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.

Reply Brief of Appellants Korean Claimants

Yeon Ho Kim

Yeon-Ho Kim International Law Office

Suite 4105, Trade Center Building, 159 Samsung-dong, Kangnam-ku,

Seoul 135-729 South Korea

Tel: +82-2-551-1256

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page

I. INTRODUCTION

Around 1500 Korean Claimants have participated in the Global Settlement Program for Silicone Breast Implant Defects in 1994. Following Dow Silicones Corporation's Chapter 11 Bankruptcy filing, Korean Claimants have participated in the process for confirmation of the Proposed Dow Corning Re-Organization Plan in 1999. Korean Counsel (Yeon-Ho Kim, hereinafter "Kim") was approached by Barbara Houser, the lead counsel for Dow Silicones Corporation, now serving as the Chief Judge of the US Bankruptcy Court in Dallas, to visit her law firm in Houston. She solicited Kim to vote consent to the Proposed Re-Organization Plan. She informed Kim that Korean Claimants occupied nearly thirty percents of Class 6.2. Kim raised the following issues; (1) The eligibility criteria for POM in the Claims Resolution Procedures are too strict (2) Korean Claimants who cannot find their implanting physicians should be taken care of (3) The settlement facility in Korea should be established and (4) There is no foreign lawyer in the Claimants' Advisory Committee. She accepted and modified the Proposed Claims Resolution Procedures as follows; (1) The eligibility criteria cannot be changed but Affirmative Statements of Class 6.2 will be accepted *flexibly* because Class 6.2 Claims are discounted by 65% in compensation compared to Class 5 (Domestic Class) Claims so the Settlement Facility will not apply a strict level of eligibility criteria for

Affirmative Statement of Korean Claimants (2) The Proposed Claims Resolution Procedures modify to create the Option 6.2.3 for Class 6.2 Claimants who cannot find their implanting physicians (3) The settlement facility in Korea is impossible due to cost concerns but a separate processing for Class 6.2 Claims will be established in SFDCT to expedite Class 6.2 Claims processing and (4) The Proposed Claims Resolution Procedures modify to include one foreign lawyer as a member of the Claimants' Advisory Committee. Kim agreed to her modifications so did not appeal to pursue the change of consent votes which had been contested by Korean Claimants during hearings in 1999. However, the confirmed Plan in the District Court has been delayed due to several parties' appeal. Finally, the Proposed Plan became effective on June 1, 2004. The Settlement Facility-Dow Corning Trust ("SFDCT") was established in Houston before the Effective Date. Kim managed to submit LOI (Letter of Intent) Claims to SFDCT. Korean Claimants made up 2,650 Claimants as registered with SFDCT.

Kim visited SFDCT and had meetings with the Claims Administrator, Wendy Huber-Trachet, and Dianna Pendleton-Dominguez. Kim brought the samples of Affirmative Statements written by Korean implanting physicians and discussed with the Claims Administrator whether the samples could be acceptable under the eligibility criteria in the Claims Resolution Procedures.

The question was the *basis for conclusion* that Korean implanting physicians used a Dow Corning product. Kim proposed the paragraph, "Korean implanting physicians know that they used a Dow Corning product only during the period that the patient underwent surgery and medical records were destroyed because ten years passed from operation. The "ten year period" phrase in Affirmative Statements for unavailability of medical records was induced from the Statute of Medicine of Korea that requires a medical physician to keep medical records for ten years. The Claims Administrator and Dianna Pendleton-Dominguez approved Kim's proposal for the basis of conclusion by Korean implanting physicians in Affirmative Statements. Kim distributed the approved sample of Affirmative Statements to Korean Claimants. Korean implanting physicians signed on Affirmative Statements (Some modified the sample to meet their recollection) and Kim submitted the signed Affirmative Statements to SFDCT, with medical records for POM that Some Korean Claimants (about 20% of the total Claimants) were able to bring. The submissions of POM were made in 2004-2006. Kim filed Motion to locate the Qualified Medical Doctors in Korea with the District Court in December 2004.

However, Kim has never heard from SFDCT until 2009 during which Wendy Huber-Trachet was displaced from her position of the Claims Administrator. The FIFO (First In-First Out) for order of processing Claims in

SFDCT is prescribed in the Claims Resolution Procedures but SFDCT ignored Korean Claims. SFDCT violated the FIFO. David Austern, a new Claims Administrator, contacted Kim and asked Kim to submit ten (10) samples of disease diagnosis written by Dr. Yong Park and Dr. Gwan-Sik Kim to SFDCT and let the ten (10) Claimants to visit a family practice clinic of Dr. Seung-Hui Park, licensed both in Korea and the Unites States, that SFDCT has chosen. He is a Diplomate of American Board of Internal Medicine. He examined the ten Claimants and sent his evaluation for disease diagnosis to SFDCT. SFDCT determined to accept disease diagnosis written by Dr.Yong Park and Dr.Gwan-Sik Kim. And then, the Claims Administrator sent Kim an e-mail on August 14, 2009 (Motion for Reversal of SFDCT Regarding Korean Claimants, RE10-6, Pg ID#12317). The Claims Administrator said in the e-mail, "SFDCT performed a POM review on 1,815 Claims and 1,488 (82%) of these were based on Affirmative Statements, and SFDCT approved POM for 1,742 of the Claims…..SFDCT did not "take back" the "acceptable" POM determination although certain (53) Claims had certain inconsistencies in the Claim files".

