarding "Motion for Re-categorization of Korea", "Motion for reversal of SFDCT Decision Regarding Korean Claimants", "Motion of Korean Claimants for Settlement Facility to Locate Qualified Medical Doctor of Korea"
Page ID #17020-17045

RE.1025 Response to Joint Motion for Order of Mootness of Korean Motions Page ID #18552-18555

RE.1026 Reply in Support of Suggestion of Mootness
Page ID#17315-17322

RE.1030 Supplemental Response to Reply in Support of Suggestion of Mootness Page ID#17425-17432

RE.1267 Mandate from US Court of Appeals re.Notice of Appeal filed by Korean Class 7 Claimants Page ID #19268-19273

RE.1271 Motion for Recognition and Enforcement of Mediation
Page ID #19277-19338

RE.1274 Response to Motion for Recognition and Enforcement of Mediation filed by the Finance Committee Page ID #19342-1343

RE.1275 Opposition of Dow Corning Corporation, the Debtor's Representatives and Claimants' Advisory Committee to Motion for Recognition and Enforcement of Mediation
Page ID #19344-19369

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2018, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

Date: February 25, 2018 Signed by Yeon Ho Kim