IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOTHERN DIVISION

IN RE:	§	CASE NO: 00-CV-00005-DT
	§	(Settlement Facility Matters)
DOW CORNING CORPORATION	§	
	§	
Reorganized Debtor	§	
	§	
	§	Hon.Chief Judge Denise Page Hood

KOREAN CLAIMANTS' REPLY TO RESPONSE OF DOW CORNING CORPORATION, THE DEBTOR'S REPRESENTATIVES, CLAIMANTS' ADVISORY COMMITTEE AND FINANCE COMMITTEE TO MOTION FOR EXTENSION OF DEADLINE FOR FILING CLAIM

I. Introduction

The Korean Claimants who filed the Motion for Extension of Deadline for Filing Claim file this Reply to the Response of Dow Corning Corporation, the Debtor's Representatives and Claimants' Advisory Committee (hereinafter collectively referred to as "Dow Corning") filed on September 17, 2021 and the Response of the Finance Committee which depended on Federal Rule of Civil Procedure 10 (c) [Adoption by Reference, Form of Pleadings].

If the Korean Claimants are successful in this Motion, there should be a lot of the Claimants, whether Korean or not, who can be benefitted from the Order Granting the Motion because many Claimants failed to submit their Claim by June 3, 2019 although they had participated in the Dow Corning Settlement Program. The reason why so many Claimants in the Settlement Program did not submit the Claim form and/or supporting documents by the deadline of June 3, 2019 may be individual but one thing was clear so that the Parties were in

a hurry to close the Settlement Facility due to money-saving purposes.

The more sad reality to the yet un-filing Personal Injury Claimants in the Settlement Program is that the Parties who were supposed to help the Claimants under the Plan betrayed them and were cooperating with one another for the interests of the insurers which wanted to cut off claim filings as soon as possible.

Dow Corning asserted that Closing Order 1 is not an order terminating the Settlement Facility but is merely an administrative order providing guidance during the final period of operation of the Settlement Facility. Dow Corning tried to make a basis for the lack of notice to the Claimants before Closing Order 1 was entered.

Dow Corning asserted that while the termination of the Settlement Facility is governed by the Funding Payment Agreement ("FPA", Exhibit 19) and 10.03 of the FPA does not refer to completing claims it instead addresses the administrative wind down of the Settlement Facility operation - meaning disposition of equipment and files, termination of contracts for services and similar actions. If 10.03 of the FPA merely addressed the administrative wind down, Dow Corning would not be required to seek confirmation from the Court, after notice to all other Parties (including the Korean Claimants) and the opportunity for hearing under 10.03 of the FPA.

II. Counterargument

A. The Plan itself did not establish the final filing deadline

Dow Corning asserted that the Plan itself –not Closing Order 1- established the final filing deadline and Closing Order 1 simply provides guidance to the SF-DCT to facilitate efficient claims processing and to allow the orderly closure of incomplete and ineligible

claims.

Dow Corning depended on Article VII of Annex A to the SFA which prescribes as follows;

(3) Claimants were allowed to apply for disease benefits at any time up to the fifteenth anniversary of the Effective Date. *See* 7.09 Annex to the SFA

However, that prescription does not exist in the Dow Corning Amended Joint Plan of Reorganization. The Plan itself did not prescribe it. That Clause was included in the Annex to the SFA, not even in the SFA.[1] That Clause was not a part of the Plan itself but a part of the Annex to the SFA, not even the SFA itself.

Furthermore, 7.09 Annex to the SFA can be modified through a modification of the SFA.

> This Agreement may be amended to resolve ambiguities, make clarifications or interpretations or to correct manifest errors contained herein by an instrument signed by the Reorganized Dow Corning and the Claimants' Advisory Committee. All other amendments, supplements, and modifications shall require approval of the Court after notice to Reorganized Dow Corning, the Shareholders, and the Claimants' Advisory Committee and such other notice and hearing as the Court direct, provided that without the prior written consent of the Reorganized Dow Corning and the Claimants' Advisory Committee the Agreement shall not be amended, supplemented or modified if such amendment, supplement, or modification would, directly or indirectly: (i) increase the liquidation value or settlement value of any Claim, or the amount or value of any payment, award or other form of consideration payable to or for the benefit of a Claimant, including, without limitation, any cash payment or other benefits provided to a Claimant, (ii) affect the validity, requirement for or effectiveness of any release of the Released Parties, or any of them, (iii) increase the amount or change the due date of any payment to be made by the Debtor to the Settlement Facility pursuant to the Plan or the Funding Payment Agreement, (iv) affect the right of the Settlement Facility to receive payments pursuant to the Insurance Allocation Agreement, or (v) cause the Trust to no longer qualify as a Qualified Settlement Fund. *See* 10.6 the SFA

[1] Dow Corning indicated in the Response that the Korean Claimants were asking for extension of the deadlines for filing Explant and Rupture Claims in this Motion too. But the Korean Claimants who filed this Motion are aware that Explant and Rupture Claims passed the deadlines, the tenth and the second anniversary of the Effective Date respectively. Therefore, the Korean Claimants do not contest the deadlines of Explant and Rupture Claim.