The Claims Administrator decided these POM approvals based upon SFDCT's thorough review and investigation of Affirmative Statements from 2005/2006 to August 14, 2009. During that period, SFDCT must have been conducting through reviews and investigations of Affirmative Statements of

Korean Claimants.[1] If not, SFDCT must have not set up a separate processing for Class 6.2 prescribed in the Claims Resolution Procedures. Since Class 6.2 Claims were not more than five (5) thousand Claimants in total, Korean Claimants should have received a notice from SFDCT far and away before 2009. SFDCT again violated the Claims Resolution Procedures by failing to set up a separate processing for Class 6.2.

The Finance Committee asserted in its Brief that SFDCT accepted Affirmative Statements for Korean Claims based on Korean Counsel's representation that Korean medical records were destroyed after a ten year period and based on these representations, SFDCT approved Proof of Manufacturer for over 1,700 Korean Claims (Brief of Appellee Finance Committee, p.18). SFDCT has never been a kind of Settlement Facility that approved Affirmative Statements just because Kim represented SFDCT as such. It is evident from the fact that the Finance Committee is vigorously seeking sanctions on Korean Counsel through Motions to Show Cause with respect to Yeon-Ho Kim and to Show Cause with respect to his Law Office's Excessive Attorney Fees.

Although SFDCT has conducted thorough reviews and investigations

[1] As the result, 662 Korean Claimants received checks from 2009 – 2010.

into Affirmative Statements over four years before the Claims Administrator approved Affirmative Statements of 1,762 Claimants on August 14, 2009, the Claims Administrator, Ann Phillips, canceled *all* of the approved Affirmative Statements on August 22, 2011 (Motion for Reversal of SFDCT Decision Regarding Korean Claimants, RE810-10, Pg ID#12330). The Finance Committee contended, "It also bears emphasizing that the Claims Administrator did not "cancel" the previously accepted Claims. Rather, the Claims Administrator decided to investigate and re-review previously accepted claims" (Brief of Appellee Finance Committee, p.42). However, the letters of SFDCT to Korean Claimants made clear, "**The proof of Manufacturer Claims has now been changed to Unacceptable: No proof submitted**" (Supplemental Response to Reply in Support of Suggestion of Mootness, RE1030, Pg ID#17433-17470). Korean Claimants received letters from SFDCT that their Status of POM changed from "Acceptable" to "Unacceptable". It means that their previously accepted Claims were "canceled".[2] The Finance Committee attempts to evade responsibility for cancellation of the previously approved 1,762 Claims. The Finance Committee contends that SFDCT's decision was based on several grounds including (1) prior acceptance of Affirmative Statements were based on Korean Counsel's explanation that Korean medical

[2] The Order of the District Court made clear, "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)

records were destroyed after ten years (2) Korean physicians signed Affirmative Statements without any basis for concluding (3) Korean Counsel's other offered explanations to establish that Claimants used Dow Corning productions was deemed unreliable (Brief of Appellee Finance Committee, p.19). However, the grounds that SFDCT canceled the approved Claims of POM were different and various as follows (Supplemental Response to Reply in Support of Suggestion of Mootness, RE1030, Pg ID#17433-17470) ; (1) Dr. Hong was 20 years old in 1984. Dr.Hong did not graduate from medical school in 1990. Dr.Hong could not have written the explants operative documents. As the result, SFDCT canceled four Affirmative Statements signed by Dr.Hong (2) Dr.Ahn does not specify whether he was the implanting surgeon or a representative of the implanting facility. He does not specify the name of the facility in which the surgeries occurred. Dr.Ahn is currently practicing at Ahn Kyung Urology Clinic in Daejeon. As the result, SFDCT canceled five Affirmative Statements signed by Dr.Ahn (3) Dr.Won-Taek Kim does not specify whether he was the implanting surgeon or a representative of the implanting facility. He does not specify the name of the facility in which the surgeries occurred. Dr.Kim is currently practicing at Kim Won Taek Plastic Surgery Clinic. However, available information (Korean Job Portal) is that this clinic did not start operation until 1995, after the surgeries for the Claimants. As the result, SFDCT canceled five Affirmative Statements signed by Dr.Kim (4) The Quality

