

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

**In re:**

**SETTLEMENT FACILITY DOW  
CORNING TRUST**



**Case No. 00-CV-00005  
(Settlement Facility Matters)**

**Hon. Denise Page Hood**

**RESPONSE OF DOW SILICONES CORPORATION,  
THE DEBTOR’S REPRESENTATIVES, AND THE CLAIMANTS’  
ADVISORY COMMITTEE TO THE MOTION FOR VACATING  
DECISION OF SETTLEMENT FACILITY REGARDING ADDRESS  
UPDATE/CONFIRMATION**

For the reasons set forth in the attached memorandum, Dow Silicones Corporation (“Dow Silicones”),<sup>1</sup> the Debtor’s Representatives (the “DRs”) and the Claimants’ Advisory Committee (“CAC”) oppose Korean Claimant’s Motion for Vacating Decision of Settlement Facility regarding Address Update/Confirmation, ECF No. 1569 (“Motion for Vacating”) and respectfully submit that the Motion for Vacating should be denied.

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<sup>1</sup> As Dow Silicones Corporation previously advised the Court, Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

Dated: February 26, 2021

Respectfully submitted,

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*Claimants' Advisory Committee*

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

**In re:**

**SETTLEMENT FACILITY DOW  
CORNING TRUST,**



**Case No. 00-CV-00005  
(Settlement Facility Matters)**

**Hon. Denise Page Hood**

**PROPOSED ORDER OF DOW SILICONES CORPORATION,  
THE DEBTOR'S REPRESENTATIVES AND THE CLAIMANTS'  
ADVISORY COMMITTEE DENYING THE MOTION FOR VACATING  
DECISION OF SETTLEMENT FACILITY REGARDING ADDRESS  
UPDATE/CONFIRMATION**

The Court has considered the response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to Korean Claimants' Motion for Vacating Decision of Settlement Facility regarding Address Update/Confirmation, ECF No. 1569 ("Motion for Vacating"), and the Court finds and concludes that the Motion for Vacating should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Motion for Vacating is DENIED with prejudice.

DATED: \_\_\_\_\_

\_\_\_\_\_  
DENISE PAGE HOOD  
CHIEF JUDGE

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

**In re:**

**SETTLEMENT FACILITY DOW  
CORNING TRUST**



**Case No. 00-CV-00005  
(Settlement Facility Matters)**

**Hon. Denise Page Hood**

**MEMORANDUM IN SUPPORT OF THE RESPONSE OF DOW  
SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES  
AND THE CLAIMANTS' ADVISORY COMMITTEE TO THE MOTION  
FOR VACATING DECISION OF SETTLEMENT FACILITY REGARDING  
ADDRESS UPDATE/CONFIRMATION**

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**CONCISE STATEMENT OF ISSUES PRESENTED**

1. Should the Court amend or vacate the provisions of Closing Order 2 that prohibit the distribution of the limited Settlement Fund assets where the Settlement Facility does not have a confirmed current address for the claimant and therefore cannot confirm that the claimant received the payment?

Respondents' Answer: No.

2. Should the Court order the Settlement Facility to distribute funds to Korean Claimants who have not provided a confirmed current address notwithstanding the terms of Closing Order 2 that prohibit such a distribution?

Respondents' Answer: No.

3. Should the Court deny the Motion for Vacating because it is an unauthorized appeal prohibited by the Plan?

Respondents' Answer: Yes.



## **CONTROLLING OR MOST APPROPRIATE AUTHORITY**

- Closing Order 2, ECF No. 1482
- *In re Dow Corning Corp.*, 287 B.R. 396 (E.D. Mich. 2002)
- Dow Corning Amended Joint Plan of Reorganization
- Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A

Dow Silicones Corporation (“Dow Silicones”), the Debtor’s Representatives (the “DRs”) and the Claimants’ Advisory Committee (the “CAC”) respectfully request that the Court deny Korean Claimants’ Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation, ECF No. 1569 (“Motion for Vacating”).<sup>1</sup>

### INTRODUCTION

The Motion for Vacating is another in a series of motions filed by Korean Claimants belatedly disputing orders entered by this Court and actions taken by the Settlement Facility-Dow Corning Trust (“SF-DCT” or “Settlement Facility”) in conformance with the requirements of the Plan and the Orders of this Court.<sup>2</sup> *See e.g.*, Motion for Premium Payments to Korean Claimants, ECF No. 1545 (July 6, 2020); Motion for Extension of Deadline for Filing Claim, ECF No. 1586 (Feb. 3, 2021), Motion for Extension of Deadline of Class 7 Claimants, ECF No. 958 (Mar.

