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.Judge Denise Page Hood

REPLY TO RESPONSE OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, THE CLAIMANTS' ADVISORY COMMITTEE AND THE FINANCE COMMITTEE

I. Introduction

The SF-DCT set up Closing Order 2 on March 19, 2919. Among other things, the Closing Order 2 adopts and mandates the long-standing policy of the SF-DCT to assure that claimants are located before 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." (paragraph 11, Closing Order 2). "The 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."

The Purpose of requiring a current claimant address is clearly stated in Closing Order 2: "The 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."(paragraph 7, Closing Order 2)

The Korean claimants received all of payments from the AOR when the SF-DCT sent checks to the AOR. The Finance Committee after questioning the AOR filed the motion to Show Cause requesting the return of funds for the claimants because the award letters sent to them were returned as undeliverable. This court denied the motion. The Korean claimants were cleared from unreliability of the AOR. Furthermore, the claimants had submitted their Korean Government-issued Resident Registry when they filed a proof of debt (claim). However, the SF-DCT did not lift off the sanctions regarding the address update and confirmation requirement on ALL of the Korean claimants and the AOR.

In addition, there is the Deposit Act of Korea (Exhibit S), which is used by Korean attorneys when they cannot find their clients who are eligible for share of sums from winning a lawsuit or settlement during lawsuit. The Deposit Act can be used by the AOR if the claimants who are not able to reach after receiving a check from the SF-DCT. After the AOR takes the attorney's fees and expenses incurred from the collection of checks, the AOR is able, or responsible to deposit the share of sums which shall be distributed to the claimants with the Korean court. The court which was deposited with the share can find the location of the claimants by researching their address through the public channels and notify them to apply for receiving the deposited money with interest incurred during the periods deposited. As long as the SF-DCT sends a check to the AOR, there is no danger that the claimants are not paid. Therefore, the purpose of Closing Order 2 that the SF-DCT takes actions to ensure that Settlement Fund payments are distributed to claimants can be achieved because of the Deposit Act in Korea.

II. Counter-Arguments to the Respondents' Arguments

A. This Motion is Not to Seek to Relitigate Issues Already Decided before This Court

and the Sixth Circuit

The Korean claimants' motions regarding the address update and confirmation requirement which were previously filed and decided by this court and the sixth circuit were to challenge Closing Orders of 2, 3 and 5 in general.

This motion to lift (the AOR used "lift off" word) the requirement was to seek exemption or lenient treatment from the SF-DCT before the Korean claimants go ahead full litigations in the Korean courts. If this court decides unfavorably to the Korean claimants, the Korean claimants including the SF-DCT approved claimants and the late claimants whose claims were not processed by the SF-DCT will file lawsuits in Korea.

The Korean claimants are aware that this court and the sixth circuit approved Closing Orders 2, 3 and 5 and authorized the practices of the SF-DCT regarding the address update and confirmation which has been conducted even four or five years before the Orders took place under the integrity of claim-processing.

The Korean claimants do not want to challenge the Orders. Rather this motion is to seek exemption from the Orders and thus this motion is not to seek to relitigate issues already decided after full adjudication before this court and the sixth circuit.

B. This Motion is Not to Seek Different Treatment and is Not in Violation of Section 1123(a)(4) of the Bankruptcy Code Even if it Were to Seek Different Treatment

This motion is not to seek different treatment. This motion is to correct discriminatory treatment from the SF-DCT.

The Korean claimants participated in the SF-DCT's settlement facility rather than the

litigation facility by virtue of the CAC's recommendation. The Korean claimants thought from the recommendation that the SF-DCT would conduct the claim-processing for Korean claims impartially.

However, the SF-DCT was influenced by the debtor's interest group including the debtor's insurance companies. The former Claims Administrator confided the AOR that they pressed the Claims Administrator to approve the claims within the budget and not to approve over the budget no matter what the claim documents were received. The former Claims Administrator stated when the AOR visited the SF-DCT in Houston, "Insurance guys stopped in the SF-DCT regularly and suggested something if I resisted their requests."