Management Department has determined that in September 2005, Dr.Sung-Yeol Ahn signed a statement for a Claimant that was not implanted at his surgical facility or in the Republic of Korea. As the result, SFDCT canceled nine Affirmative Statements signed by Dr.Ahn (5) Dr.Hyong-Joo Lee submitted medical records for a Claimant that he implanted a Dow Corning product on May 1991 and explanted it on May 10, 1993, and he implanted a McGhan product the same day and explanted it on August 11, 1994. However, there is a record in the Claimant's file dated May 28, 1993 for the removal of "Rt.ruptured bag". It is not consistent with the surgery dates in the statements provided by Dr.Lee for the Claimant. As the result, SFDCT canceled the Affirmative Statement (6) Dr.Kee-Sun Ham has reported an implant surgery date as May 26, 1987. Dr.Ham states "only Dow Corning Products were used back then in this facility (Hanseo University and Medical Center)". SFDCT has evidence that in 1987, Dr.Ham used products of McGhan Medical Corporation. Dr.Ham's statement that "only Dow Corning Products were used" is false for implant year 1987. As the result, SFDCT canceled three Affirmative Statements signed by Dr.Ham.

The grounds for cancelation of previously approved 1,762 Claims for POM remotely depart from the allegations in the brief of the Finance Committee. The Finance Committee contends that SFDCT accepted Affirmative

Statements for Korean Claims based on Korean Counsel's representation that Korean medical records were destroyed after a ten year period. However, the grounds for cancelation in the SFDCT's letters to Korean Claimants were the age of doctor (collected from Korean Job Portal), discrepancies of name of clinic (collected from Korean Job Portal), discrepancies of dates for surgery and dates of opening a clinic of implanting surgeon, and discovery of dates of other contradicting surgery, et cetera. The grounds for cancelation in the SFDCT letters to Korean Claimants have nothing to do with Korean Counsel's representation that Korean medical records were destroyed after a ten year period.

Furthermore, SFDCT canceled *all* of the approved (1,762) Claims for POM.[3] The Claims Administrator declared in her e-mail of August 22, 2011 to Korean Counsel, "We can no longer accept your statements that all Korean medical records were destroyed after ten years. 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 1,762 Claimants who filed claims forms, any Claimant previously based solely on an Affirmative Statement is not eligible for further benefits, including Premium Payments. A list of those Claimants will be

[3] All 1,762 Claimants received the Notice of Status from SFDCT that POMs were approved.

sent by the Quality Management Department shortly[4]" (Motion for Reversal of SFDCT Decision Regarding Korean Claimants, RE810-10, Pg ID#12330).

Korean Claimants filed Motion for Reversal of SFDCT Decision on September 26, 2011. Korean Claimants sought several reliefs including the relief that SFDCT shall not cancel 1,762 approved Claims for POM (Motion for Reversal of SFDCT Decision, RE810, Pg ID#12286-12301). No relief in Motion for Reversal of SFDCT Decision requested for "Lift of the Administrative 'hold'". This was a new relief created by Dow Silicones Corporation in Joint Motion for Mootness of Motions filed by Korean Claimants (Suggestion of Mootness Regarding Motions of Korean Claimants, RE1020, Pg ID#17020-17045). While Motion for Reversal of SFDCT Decision was pending the District Court, the Finance Committee proposed Korean Counsel to settle the disputes about Korean Claims pending SFDCT through mediation in June 2012. The Finance Committee agreed to pay Korean Counsel five million dollars for Korean Claims pending SFDCT. The Finance Committee did not respect it. The Claims Administrator, Ann Phillips, sent Korean Counsel an e-mail that Dow Silicones Corporation did not authorize it. Korean Counsel was surprised to find that the Finance Committee was under control of Dow Silicones Corporation. Korean Counsel waited for authorization

[4] SFDCT has never sent a list of those Claimants to Korean Counsel.

of Dow Silicones Corporation. On January 17, 2014, the Claims Administrator sent Korean Counsel a letter that SFDCT determined to withdraw the exclusion previously imposed on Korean Claims with respect to Affirmative Statements (Motion for Mootness of Motions filed by Korean Claimants, RE1020, Pg ID#17055). In the meantime, Korean Counsel discovered that a per capita GDP of South Korea surpassed sixty percents of that of the United States, which allows re-categorization from category 3 to category 2 under the SFA. Korean Claimants filed Motion for Re-Categorization on April 7, 2014 (Motion for Re-Categorization of Korea, RE965, Pg ID#16262-16304).