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<sup>1</sup> Respondents have the absolute right to be heard on any matter that affects the Dow Corning Amended Joint Plan of Reorganization (“Plan”) (Exhibit A) or Plan Documents. The Settlement Facility and Fund Distribution Agreement (“SFA”) (Exhibit B) provides that the CAC and/or the DRs “may file a motion or take any other appropriate actions to enforce or be heard in respect of the obligations in the Plan and in any Plan Document.” SFA § 4.09(c)(v).

<sup>2</sup> Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Plan, the SFA or the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the Settlement Facility and Fund Distribution Agreement (“Annex A”) (Exhibit C).

7, 2014).<sup>3</sup> In the Motion for Vacating, Korean Claimants challenge the Settlement Facility's requirement for assuring that a claimant has a valid, confirmed address before processing a claim or issuing a payment. The Motion for Vacating must be denied because the requirement of a valid, confirmed current address was mandated by Closing Order 2 and the Settlement Facility must abide by its terms. *See* Closing Order 2 (Regarding Additional Procedures for Incomplete and Late Claims;

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<sup>3</sup> To date, Korean Claimants have filed 11 motions with this Court and taken 3 appeals to the Sixth Circuit. *See* Motion for Vacating; Motion for Extension of Deadline for Filing Claim, ECF No. 1586 (Feb. 3, 2021); Motion for Premium Payments to Korean Claimants, ECF No. 1545 (July 6, 2020); Motion for Exclusion of Dow Silicones Corporation and the Claimants' Advisory Committee from the Korean Claimants' Cross-Motion for Entry of Order to Show Cause with Respect to the Finance Committee, ECF No. 1378 (Feb. 3, 2018); Motion for Joinder and Holding Joint hearing with the Korean Claimants' Motion for Recognition and Enforcement of Settlement Agreement Filed on December 15, 2016, ECF No. 1371 (Jan. 30, 2018); Motion for Cross-Motion for Entry of Order to Show Cause with Respect to the Finance Committee, ECF No. 1357 (Jan. 17, 2018); Motion for Recognition and Enforcement of Mediation, ECF No. 1271 (Dec. 14, 2016); Motion for Reversal of Decision of SF-DCT Regarding Korean Claimants, ECF No. 810 (Sept. 26, 2011); Motion for Re-Categorization of Korea, ECF No. 965 (Apr. 7, 2014); Motion for Extension of Deadline of Class 7 Claimants, ECF No. 958 (Mar. 7, 2014); Motion of Korean Claimants for the Settlement Facility to Locate Qualified Medical Doctor of Korea and Either Pay for that Qualified Medical Doctor to Travel to Korea and Conduct the Disease Evaluations or Hire Qualified Medical Doctor in Korea to Conduct the Reviews at the Settlement Facility's Expense, ECF No. 77 (Dec. 15, 2004).

Korean Claimants have also taken three appeals to the Sixth Circuit. *See Korean Claimants v. Claimants' Advisory Committee, et al.*, 18-2446; *Korean Claimants v. Debtor's Representatives, et al.*, 18-1040; *Korean Claimants v. Debtor's Representatives, et al.*, No. 15-2548.

Protocols for Issuing Payments; Audits of Attorney Distributions of Payments; Protocols for Return of Undistributed Claimant Payment Funds; Guidelines for Uncashed Checks and for Reissuance of Checks; Restrictions on Attorney Withdrawals), ECF No. 1482 (“Closing Order 2”) (Exhibit D). Payments to Korean Claimants, like payments to all other claimants, can be made only in accordance with the Plan Documents and the Orders of this Court, including Closing Order 2.

Closing Order 2 expressly prohibits the Settlement Facility from issuing payments if the Settlement Facility does not have a confirmed current address for the claimant. The Settlement Facility may use many means to determine a current confirmed address and Closing Order 2 specifically authorizes the Settlement Facility to seek the address verification from a source other than the attorney of record. The uncontroverted record shows that the decisions and actions that Korean Claimants dispute were in compliance with Closing Order 2 and that the Settlement Facility has expended considerable resources and time in an effort to obtain from Korean Claimants the information that would permit the distribution of payments.

If Korean Claimants believe that Closing Order 2 is somehow inappropriate, they should have raised an objection when it was entered – nearly two years ago – on March 19, 2019. There is no excuse for the failure to raise any issues or concerns at that time and there is no credible basis to raise an objection at this late date.

Korean Claimants assert that sending mailings to claimants will be harmful to claimants and will violate their privacy. But these claimants are seeking compensation from the Settlement Fund – and to receive that compensation, they must submit the necessary documents and abide by the applicable rules. If they do not wish to do so, they are always free to withdraw their claims. In fact, these claimants apparently did not have such privacy concerns when they filed their claims – because, as Korean Claimants admit, they did provide address information at that time.