As prescribed above, the SFA can be modified without the prior consent of the Reorganized Dow Corning and the Claimants' Advisory Committee if such modification would not, directly or indirectly, (i) increase the liquidation value of any Claim (ii) affect the validity of release of the Released Parties (iii) increase amount of any payment to be made by the Debtor (iv) affect the right of the Settlement Facility to receive payments.

The extension of deadline for filing claim in this Motion is inapplicable to any of those four conditions that the Reorganized Dow Corning and the Claimants' Advisory Committee are required to consent. The Claimants' claims of this Motion are the existing claims which have already participated in the Settlement Program. And because the Claimants' claims have not been reviewed by the Settlement Facility since they did not submit to the Settlement Facility, the modification to allow them to be reviewed just as timely filed claim would not increase the liquidation value or settlement value or the amount or value of any benefit of the Claimants. Therefore the annex A to the SFA, particularly 7.09 Annex to the SFA, can be modified, if this Court decides so. Dow Corning's assertion that the Plan itself established the final filing deadline is baseless.

Dow Corning further asserted that the relief that the Korean Claimants seek would result in a prohibited plan modification.

> The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan so that such plan as modified under subsections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title. *See* 11 U.S.C. 1127 (b)

Dow Corning asserted that the Korean Claimants were not a proponent. If this argument comes, the Claimants' Advisory Committee was not a proponent either because the proponent for personal injury creditors was the Tort Committee, not the Claimants' Advisory Committee.

The prior consent of the Claimants' Advisory Committee to modify the SFA under 10.6 of the SFA is an unnecessary addition to the conditions to modify the SFA under 11 U.S.C. 1127 (b). If this reasoning goes further, there was no room for modification of the SFA beginning from the Effective Date because the Tort Committee had disappeared.

Dow Corning asserted that the district court has no power to modify a confirmed plan and therefore the Court does not have the power to grant the relief requested by the Korean Claimants.

The Appellate Court opined that the district court had no authority to modify the Plan, equitable or otherwise. *In Re Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633, 2009 WL 9332281 at 2(6th Cir. 2009) The plaintiff was a claimant who was denied a rupture claim from the Settlement Facility. The plaintiff would increase value of liquidation of her claim if successful. In this Motion, however, the Korean Claimants do not increase liquidation or settlement value but merely seek a review of their claim from the Settlement Facility that will be filed if this Motion is granted. If the Claimants' claim does not meet criteria for payment, then the Settlement Facility is able to deny the claim.

B. Closing Order 1 is not just an administrative order providing guidance

Dow Corning admitted in the Response that the Closing Order 1 was not notified or heard before the Order was entered. Instead, Dow Corning asserted that the Korean Claimants admitted in the Motion that they received notice of Closing Order 1 through the ECF system.[2] Notice must be preceded before hearing. A hearing was not held because there was no notice. The lack of notice and hearing before the Order was entered is a defect of Closing Order 1. The Korean Claimants meant that Closing Order 1 was docketed as the

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[2] As Dow Corning distorted the Korean Claimants' point in the former Motions, it does it in this Motion too.

Order on the Court site without both notice and hearing.

Dow Corning asserted that the Korean Claimants incorrectly asserted that the deadline was imposed by Closing Order 1. Dow Corning added that the Korean Claimants incorrectly conflated the provision for termination of the Settlement Facility with Closing Order 1.

Closing Order 1 established the final deadline for filing Claim. Under the title of Claim Denials – Late Claims, paragraph 29 of Closing Order 1 prescribed, "The SF-DCT shall deny Proof of Manufacturer and benefit claim forms and documents that are postmarked on or after June 4, 2019." This paragraph affects substantive rights of the Claimants including the Korean Claimants. There are also a dozen of paragraphs other than paragraph 29 affecting rights of the Claimants which were written or not specifically written in the Plan documents. Closing Order 1 was not merely an administrative order providing guidance during the final period of operation of the Settlement Facility. Therefore, Closing Order 1 shall be notified and to be heard before it was entered. Dow Corning failed to do so. Closing Order 1 including paragraph 29 is void.