On December 4, 2014, the Claims Administrator sent Korean Counsel an e-mail that SFDCT decided re-categorization for South Korea to be granted from Category 3 to Category 2 *beginning from January 2015* (Motion for Mootness of Motions filed by Korean Claimants, RE1020, Pg ID#17052). And then, SFDCT sent Korean Counsel 481 checks which were 3,500 dollars at face value for Class 6.2 disease payments via the Federal Express on December 20, 2014. Korean Counsel cashed the checks but reserved the issue for timing of re-categorization to be raised later.[5] On April 24, 2015, Dow Silicones Corporation,

[5] The Claims Administrator sent Korean Counsel an e-mail on March 23, 2015, "I believe that your email might raise a Plan interpretation about the timing of payments for foreign claims that have been re-categorized from 6.2 to 6.1. Pursuant to an Order entered by Judge Hood on June 10, 2004, all Plan

Debtor's Representative and the CAC filed Joint Motion for Mootness of Motions filed by Korean Claimants. Korean Claimants asserted regarding Motion for Re-Categorization, "Korean Claimants request the Court to fix the starting point to apply re-categorization prospectively. Korean Claimants do not request the Court to order re-categorization to apply to all Korean Claims retroactively but request the Court to order re-categorization to apply Korean Claims which had not yet been paid. The Kim's agreement does not contradict the request that the Court should fix the starting point to apply re-categorization prospectively" (Supplemental Response to Reply in Support of Suggestion of Mootness, RE1030, Pg ID#17428). Therefore, Korean Claimants raised the issue of timing for re-categorization in the District Court (Brief of Appellee Dow Silicones Corporation, p.22 footnote).

On December 14, 2016, Korean Claimants filed Motion for Recognition and Enforcement of Mediation. Korean Claimants have waited for authorization of Dow Silicones Corporation over four years (2012-2016). Korean Counsel received the final decision from Dow Silicones Corporation's Counsel in her e-

---

interpretations are submitted to the parties. Therefore, I am forwarding your email and issue to the parties. As soon as I have received their response, I will notify you. You do not need to do anything at this time. You do not need to contact the parties during the process. If they require any information, I will let you know" (Reply in Support of Suggestion of Mootness, RE1026-1, Pg ID#17324).

mail of December July 1, 2016, saying "First, let me repeat as clearly as I can the roles of David Autern (who is deceased) and Francis McGovern with respect to your claims against Dow Corning have always been that of neutral court appointees and never as representatives or agents of Dow Corning. Neither I nor Dow Corning ever gave either of them authority to enter into settlement negotiations with you. Neither I nor Dow Corning had any knowledge of the mediation in Washington until after the fact when Mr. Austern advised us, and the CAC, of the mediation during a subsequent call. We were very surprised and consistently objected to any such offer or agreement as beyond the authority of the Finance Committee" (Motion for Recognition and Enforcement of Mediation, RE1271-1, Pg ID#19337). Korean Claimants filed Motion for Recognition and Enforcement of Mediation on December 14, 2016. Dow Silicones Corporation contends that Motion for Recognition and Enforcement of Mediation has been a delayed attempt by Korean Counsel after five years. Contrarily, Dow Silicones Corporation delayed until July 1, 2016 whether Dow Silicones Corporation would authorize the mediation conducted by the Finance Committee. Therefore, Motion for Recognition and Enforcement of Mediation was a timely filed.

On December 28, 2017, the District Court suddenly issued the Order granting Joint Motion for Mootness and Cross Motions to Dismiss Motions

filed by Korean Claimants. After the hearing of December 10, 2015, the District Court issued the Order without ruling on Motion for Recognition and Enforcement of Mediation, even though the Finance Committee made clear through the *title* of their position paper submitted to the Sole Mediator, "Settlement Facility-Dow Corning Trust Position Paper in *Response to Motion for Reversal* of Decision of SFDCT Regarding Korean Claimants".

Following the Order Granting Joint Motion of Mootness of Motions filed by Korean Claimants, the Finance Committee filed Motions to Show Cause with respect to Korean Counsel and with respect to his Law Office's Excessive Attorney's Fees on baseless beliefs. The District Court ordered Korean Counsel to appear in the Court on March 22, 2018. Korean Claimants request this Court the correction of injustice that took place regarding Korean Claims for many years.

II. ARGUMENTS

1. The District Court Improperly Dismissed Korean Claimants' Motion for Re-Categorization and Improperly Granted Joint Motion for Mootness

Dow Silicones Corporation and the Finance Committee defended the Order of the District Court regarding Motion for Re-Categorization filed by Korean Claimants by contending that Korean Claimants seek a retroactive re-categorization which is not permissible under the languages of the SFA and the decision of the Finance Committee that granted re-categorization for South Korea *beginning from January 2015* rendered Motion for Re-Categorization moot because the relief given to Korean Claimants was the same relief that Korean Claimants sought in Motion for Re-Categorization.