The Motion for Vacating must be denied for the additional reason that it is an unauthorized appeal of a Claims Administrator’s decision that is barred by the Plan.

For the reasons set forth herein, the Motion for Vacating must be denied.

## **BACKGROUND**

### **A. Controlling Plan Documents**

Dow Corning filed its petition for reorganization under Chapter 11 of the Bankruptcy Code on May 15, 1995. Over nine years later, on June 1, 2004, the Plan became effective by Court order. The Plan prescribes detailed terms and conditions for the resolution of the claims of creditors. Tort creditors – such as Korean Claimants – were provided a settlement option and a litigation option for the resolution of their claims against Dow Corning. The details of the settlement program are set forth in the SFA and Annex A.

The Court retains jurisdiction over the Plan to, *inter alia*, “resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents.” Plan, § 8.7.3. The SFA provides that the resolution of Claims under the terms of the SFA and the Claims Resolution Procedures shall be supervised by the Court, and that the Court “shall perform all functions relating to the distribution of funds and all determinations regarding the prioritization or availability of payments, specifically including all functions related to Articles III, VII, and VIII herein.” SFA § 4.01.

The Settlement Fund assets, from which claims are paid, remain under the supervision and control of the Court until the claimant *actually receives* the funds. *See* SFA § 10.08 (“All funds in the Settlement Facility are deemed *in custodia legis* until such times as the funds have actually been paid to and received by a Claimant, ....”). The Court thus has the plenary authority (and the obligation) to control the procedures for the distribution of funds to assure that qualified claimants actually receive the funds and that the funds are not “lost” or otherwise diverted. The Court further has the authority to take action to recoup funds that have been distributed to counsel but have not been paid to the claimants.

To receive a settlement payment, claimants must satisfy specific criteria and submit supporting documents and records. The SFA states:

The Claims Office shall process Settling Personal Injury Claims payable from the Settlement Fund in accordance with the Claims

Resolution Procedures outlined in Annex A. This Settlement Facility Agreement and Annex A shall establish the exclusive criteria for evaluating, liquidating, allowing and paying Claims, except as modified in accordance with Sections 5.05 and 10.06. ... Only those Claims that satisfy the eligibility criteria specified in the Claims Resolution Procedures as applicable are eligible to receive payment, ...

SFA § 5.01(a).<sup>4</sup>

To qualify for payment, a settling claimant must submit both acceptable proof of manufacturer (proving the use of a Dow Corning Breast Implant) and appropriate documentation establishing the elements of the particular benefit option selected. Annex A details the documentation that must be submitted to demonstrate proof of manufacturer and the medical documentation that is required to support each of the different compensation options, including test results, diagnoses, findings, and symptoms. *See* Annex A § 5.01.

The Plan charges the Settlement Facility with the task of assuring that claims meet the necessary criteria, that the supporting documentation is reliable, and that funds are distributed only to eligible claimants. Section 5.04(b) of the SFA provides, “The Claims Administrator shall have the plenary authority and obligation to institute procedures to assure an acceptable level of *reliability* and quality control of

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<sup>4</sup> SFA § 5.05 (Interpretation of Criteria/Consent of Parties) provides that the Claims Administrator may seek a Plan Interpretation from the Debtor’s Representatives and Claimants’ Advisory Committee.

Claims and to assure that payment is distributed *only for Claims that satisfy the Claims Resolution Procedures.*” SFA §5.04(b) (emphasis added).

To further assure that only qualified claimants are paid and that the Settlement Fund assets are not distributed inappropriately, the SFA provides that the Settlement Facility has the affirmative obligation to institute procedures to deter fraud and to identify claim submissions that potentially are fraudulent, or represent an abuse of the claims process. *Id.* at §5.04(a) (“The Claims Administrator and Claims Operations Manager shall have the authority and obligation to institute claim-auditing procedures and other procedures designed to detect and prevent the payment of fraudulent Claims.”).<sup>5</sup>

The authority granted to the Court and these affirmative obligations of the Settlement Facility function to protect the limited Settlement Fund assets, preserve the equitable treatment of claims set forth in the Plan, prevent incorrect or erroneous distributions, and assure that the eligible claimants are paid.

### **B. Applicable Orders**

Closing Order 2, entered on March 19, 2019, adopts and mandates the long-standing policy of the Settlement Facility to assure that claimants are located before

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<sup>5</sup> Additional provisions of the SFA impose further obligations. For example, Section 7.02(b) states: “The Finance Committee is responsible for establishing procedures to verify the Allowed amount of each Claim certified for payment so that the correct payments are issued.” *Id.*



incurring the cost of reviewing and issuing checks for claimants. Closing Order 2 provides in relevant part: “Claimants and attorneys are required to keep their address and contact information current with the SF-DCT.” Closing Order 2 at ¶ 11. “[T]he SF-DCT shall not issue payments to or for claimants or an authorized payee unless the SF-DCT has a confirmed, current address for such claimant or authorized payee.” *Id.* The purpose of requiring a current claimant address is clearly stated in Closing Order 2: “[t]he following protocols are designed and intended to authorize the SF-DCT to take actions to ensure that Settlement Fund payments are distributed to claimants as required by the Plan.” Closing Order 2 at 7.