Dow Corning asserted that the termination of the Settlement Facility is governed by the Funding Payment Agreement. Dow Corning indicated that the Korean Claimants misstated the requirements of Section 10.03 of the SFA. Dow Corning asserted that Section 10.03 of the SFA did not refer to completing claims – it instead addresses the administrative wind down of the Settlement Facility operation – meaning disposition of equipment and files, termination of contracts for services and similar actions.

Section 10.03 (a) of the SFA reads;

> 10.03 Termination/Closure
> (a) Termination Date. The Settlement Facility and Trust shall terminate as soon as practicable after the Reorganized Dow Corning's obligation to fund under the Funding Payment Agreement is terminated in accordance with Section 2.01 (c) of the Funding

Payment Agreement. The Claims Administrator will use his or her best efforts to substantially complete and terminate the Settlement Facility and Trust within sixty (60) days after such termination of the Funding Payment Agreement. The Claims Administrator shall seek an order from the District Court confirming that is is appropriate to terminate the Settlement Facility.

Section 2.01 (c) of the FPA reads;

Dow Corning's obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of (i) the date when all Allowed Claims in each of Classes 5 through 19 and all other obligations of the Settlement Facility and the Litigation Facility have been paid, all Claims filed have been liquidated and paid or otherwise finally resolved, and no new timely Claims have been made against the Settlement Facility or the Litigation Facility for two consecutive Funding Periods; or (ii) the payment of all amounts required by this Agreement. Upon the occurrence of one or more of the events set forth in the immediate preceding sentence, Dow Corning shall seek confirmation from the Court, after notice to all other Parties and the opportunity for hearing, that Dow Corning funding obligations under this Agreement are terminated.

As written in 10.03 (a) of the SFA, the Settlement Facility shall terminate in accordance with 2.01 (c) of the FPA. Section 2.01 (c) of the FPA prescribes that Dow Corning shall seek confirmation from the Court after notice and hearing. If 10.03 (a) of the SFA and 2.01 (c) of the FPA did not refer to completing claims – it instead addresses the administrative wind down of the Settlement Facility operation – meaning disposition of equipment and files, termination of contracts for services and similar actions, they would not require notice and hearing before doing it. The Claimants were interested in their claim, not interested in the Settlement Facility operation. The latter (operation) which has nothing to do with claim was required notice and hearing, while the former (claim) was not required notice and hearing, then it does not make a sense.

In the Response, Dow Corning attempted to cut the Settlement Facility in two parts; function of claim review and space of facility, asserting that the former does not need notice and hearing to close and the latter needs notice and hearing to close. It is not conscionable.

Dow Corning asserted that if the Korean Claimants wished to object to or appeal Closing

Order 1, they could have done so in 2018 when it was entered.

Fed. R. Civ. P. 60 (b) prescribes several grounds for relief from a final judgment, order or proceeding. Although the grounds, (1), (2) and (3), are applicable to (c) which limits a motion made no more than a year after the entry of the judgment or order, the ground (4), “The judgment is void”, shall not be applied by the one year limitation.

The issue here is rather whether the Korean Claimants’ request for relief from Closing Order 1 in this Motion is reasonable under Fed. R. Civ. P. 60 (c) (1). “(1) Timing. A motion under Rule 60 (b) must be made within a reasonable time.”

Dow Corning asserted that a request raised more than two and a half years after entry of the order cannot be considered a “reasonable” period of time.

However, what constitutes a reasonable time depends on the facts of each case. See *Ghaleb v. American Steamship Company*, No. 18-1742770, Fed. Appx. 249 at 2 (6th Cir. May 9, 2019)

The Korean Claimants did not receive notice for Closing Order 1. Dow Corning admitted that they did not deliver notice to the Korean Claimants before the Order was entered. Neither did to the attorney (“Yeon-Ho Kim”). A hearing was not held because of the lack of notice for hearing.

On December 27, 2017, this Court issued the Stipulation and Order Approving Notice of Closing and Final Deadline for Claims (Exhibit G of Dow Corning) and directed the Settlement Facility to distribute by mail of the Notice in early 2018 to all individuals classified I Plan Classes 5, 6.1, 6.2 who filed a timely proof of claim or notice of intent under Notice Plan. (*See* Exhibit G of Dow Corning) This Court made sure that all individuals of

Plan Classes 5, 6.1, 6.2 shall receive the Notice under Notice Plan. This Court also ordered the Settlement Facility to post deadline information on its website and to assist claimants with deadline questions via the telephone helpline. This Court estimated in the Order that 143,000 individuals would be mailed to.

Dow Corning asserted that the Settlement Facility mailed to all individuals of the Korean files.