First, Korean Claimants repeat the argument in the opening brief that re-categorization of countries proactively applies *only if* the Claims Administrator initiated re-categorization voluntarily, and in the other case that a foreign Claimant request the Claims Administrator to re-categorize the foreign country, re-categorization shall apply from the year that the economic conditions of the foreign country were met with the requirement for re-categorization. This interpretation is reasonable because there is a probability that the Claims Administrator delays re-categorization even if the economic conditions for re-categorization were met and then, the foreign Claimant would be disadvantaged, which is the case of Korean Claimants. The Claims Administrator has never re-categorized foreign countries even if this Dow Corning Re-Organization Plan contemplated sixteen years for settling foreign Claims through SFDCT. The Claims Administrator did not re-categorize foreign countries based upon a per capita GDP even when the financial crisis hit a per capita GDP of the United States in 2008 and thereafter until recovery.

Even if re-categorization shall apply proactively, whether or not the Claims Administrator initiated re-categorization voluntarily, the timing of re-categorization shall start from the date/year that either a foreign Claimants requested the Finance Committee or filed Motion for Re-Categorization with the District Court. Again, there is a probability that the Finance Committee delays re-categorization. And then, the foreign Claimants would be disadvantaged, which is the case of Korean Claimants. Korean Claimants filed Motion for Re-Categorization on April 7, 2014 but the Finance Committee granted re-categorization for South Korea and decided the re-categorization to apply beginning from *January 2015*. Between April 7, 2014 and January 2015, SFDCT sent 481 Korean Claimants Class 6.2 checks. Had the Finance Committee applied the re-categorization beginning from *April 7, 2014*, the 481 Korean Claimants could have received Class 6.1 checks from SFDCT. The Claims Administrator delayed re-categorization for South Korea. To prevent the disadvantages from being imposed on foreign Claimants, the Claims Administrator shall apply re-categorization immediately from the date/year that Korean Claimants filed Motion for Re-Categorization with the District Court.

Whether re-categorization applies proactively or retroactively depends on the timing of application of re-categorization. For example, had the Claims Administrator applied re-categorization for South Korea *beginning from April 7 2014*, the 481 Korean Claimants who received Class 6.2 checks from SFDCT on December 20, 2014 must not have been the foreign Claimants

whose re-categorization is impermissible under the Plan since re-categorization shall not apply retroactively. Since the Finance Committee decided to apply re-categorization for South Korea *beginning from January 2015*, the 481 Korean Claimants who received checks in December 2014 from SFDCT became the Korean Claimants who were retroactively applied for Re-Categorization for South Korea, granted by the Finance Committee. "Retroactive" or "Proactive" is to be determined by the timing of re-categorization that the Finance Committee grants. Therefore, the timing of application for re-categorization is a landmark whether re-categorization applies proactively or retroactively. The Claims Administrator knew this thus requested Dow Silicones Corporation and the Claimants' Advisory Committee that they provide an interpretation on the timing issue potentially raised by Korean Claimants' Response. Dow Silicones Corporation and the Claimants' Advisory Committee informed the District Court of the Claims Administrator's request. The District Court did not rule whether the timing of re-categorization for South Korea by the Finance Committee is proper. Therefore, the Finance Committee's relief that granted Re-Categorization for South Korea *beginning from January 2015* is not identical relief that Korean Claimants seek in Motion for Re-Categorization.

The District Court approved the Finance Committee's decision on re-categorization for South Korea *beginning from January 2015*. The timing of application for re-categorization, however, produces a significant difference to Korean Claimants who received checks in December 2014 (the 481 Claimants).

They received Class 6.2 checks from SFDCT. If the Finance Committee had applied for re-categorization for South Korea *beginning from April 7, 2014* that Korean Claimants filed Motion for Re-Categorization, they could have received Class 6.1 checks from SFDCT. The difference of the total amount reaches 1,202,500 dollars (=481 X [6,000 dollars-3,500 dollars]). Korean Claimants lost that money because the timing of application for re-categorization was improperly applied by the Finance Committee. Korean Claimants raised that issue in the District Court ("The Finance Committee did not determine whether re-categorization should apply to the claims paid between 2012 and 2014. Because the Finance Committee did not determine it, the decision of the Finance Committee is partial so that the Finance Committee failed to grant the relief requested in Motion for Re-Categorization", Supplemental Response to Reply in Support of Suggestion of Mootness, RE1030, Pg ID#17427).

The District Court improperly dismissed Motion for Re-Categorization and improperly granted Motion for Mootness based on that the Finance Committee granted the same relief requested by Korean Claimants.