Closing Order 2 defines a “confirmed current address” as “an address that has been verified as a mailing address where the claimant or authorized payee is receiving mail *so that the SF-DCT can assure that the claimant or authorized payee will actually receive the mailed check.*” *Id.* (emphasis added). The Order authorizes but does not require the Settlement Facility to accept address information from the attorney of record. Indeed, the Order expressly authorizes and contemplates that the Settlement Facility will implement additional procedures to confirm addresses.

The SF-DCT may accept confirmation of a claimant’s current address provided by the claimant’s attorney of record; however, the SF-DCT may seek additional confirmation as appropriate including, for example, in instances where prior mailings were returned as undeliverable or where prior address confirmations were not accurate.

*Id.*

The Order does not limit the circumstances under which the SF-DCT may seek such further verification but the specific examples provided in the Order (noted above) give guidance: the SF-DCT should seek additional confirmation – such as from the claimant directly – where there is evidence that prior address information provided by counsel has proven to be inaccurate, inconsistent, or unreliable.<sup>6</sup> There is nothing in Closing Order 2 that restricts these address procedures only to claimants who have had mailings from the SF-DCT returned as undeliverable. The Settlement Facility’s obligation is to undertake procedures to achieve the expressly stated purpose of “assur[ing] that the claimant or authorized payee will actually receive the mailed check” (Closing Order 2 at ¶ 11) – which means that the address information must be current and must be collected at the time of payment. Korean Claimants did not object to or appeal or even comment on Closing Order 2 when it was entered.

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<sup>6</sup> The Court confirmed similar procedures in approving the Class 7 Consent Order which finalized the distribution of the Class 7 sub-fund. *See* Order Approving Consent Order to Establish Guidelines for Distribution from the Class 7 Silicone Material Claimants’ Fund, ECF. No. 1226 (Dec. 3, 2015); Class 7 Consent Order. Specifically, the Class 7 Consent Order set forth and adopted the procedure employed by the Settlement Facility to locate claimants. If the Settlement Facility was unable to contact a claimant, then the Settlement Facility conducted research in an effort to identify a reliable address for the claimant. Class 7 Consent Order at ¶ 40. Once a potential address was identified, the Settlement Facility sent an address verification form to the claimant – requiring the *claimant* to confirm the address in writing. *Id.* If the claimant failed to respond to any address verification request, then the claim was deemed abandoned and permanently denied. *Id.*

### C. Settlement Facility Directives and Correspondence

Claimants and attorneys have always been under an obligation to maintain current address information with the Settlement Facility. The initial Claimant Information Guides, which were published and made available before the Effective Date of the Plan and have also been posted on the Settlement Facility website, state clearly that each claimant has an affirmative obligation to inform the Settlement Facility of any change of address. *See* Exhibit E, February 26, 2021 Declaration of Ellen Bearicks (“Bearicks Feb. 26 Dec.”) at ¶ 7 and at Exhs. 1-3 (CIG 9-14, 9-15, 10-8, 10-9); [https://www.sfdct.com/\\_sfdct/index.cfm/how-to-file-a-claim-for-enefits/claimant-information-guide-cig-by-class](https://www.sfdct.com/_sfdct/index.cfm/how-to-file-a-claim-for-enefits/claimant-information-guide-cig-by-class) (last accessed February 26, 2021).

During the course of its operations, the Settlement Facility has sent numerous directives and correspondence to attorneys and claimants reminding them of the obligation to provide the Settlement Facility with address updates and seeking to confirm address information. Bearicks Feb. 26 Dec. at ¶ 8. Thousands of claimants and hundreds of attorneys of record have complied with SF-DCT’s address update requests. *Id.* at ¶ 22.