From the Declaration of Ann Phillips (Exhibit 20), 50 percents of the Korean Claimants' address are not valid. Whether the Settlement Facility mailed to all individuals of the Korean files is doubtful. Whether the Settlement Facility mailed to all individuals of the Korean files, even if the Dow Corning's assertion is favorably interpreted, is meaningless because 50% of the Korean Claimants' address are not valid according to Mrs. Phillips.

Dow Corning asserted that the Settlement Facility mailed to counsel for Korean Claimants. This is a lie. Counsel did not receive the Notice. While the Finance Committee filed the Motion for Entry Order to Show Cause on January 10, 2018 (Exhibit 21) , it is highly plausible that the Settlement Facility deleted counsel for Korean Claimants from the list of AOR (Attorney of Records) for mailing the Notice.

Dow Corning asserted that the Notice was posted on the SF-DCT website. Although the Settlement Facility has done so, counsel for Korean Claimants has been prohibited from access to the Claimants' file through the SF-DCT website from around 2011 when the Settlement Facility canceled the POM approval of Affirmative Statement of Korean Claimants. The Settlement Facility revoked the Password of counsel for Korean Claimants to log in. Since then, counsel for Korean Claimants has never logged on the SF-DCT website. The fact that the Notice was posted on the SF-DCT website was meaningless to counsel for Korean Claimants.

Dow Corning asserted that the SF-DCT ensured that a second reminder notice was provided where appropriate and a specific additional reminder notice was sent to counsel for the Korean Claimants on March 13, 2019. However, it is impossible for counsel for Korean Claimants to submit the POM and the claim form with all supporting documents within June 3, 2019. Normally, several months were needed to finish filing claim for a claimant. Therefore the notice of Ellen Bearicks of March 13, 2019 (*See* Exhibit H of Dow Corning) was meaningless to counsel for Korean Claimants.

Dow Corning asserted that counsel for Korean Claimants subscribed to the CAC's newsletters form 2004 and the newsletters advised the subscribers that the final deadline to submit claims for benefits from the Settlement Facility was June 3, 2019. Unfortunately, however, counsel for Korean Claimant directed the emails for the CAC's newsletters to the garbage can of the email as soon as they arrived. Counsel for Korean Claimants did not read them. It is a sort of protest to the CAC whose advice through the newsletters has never been helpful to counsel for Korean Claimants. The CAC has been acting only for the US Claimants.

The Settlement Facility breached Stipulation and Order Approving Notice of Closing and Final Deadline for Claim because the Settlement Facility did not mail to counsel for Korean Claimants and did not mail to *all* individuals of Korean file. In addition, this Court ordered that once the notice was mailed the SF-DCT would begin sending revised notification of status letters that would also include deadline information. (*See* the fourth paragraph, Notice Plan Overview, Exhibit B of Exhibit G of Dow Corning) But the Settlement Facility did not send revised notification of status letters to the Korean Claimants at all. Nor have the Settlement Facility done so to counsel for Korean Claimants. The Settlement Facility boldly violated Stipulation and Order Approving Notice of Closing and Final Deadline for Claim.

Therefore the Korean Claimants' request for relief from paragraph 29 of Closing Order 1 is reasonable.

To make a point of unreasonableness on the side of counsel for Korean Claimants, Dow Corning asserted that while the motion to enforce mediation was still pending counsel for Korean Claimants filed over 200 claims at the deadline so that he could not credibly contend that he did not know to file claims by the deadline or that somehow the pendency of the motion to enforce provided a reasonable basis for not filing. This assertion is from confusion over how a counsel was representing a client. First of all, whether a Claimant files her claim is a decision of the Claimant. Counsel simply advised the Claimant. In addition, counsel for Korean Claimants cannot file claim alone. The claim form and supporting documents to prove injury should be provided by the Claimant. Therefore over 400 hundred Claimants who filed this Motion did not file claim by the deadline on their own, thinking that the motion for enforcement of mediation was optimistic. Second, whether counsel for Korean Claimants filed over 200 claims at the deadline has nothing to do with whether counsel did not file 400 claims by the deadline. Rather, if counsel could file claim without consent and cooperation from the Claimants, he would do so for them just like 200 claims that counsel filed claim at the deadline. Therefore the Dow Corning's assertion that counsel for Korean Claimants filed 200 claims at the deadline while 400 claims were not filed by the deadline has no persuasive weight to be considered.

III. Conclusion

Dow Corning did not provide a basis for denying the extension of deadline for filing claim. For the reasons above in this Reply and in the Motion, the Korean Claimants request this Court to Grant the Motion quickly.

Date: February 23, 2021

Respectfully submitted,

(signed) Yeon-Ho Kim

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2021, this Motion has been electronically filed with the Clerk of Court using ECF system, and the same has been notified to all of the relevant parties of record.

Dated: February 23, 2021 Signed by Yeon-Ho Kim