2. Korean Claimants did not forfeit their Appeal of the District Court's Dismissal on Mootness Grounds

Korean Claimants challenged the District Court's holding that Motion for Re-Categorization is moot. Korean Claimants stated in the opening brief that the District Court ruled, "It appears now that Korean Claimants argue that the

revised payment category should apply retroactively to all Korean Claims and Korean Claimants did not seek a relief that revised payment category should apply retroactively to all Korean Claims". Korean Claimants sought a relief that revised payment category should apply from the year that changed economic conditions of South Korea were met, which was 2009, or *alternatively* from the year that Korean Claimants filed Motion for Re-Categorization (Brief of Appellant Korean Claimants, page 24). Korean Claimants also stated in the opening brief that the conclusion of the District Court that Korean Claimants seek 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 (Brief of Appellant Korean Claimants, page 30). These statements in the opening brief challenge the holding of the District Court that Motion for Re-Categorization is moot. Both Dow Silicones Corporation and the Finance Committee contend that Korean Claimants do not mention the mootness determination at all in the opening brief or statement of issues on appeal and Korean Claimants do not argue that Motion for Re-Categorization is not moot.

However, Korean Claimants impliedly challenged the holding of the District Court that Motion for Re-Categorization is moot even if Korean Claimants did not state in the Statement of Issues of the opening brief that they challenge the Order Granting Motion for Mootness in a direct fashion. The holding of the District Court was based on that the Finance Committee granted re-categorization for South Korea *beginning from January 2015*. However,

Korean Claimants argue in the opening brief that Re-Categorization for South Korea shall apply from the year (2009) that changed economic conditions were met for re-categorization or alternatively, from the year (2014) that Korean Claimants filed Motion for Re-Categorization. Korean Claimants challenge application of re-categorization *beginning from January 2015*, granted by the Finance Committee, which was approved by the District Court in the Order Granting Mootness Motion regarding Motion for Re-Categorization. Korean Claimants disputed the District Court's holding that Re-Categorization for South Korea shall apply *beginning from January 2015* by arguing, "Alternatively, re-categorization for South Korea shall apply from the year that Korean Claimants filed Motion for Re-Categorization with the District Court". Therefore, Korean Claimants did not fail to challenge the holding of the District Court that Motion for Re-Categorization is moot.

The precedents of case presented by Dow Silicones Corporation and the Finance Committee (*Barret v. Detroit Heading, LLC*, 311 Fed.Appx. 779(6th Cir. Feb. 17, 2009), *Dog Pound, LLC v. City Monroe, Mich.*, 558 F.Appx. 589(6th Cir. Mar. 10, 2014), *Collins v. Bogan*, 25 F.3d 1047(6th Cir. May 16, 1994), *Massey Coal Services, Inc. v. Victaulic Co. of America*, 249 F.R.D. 477(S.D.W.Va, 2008)) are not applicable since the facts of these precedents are different from the facts of these Motions.

3. The District Court Improperly Dismissed Motion for Reversal and Improperly Granted Motion for Mootness

The District Court held that Motion for Reversal of SFDCT Decision is moot since SFDCT lifted an administrative "hold" placed on Korean Claims. The Claims Administrator canceled *all* of the approved Claims for POM (approved 1,762 POM Claims) in her letter of August 22, 2011 to Korean Counsel. It said, "We can no longer accept your statements that all Korean medical records were destroyed after a ten years. 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 1,762 Claimants who filed claims forms, any Claimant previously based solely on an Affirmative Statement is not eligible for further benefits, including Premium Payments". Korean Claimants filed Motion for Reversal of this SFDCT's Decision on September 26, 2011. Korean Claimants request the relief that SFDCT decision canceling 1,762 approved Claims for POM is "reversed", including other several reliefs. Korean Claimants have never requested a relief for Lift an Administrative "Hold". There is no such word as administrative "hold" in the letter of August 22, 2011 of the Claims Administrator that canceled the approved 1,762 Claims for POM.

Before this letter of August 22, 2011, the Claims Administrator, David Austern, sent an e-mail on December 16, 2010 to Korean Counsel (Motion for Reversal of SFDCT Decision, RE10-09, Pg ID#12326). In this e-mail, he said, "Obviously, it will take us some period of time to examine the 1,325 claim files.

In the meantime, please respond to the question in paragraph 1 above. I will let you know when we have completed our examination of the files". Following this e-mail, the Claims Administrator, Ann Phillips, sent the letter of August 22, 2011. There was no word in both correspondences indicating that SFDCT placed an administrative "hold" on Korean Claims or what the administrative "hold" meant. The phrase in the e-mail of December 16, 2010 of David Austern, "Obviously, it will take us some period of time to examine the 1,325 claim files", only can be charitably interpreted as the administrative "hold". However, this phrase departs far from an administrative "hold". No relief in Motion for Reversal of SFDCT Decision requested "Lift of the Administrative 'hold'". This is a new relief created by Dow Silicones Corporation in Suggestion of Mootness Regarding Motion for Reversal of SFDCT Decision. Therefore, the holding of the District Court that the Claims Administrator granted the same relief in Motion for Reversal of SFDCT Decision is baseless.