Based on the directives and guidance in Closing Order 2, the Settlement Facility will not accept address information provided by counsel where previous experience demonstrates that the address information cannot be considered reliable. *Id.* at ¶ 23. The Settlement Facility does not accept address information provided

by an attorney where it is inconsistent with address information provided by the claimant. *Id.* at ¶ 24. The Settlement Facility does not accept address information from counsel where previous address submissions from counsel have proved to be invalid and more than a negligible percentage of mail sent to addresses provided by counsel has been returned as undeliverable. *Id.*

The Settlement Facility has issued numerous mailings specifically to Korean Claimants in an effort to confirm addresses or determine whether an address previously provided is no longer applicable. *Id.* at ¶ 32. In fact, from 2009 to 2020, the Settlement Facility sent 1,839 requests for address verification to Korean Claimants eligible for a future payment. *Id.* at ¶ 33.<sup>7</sup>

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<sup>7</sup> The Settlement Facility has employed multiple different procedures to confirm addresses and to determine which addresses are no longer valid. *Id.* at ¶ 14. In some instances, the Settlement Facility conducted its address verification through a mass mailing – identifying the mail that was returned as undeliverable and then taking steps to locate those claimants. *Id.* at ¶ 15. In other cases, the Settlement Facility has conducted more targeted mailing to individuals and law firms. *Id.* at ¶ 16. Once the Settlement Facility determines that an address is not valid – primarily because mail is returned as undeliverable – the Settlement Facility researches available databases in an effort to locate claimants. *Id.* at ¶ 17. If that research yields a “lead” then the Settlement Facility will send an address verification mailing to that newly identified address. *Id.* at ¶ 18. The address verification mailing asks the claimant to contact the Settlement Facility either in writing or by telephone to confirm the current address. *Id.* at ¶ 19. In addition, whenever a Settlement Facility staff member speaks to a claimant by telephone, the standard procedure is to ask for address verification on that call. *Id.* at ¶ 20. The Settlement Facility then documents verification of address information – either confirming the address already on file or updating the address in light of the information received from the claimant. *Id.* at ¶ 21.

## ARGUMENT

### A. KOREAN CLAIMANTS' MOTION FOR VACATING IMPROPERLY SEEKS TO VACATE OR AMEND THIS COURT'S PRIOR ORDER

Korean Claimants couch the Motion for Vacating as a request to revoke certain administrative determinations of the Settlement Facility. But in reality, the Motion for Vacating seeks to avoid the express requirements of Closing Order 2. By requiring credible and reliable information to confirm the current addresses of Korean Claimants, the Settlement Facility is following the strictures of Closing Order 2 – as it must.

The address verification requirement is the means by which the Court can obtain maximum assurance that funds will be received by the eligible claimant. If there is no confirmed address, then neither the Court nor the Settlement Facility has any way to determine whether funds distributed will be or actually were received by a claimant.<sup>8</sup> The Settlement Facility's experience with attempting to issue payments to Korean Claimants illustrates the critical importance of this process: Starting in November 2019, the Settlement Facility issued 30 Premium Payments to counsel for Korean Claimants for payment to 27 eligible Korean Claimants. Bearicks Feb. 26

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<sup>8</sup> The Settlement Facility has received claims from over 65,000 individuals in classes 5 and 6. The Settlement Facility does not have email addresses for all of these individuals. The only feasible way to contact these many individuals is through the mail. *See* Bearicks Feb. 26 Dec. at ¶ 31.

Dec. at ¶ 35. Of those 30 payments, only one was cashed by counsel. The other 29 payment checks were never cashed and have now expired. *Id.* It is important for the Settlement Facility to be able to contact those claimants directly at a current address so that they can be informed about the payment and make any necessary arrangements to receive the funds.

The Motion for Vacating asks this Court to eliminate this important procedure, leaving the Court and the Settlement Facility with no way to verify that claimants have received the funds. Such a result is inconsistent with the Court's plenary authority over the Settlement Fund assets (which extends until such time as the funds are received by a claimant) and the purpose of Closing Order 2.<sup>9</sup>

**B. KOREAN CLAIMANTS' REASONS FOR SEEKING AN EXEMPTION FROM THE ADDRESS VERIFICATION REQUIREMENT ARE INCONSISTENT AND UNPERSUASIVE**

Korean Claimants assert that individual claimants should not have to provide current address information. They suggest that it is a violation of their privacy rights to provide address information to the Settlement Facility and that there is no point

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<sup>9</sup> To achieve the relief that Korean Claimants seek, the Court would have to amend or waive the applicable provisions of Closing Order 2 as to Korean Claimants. Such an action would result in disparate treatment among claimants in violation of the Bankruptcy Code. *See* 11 U.S.C. § 1123(a)(4) (a plan is required to “provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.”).

in providing address information because Korean Claimants do not want to receive mail or checks at their home addresses.<sup>10</sup> Motion for Vacating, ECF 1569, PageID.26262. Counsel for Korean Claimants asserts that he has attempted to explain these issues to the Settlement Facility but that the Settlement Facility has not accepted these explanations. *Id.* at PageID.26262-63.

But this privacy argument is belied by their own submission: they admit that they provided addresses in 2005 and 2006 when the claims were first filed. *Id.* at PageID.26261. They apparently did not have privacy concerns at that time. They now object to updating those addresses. But there is no cogent explanation as to why providing address information is problematic now when it was acceptable earlier.

If privacy is not the issue (as demonstrated by the prior provision of addresses) what, then, is the reason to object to the request for address verification? It seems that counsel for Korean Claimants objects to the effort of the Settlement Facility to obtain address verification from the claimant as opposed to counsel.<sup>11</sup> But counsel

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<sup>10</sup> Of course, the Settlement Facility requires only that the claimant confirm a mailing address where the claimant may be reached; the address need not be the home address that the claimant shares with a family. And the claimant also has the option of providing the address verification through email or by telephone. *See* Bearicks Feb. 26 Dec. at ¶ 30.

<sup>11</sup> In listing the relief sought, Korean Claimants request that this Court order the Settlement Facility to withdraw the letter of March 13, 2019 that states that address updates must be provided by claimants and not by counsel. Motion for Vacating, ECF 1569 at PageID.26272

for Korean Claimants has admitted that he does not retain address information and that he does not communicate with the claimants via the mail. *Id.* at PageID.26262. Instead he communicates by cell phone. *Id.* In short, by his own admission he does not have accurate and complete records of current addresses. This conclusion is consistent with the experience of the Settlement Facility: the Settlement Facility's records show that prior address updates provided by counsel have not proven to be accurate. Bearicks Feb. 26 Dec. at ¶ 34. Given the history and the admissions of counsel, it is clear that the best and only sources of confirmed current address information are the claimants themselves.<sup>12</sup>

Korean Claimants also assert that receiving mail from the Settlement Facility would result in psychological harm. Motion for Vacating, ECF 1569 at PageID.26270. They state that correspondence would remind the claimants of the harm they suffered and that in itself would cause hurt. *Id.* But Korean Claimants have availed themselves of the settlement program – knowing and, in fact, expecting that they ultimately would receive a determination from the Settlement Facility and a payment. They subjected themselves to the jurisdiction of the Court in filing their

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<sup>12</sup> Korean Claimants also assert that because they provided address information when they filed claims in 2005 and 2006, they need not do so now. But, as noted, the Settlement Facility must obtain a current address – and based on experience, some claimants will have moved in the intervening 15 years. Even putting aside Closing Order 2, it would be unreasonable for the Settlement Facility to consider those addresses to be “current.”



claims and thereby subjected themselves to the rules and requirements for receiving compensation. *See Langenkamp v. Culp*, 498 U.S. 42, 45 (1990) (“Respondents filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court”); *In re Dow Corning Corp.*, 287 B.R. 396, 412 (E.D. Mich. 2002) (“Claimants have submitted themselves to this Court’s jurisdiction by participating in this bankruptcy action. When a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect its debt, the creditor is subject to the court’s orders and any discharge order pursuant to 11 U.S.C. § 524.”). They cannot both take advantage of the settlement program and also avoid its requirements.

In short, there is ample reason for the Settlement Facility to require address verification directly from the claimants. The Settlement Facility has a long history of attempts to obtain accurate contact information for Korean Claimants and has made multiple requests to counsel to assist in obtaining the necessary information. *See* Bearicks Feb. 26 Dec. at ¶¶ 7, 8, 13, 22; July 20, 2020 Declaration of Ann M. Phillips Regarding the Motion for Premium Payments to Korean Claimants, ECF No. 1546-8 (Exhibit F). The records of the Settlement Facility confirm that counsel has failed and indeed (as the Motion for Vacating admits) refused to provide such information. *See id.*; Motion for Vacating at PageID.26262, PageID.26270. It is entirely proper, and certainly within the mandate of Closing Order 2, for the

Settlement Facility to seek confirmation of addresses directly from the claimants. A failure to seek such confirmation would in fact violate Closing Order 2 and would risk the very outcome that Closing Order 2 was intended to avoid: the inability to distribute or verify the distribution of funds to eligible claimants.

**C. TO THE EXTENT THE KOREAN CLAIMANTS SEEK TO VACATE AN ORDER ENTERED NEARLY TWO YEARS AGO – THAT WAS NEITHER OBJECTED TO NOR APPEALED – THE MOTION FOR VACATING IS UNTIMELY**

Had Korean Claimants wished to object to or appeal Closing Order 2, they could have done so in March 2019 when it was entered. They did not do so and cannot do so now at this late date. Korean Claimants easily could have objected to the Order in 2019 had they believed that there was a justifiable basis to oppose the Order. To object to the Order nearly two years after its entry is untenable. There is no excuse for such a delay.