Dow Silicones Corporation purports in its brief (p.21), "After finalizing the investigation, on January 17, 2014, while Motion for Reversal remained pending, the Claims Administrator informed Korean Claimants that the hold had been lifted. The Claims Administrator also informed Korean Claimants that the 'exclusion' had been lifted. (The "exclusion" refers to the decision to deny payment (including future payment) to all claims submitted with an affirmative statement as the only form of proof of manufacturer.) The elimination of the

"exclusion" meant that SFDCT had determined on such claims based solely on the use of the affirmative statements". For this purport, Dow Silicones Corporation depends on the Declaration of Ann Phillips Regarding Suggestion of Mootness of Korean Motions (RE1020-2, Pg ID#17046). However, there is no such thing existing in the Declaration of the Claims Administrator. It only says, "On January 1, 2014, I informed Mr. Kim through e-mail that the SF-DCT is "withdraw[ing] the exclusion previously imposed on [his] claims" and that "[the SF-DCT] will review and process [his] claims consistent with the Plan of Reorganization". In the letter of August 11, 2011, the Claims Administrator made clear, "We can no longer accept your statements that all Korean medical records were destroyed after a ten years. 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 1,762 Claimants who filed claims forms, any Claimant previously based solely on an Affirmative Statement is not eligible for further benefits, including Premium Payments". There has been no change by the Claims Administrator since then. Dow Silicones Corporation attempts to deviate from the decision of August 11, 2011 by the Claims Administrator to dismiss this Appeal.

The fact that the Finance Committee proposed mediation to settle Korean Claims on June 2012 is the 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 District Court improperly dismissed Motion for Reversal of SFDCT Decision

and improperly granted Motion for Mootness based on that the Claims Administrator lifted the administrative "hold".

4. The District Court Erred in Holding that Korean Claimants Filed Unauthorized Appeal of the Claims Administrator's Eligibility Decisions

The District Court held that a substantive decision of SDCT on eligibility criteria is not appealable to the District Court, rather appealable to the Claims Administrator and the Appeals Judge. However, Korean Claimants do not seek Individual Review of their Claims. Korean Claimants seek reversal of the broad and overreaching decisions of August 22, 2011 by the Claims Administrator. The relief sought in Motion for Reversal of SFDCT Decision shall not fall within a jurisdiction of the Claims Administrator and Appeals Judge. Since the Claims Administrator answered in her letter regarding cancelation of the approved 1,762 claims for POM, the Appeals Judge will be in charge if Korean Claimants follow the track of appeal for Individual Review. However, Motion for Reversal of SFDCT Decision Regarding Korean Claimants covers much broader issues including whether the Claims Administrator can cancel the approved Claims for POM which had been established through the Notices of Status sent to Claimants that POM is acceptable.

After Korean Claimants filed Motion for Reversal of SFDCT Decision with the District Court on September 26, 2011, the Finance Committee

proposed mediation for resolution of disputes raised by Korean Claimant in June 2012. Had the Claims Administrator's eligibility decision been impossible to be appealed to the District Court, the Finance Committee would not have proposed mediation for resolution of disputes raised in Motion of Reversal. The Finance Committee knew and admitted implicitly that the decision of the Claims Administrator in her letter of August 22, 2011 is not appealable to Appeals Judge and rather appealable to the District Court.

Therefore, the holding of the District Court that the appeal of the SFDCT decisions to the District Court is barred by the Plan is based on a misinterpretation of the SFA and the District Court erred in refusing to consider Motion for Reversal that seeks the relief for "reversal" of the decisions of the Claims Administrator on August 22, 2011.

5. Motion for Recognition and Enforcement of Mediation is a Proper Issue in This Appeal

Dow Silicones Corporation argues in the brief (p.33-35) that Korean Claimants' Mediation Motion is not a proper issue in this appeal. Dow Silicones Corporation contends that Mediation Motion is simply irrelevant to this appeal. However, Dow Silicones Corporation's Joint Motion for Mootness is closely connected with Motion for Recognition and Enforcement of Mediation.

After Korean Claimants filed Motion for Reversal of SFDCT Decision

on September 26, 2011, the Finance Committee proposed mediation to settle Korean Claims pending SFDCT in June 2012. Korean Claimants and the Finance Committee agreed to carry out mediation and the Finance Committee submitted the position paper to the Sole Mediator. The *title* of the Finance Committee's position paper is "SFDCT Position Paper in response to Motion for Reversal of Decision of SFDCT Regarding Korean Claimants". It is obvious that the mediation was proposed for resolution of issues raised in Motion for Reversal of SFDCT Decision. Therefore, Mediation Motion is deeply relevant to this appeal challenging the Order of the District Court granting Motion for Mootness of Motion for Reversal filed by Korean Claimants.