Closing Order 2 is not a “judgment” although Korean Claimants contend that its address verification terms preclude them from obtaining their compensation. If we look to Federal Rule of Civil Procedure 60 (governing relief from judgments) as a reference, it is clear that any request to alter the terms of Closing Order 2 is untimely. A request for relief under FRCP 60 must be raised within a reasonable time—in most cases within one year. *See* Fed. R. Civ. P. 60(c)(1) (stating that a motion under Fed. R. Civ. P. 60(b) must be made within a reasonable time—and motions under Fed. R. Civ. P 60(b)(1), (2), and (3) must be made no more than a

year after the entry of the judgment or order or the date of the proceeding); *Yarbrough v. Warden, Lebanon Correctional Inst.*, No. 16-4083, 2017 WL 3597427, at \*2 (6th Cir May 25, 2017) (“A Rule 60(b)(1) motion must be filed within one year of the challenged judgment.”). An objection raised nearly two years after entry of an order cannot be considered a “reasonable” period of time. *See Gresham v. Johnson*, No. 13-10351, 2015 WL 5729072, at \*1 (E.D. Mich. Sept. 30, 2015) (holding that relief was unavailable under any subsection of Fed. R. Civ. P. 60(b), as plaintiff had filed twenty months after the court issued its judgment); *Johnson v. Genesee County*, No. 12-CV-10976, 2015 WL 6671521, at \*2 (E.D. Mich. Nov. 2, 2015) (“Plaintiff sat on his right to seek relief from judgment for nearly two years . . . The Court finds insufficient basis in the facts and circumstances presented here to excuse Plaintiff’s tardy filing of his Rule 60(b)(6) Motion”).

**D. KOREAN CLAIMANTS’ MOTION FOR VACATING MUST BE DENIED AS AN UNAUTHORIZED APPEAL PROHIBITED BY THE PLAN**

Under the Plan, claim appeals to this Court are expressly and unambiguously barred. The provisions of the Plan are binding on claimants as a matter of federal bankruptcy law. *See* 11 U.S.C. § 1141(a) (“the provisions of a confirmed plan bind . . . any creditor . . . whether or not such creditor . . . has accepted the plan”). The Plan was expressly intended to prohibit judicial review of determinations by the Claims Administrator in the context of the settlement program. “There is no

provision under the Plan or the SFA which allows a claimant to submit an issue to be interpreted by the Court or to amend the Plan.” *In re Settlement Facility Dow Corning Trust*, No. 00-00005, 2017 WL 7660597, at \*1 (E.D. Mich. Dec. 28, 2017), *aff’d* 760 Fed. Appx. 406 (6th Cir. 2019).

The Motion for Vacating challenges the determination of the Claims Administrator regarding the standards for issuing payment for individual claimants. This is nothing more than an appeal of the Claims Administrator’s decision – which is unequivocally barred by the Plan. *See In re Settlement Facility Dow Corning Trust*, 760 Fed. Appx. 406, 411-412 (6th Cir. 2019) (“To the extent the Korean Claimants seek to challenge any substantive decisions of the Claims Administrator with respect to any particular claims, such review is beyond the scope of the plan. ‘The Plan provides no right of appeal to the Court.’”) (quoting *In re Settlement Facility Dow Corning Tr.*, No. 12-10314, 2012 WL 4476647, at \*2 (E.D. Mich. Sept. 28, 2012)). As the Sixth Circuit stated in rejecting an earlier appeal by Korean Claimants, only “[c]ertain parties under certain circumstances can seek review of decisions ‘regarding the interpretation and implementation of the Plan.’” *In re Settlement Facility Dow Corning Trust*, 760 Fed. Appx. at 412 (quoting *In re Clark-James*, No. 08-1633, 2009 WL 9532581, at \*2 (6th Cir. Aug. 6, 2009) (order)). Korean Claimants’ disagreement with decisions regarding claims “are decisions for the Claims Administrator and the Appeals Judge selected under the terms of the plan,

and not the district court” and thus their effort to “seek review of substantive decisions regarding particular claims . . . is contrary to the terms of the plan.” *In re Settlement Facility Dow Corning Trust*, 760 Fed. Appx. at 412.<sup>13</sup>

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<sup>13</sup> As this Court has previously explained:

The Plan establishes administrative claim review and appeals processes for Settling Personal Injury claimants. Any claimant who does not agree with the decision of the SF-DCT may seek review of the claim through the error correction and appeal process. (SFA, Annex A, Art. 8.) A claimant may thereafter obtain review by the Appeals Judge. (SFA, Annex A, Art. 8.) The Plan provides that “[t]he decision of the Appeals Judge will be final and binding on the Claimant.” (SFA, Annex A, § 8.05.) Claimants who seek review under the Individual Review Process also have a right to appeal directly to the Appeals Judge. The Plan provides that “[t]he decision of the Appeals Judge is final and binding on both Reorganized Dow Corning and the claimant.” (SFA, Annex A, § 6.02(vi).)