Dow Silicones Corporation with the Finance Committee argues that Mediation Motion cannot be imported into this appeal because Korean Claimants' arguments relating to Mediation Motion are not ripe for consideration by this Court. This argument attempts to restrict this Court's scope of deliberations and the power of the Appellate Courts. Dow Silicones Corporation argues that the "Agreement" is a draft that was not signed by the Claims Administrator or the Finance Committee. Korean Claimants and the Finance Committee reached to a verbal agreement in the mediation conference of August 10, 2012 that SFDCT should pay five million dollars to settle Korean Claims pending SFDCT. Following the conference, a written "Agreement" drafted by the Finance Committee was delivered to Korean Counsel. The "Agreement" was signed by Korean Counsel and sent back to the Claims Administrator. Therefore, it developed into a written "Agreement" because the

claims Administrator drafted it. In addition, the Finance Committee approved the "Agreement". The Finance Committee is composed of the Special Master, the Claims Administrator and the Appeals Judge. The Finance Committee decides in majority. Francis McGovern acted as the Sole Mediator and Ann Phillips acted as the representative of SFDCT. The majority of members of the Finance Committee participated in the mediation. Therefore, it was approved by the Finance Committee. Dow Silicones Corporation argues that the "Agreement" references multiple issues and conditions that were not met. David Austern said in an e-mail (RE1271-1, Pg ID#19327), "An opinion letter from another Korean counsel or a statement from the authority that regulates the conduct of Korean attorneys would be sufficient. You further represented that you would dismiss all pending actions in the United States Courts in order to effectuate the purposes of the Release. No such dismissals have been filed. We do not have a signed (by you) copy of the Memorandum of Understanding or the Release". Korean Counsel submitted a Notarized Opinion Letter of the other Korean counsel (Joong-Pyo Hong) to David Austern and sent the signed "Agreement" to Ann Phillips. All actions by Korean Claimants were pending the District Court so Korean Claimants could dismiss them once the "Agreement" was implemented. Therefore, multiple issues and conditions under the e-mails of David Austern were met. Dow Silicones Corporation argues that the essential purpose of the "Agreement" no longer exists since in the almost five years since that "Agreement" was prepared and SFDCT completed the processing and payment (or preparation for payment) of almost all Korean Claims submitted for evaluation. Korean Claimants filed Motion for Recognition and

Enforcement of Mediation in *December 14, 2016*. Dow Silicones Corporation finally answered on *July 1, 2016* whether the "Agreement" of the Finance Committee could be authorized. Therefore, Motion for Recognition and Enforcement of Mediation is not late or time-barred. In addition, SFDCT has processed none of Korean Claims since the mediation conference of August 10, 2012, except the alleged "lift of the administrative 'hold'" in the e-mail of the Claims Administrator on January 7, 2014. The Claims Administrator said in her Declaration to the Court, "As of December 20, 2016, a total of 1,742 Korean Claimants have filed claims for benefits. Of those, 1,194 have been processed and paid, 280 have been processed and are pending payment, 11 are undergoing the disease review process, 155 are on hold for investigation or fraud or lack of valid address or identification, 102 have had their claims processed but were found ineligible and 805 Korean Claimants have been registered with the SF-DCT but have not sought any payment from the SF-DCT" (Response to Motion for Recognition and Enforcement of Mediation, RE1275-3, Pg ID#19484-19485). The Claims Administrator admitted in this Declaration that the substantial Korean Claims are pending SFDCT. The registered 805 Claims which did not seek any payment yet are waiting for Motion for Recognition and Enforcement of Mediation to be granted. Therefore, Korean Claimants' Mediation Motion is a proper issue in this appeal challenging that the Order granting Motion for Mootness of Motions filed by Korean Claimants is properly issued.

6. Conclusion

For the forgoing reasons, Korean Claimants request that this Court Reverse the District Court's Order Granting Joint Motion of Dow Silicones Corporation and Grant Motions for Re-Categorization and for Reversal of SFDCT Decision Regarding Korean Claimants.

Date: May 21, 2018 Respectfully submitted,

(signed by) Yeon Ho Kim

Yeon Ho Kim Int'l Law Office

Suite 4105, Trade Center Bldg.,

159 Samsung-dong, Kangnam-ku

Seoul 135-729 Korea

Tel: +82-2-551-1256,

yhkimlaw@unitel.co.kr

For Korean Claimants

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 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: May 21, 2018

Signed by Yeon Ho Kim

Form 6. Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of Fed. R. App. P. [_____]] [the word limit of Fed. R. App. P. [_____]] because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) [and [_____]]:

   ☐ this document contains _____words, or

   ☐ this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

   ☐ this document has been prepared in a proportionally spaced typeface using _____ in _____, or

   ☐ this document has been prepared in a monospaced typeface using _____ with _____.

/s/ _____

Attorney for _____

Dated: _____