*In re Settlement Facility Dow Corning Trust*, 2017 WL 7660597, at \*3. *See also In re Settlement Facility Dow Corning Trust, Marlene Clark-James*, 08-1633 at 3 (6th Cir. Aug. 8, 2008) (“The district court properly dismissed Clark-James’ complaint . . . essentially seek[ing] a review of the SF-DCT’s determination that she has not submitted sufficient proof to show that her implants had ruptured. [T]he Plan provides no right of appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents.”), *aff’g* No. 07-CV-10191 (E.D. Mich. Mar. 31, 2008); *In re Settlement Facility Dow Corning Trust, Jodi Iseman*, No. 09-CV-10799 at 4 (E.D. Mich. Mar. 25, 2010) (“Even if [claimant had] sought . . . review by the Appeals Judge, the Plan’s language is clear and unambiguous that the decision of the Appeals Judge is final and binding . . . The Plan provides no right to appeal to the Court. Allowing the appeal to go forward . . . would be a modification of the Plan language. The Court has no authority to modify this language.”); *In re Settlement Facility Dow Corning Trust, Nina Rowland*, No. 08-CV-10510 at 3 (E.D. Mich. Sept. 30, 2008) (“The Plan provides no right to appeal to the Court”); *In re Settlement Facility Dow Corning Trust, Dale Reardon*, No. 07-CV-14898 at 3 (E.D. Mich. Sept. 30, 2008) (“The Plan provides no right to appeal to the Court”); *In re Settlement Facility Dow Corning Trust, Mary O’Neil*, No. 00-00005 at 4 (E.D. Mich. Mar. 31, 2008) (“The

**E. KOREAN CLAIMANTS' OTHER ARGUMENTS – RELATING TO THE JUNE 3, 2019 DEADLINE – PROVIDE NO BASIS FOR ELIMINATING THE ADDRESS VERIFICATION REQUIREMENT IN CLOSING ORDER 2**

Korean Claimants present a somewhat convoluted argument that a letter sent by the Settlement Facility in early March of 2019 to counsel reminding him of the June 3, 2019 deadline somehow means that Korean Claimants are precluded from providing or need not provide address updates after June 3, 2019. *See generally* Motion for Vacating, ECF 1569. It seems that they are arguing that the actions and correspondence of the Settlement Facility are contradictory, seem to preclude the submission of updated addresses, and therefore they had no choice but to file this Motion for Vacating.

Of course, they do have a choice: they can provide the requested information. In addition, the argument that a notice of the final June 3, 2019 deadline somehow overrides Closing Order 2 and precludes the collection of address information is unsupportable. The Settlement Facility's obligation to obtain a current address means that address verifications must be conducted near the time of payment. To be considered current, the address must be provided within 90 days of payment. *See* Bearicks Feb. 26 Dec. at ¶ 28; Phillips 2020 Dec. at ¶ 13. An address provided on

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Plan provides no right to appeal to the Court"); *In re Settlement Facility Dow Corning Trust, Rosalie Maria Quave*, No. 07-CV-12378 at 6 (E.D. Mich. Mar. 31, 2008) (granting Dow Corning's motion to dismiss appeal "since Ms. Quave has no right to appeal the Appeals Judge's decision.").

June 3, 2019 for a claim that is processed today would not be a current address. The obligation for claimants to provide and for the Settlement Facility to seek address updates is ongoing and does not “expire” at a filing deadline. To the extent that Korean Claimants contend that the June 3, 2019 deadline fixed a final date for address updates, they are mistaken: Closing Order 2 makes clear that the address must be “current.” Closing Order 2 at ¶¶ 11-12.

Korean Claimants have multiple options to provide their current address. For example, counsel can contact the claimants through their cell phones and advise them to provide updated addresses to the Settlement Facility via email, telephone, or written correspondence. Bearicks Feb. 26 Dec. at ¶¶ 19, 30. There is no excuse for the failure to comply with Closing Order 2 and there is no excuse for a multi-year dispute over the efficiency of mail service in the United States and Korea. When the current addresses are provided, those claimants who are eligible for payment at that time can be paid.

### **CONCLUSION**

For the foregoing reasons, Dow Silicones Corporation, the Debtor’s Representatives and the Claimants’ Advisory Committee respectfully request that the Court deny the Motion for Vacating.

Dated: February 26, 2021

Respectfully submitted,

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*Claimants' Advisory Committee*



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

**In re:**

**SETTLEMENT FACILITY DOW  
CORNING TRUST**



**Case No. 00-CV-00005**

**Hon. Denise Page Hood**

**CERTIFICATE OF SERVICE**

I hereby certify that on February 26, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Dated: February 26, 2021

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