The SF-DCT has been imposing the address update and confirmation requirement upon the Korean claimants from 2015 nearly four years before Closing Order 2. The SF-DCT held the processing of the Korean claims over five years before it started imposing the address update and confirmation requirement on the Korean claimants.

The SF-DCT assumed without founding that if the award letter sent to a Korean claimant was returned as undeliverable, the claimant did not receive the payments for compensation from the AOR. Furthermore, the SF-DCT assumed that the AOR did not pay to the claimant even if the AOR cashed the check sent to the AOR.

The Respondents even filed the motion for Show Cause and the following motions to obligate the AOR to return the payments of cashed checks. As this court knows it apparently, this court denied the motions. (Exhibit T)

Even if this motion were to seek different treatment as characterized by the Respondents, this motion is not in violation of section 1123(a)(4) of the Bankruptcy Code. Under section 1123(a)(4) of the Bankruptcy Code, it is well established that all claimants are required to

receive equality of treatment. Yet, multiple courts have held that this does not mean that all claimants are required to receive equality of result. (In re Breitburn Energy Partners LP, 582 B.R. 321, 358 (S.D.N.Y. 2018), In re W.R. Grace & Co., 729 F.3d 311 (3d Cir. 2013), In re Central Med. Ctr., Inc., 122 B.R. 568, 574 (Bankr. E.D. Mo. 1990)) Section 1123(a)(4) is satisfied if claimants in the same class have the same opportunity to recover. (See In re Breitburn, 582 B.R. at 358) This means that if a plan subjects all members of the same class to the same means of claim determination, it is sufficient to satisfy the requirement of section 1123(a)(4). (See In re Central Med., 122 B.R. at 575)

The key inquiry under section 1123(a)(4) is not whether all of the claimants in a class obtain the same thing, but whether they have the same opportunity. (See Ad Hoc Committee of Personal Injury Asbestos Claimants v. Dana Corp., (In re Dana Corp.) 412 B.R. 53, 62 (S.D.N.Y. 2008) In In re Dana Corp., a portion of the claimants in a particular class reached settlement agreements with the debtor, and as a result, they received far less than their full claims, while those who did not settle did receive their full claims. Yet, the court held that the chapter 11 plan did not violate section 1123(a)(4) even though the claimants did not agree to less favorable treatment because all the claimants in the same class had the same opportunity to settle their claims. (See Id; In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 749 (2d Cir. 1992)

Accordingly, while it is well established that members of a certain class do not have to receive the same compensation under a reorganization plan, they must be subject to the same process in determining that compensation.

An issue of interpretation arises, however, when certain class members are treated better than others because they provided some new form of consideration in exchange for that better treatment. Because the Supreme Court has never defined what exactly equal treatment requires under the Bankruptcy Code and because the Bankruptcy Code itself has never

provided a standard for equal treatment, this is the question that the circuit courts are beginning to address and create a standard for. (In re Peabody Energy Corporation, 933 F.3d 918, 935 (8th Cir. 2019); Ahuja v. LightSquared Inc., 644 F. App'x 24(2d Cir. 2016); In re Cajun, 150 F.3d at 503; In re Acequia, 787 F.2d at 1352)) Under this interpretation, a reorganization plan does not violate section 1123(a)(4) if it treats creditors within the same class differently if that favorable treatment is in exchange for a "valuable new commitment" by the creditor. (See In re Peabody, 933 F.3d at 925)

The Second, Fifth, Ninth Circuits have found that it is in fact possible for a plan to treat certain creditors more favorable without violating the equal treatment rule. The Ninth Circuit established that if a claimant in a particular class is receiving preferential treatment over other claimants in the class, the inequality is permissible as long as the treatment in the result of something other than her ownership interest as a shareholder. (See In re Acequia, 787 F.2d at 1363) Additionally, the Fifth Circuit found that even though the debtor made additional payments to one claimant resulting in a more favorable treatment, the payment were not made in satisfaction of the members' claims against *[Cajun]*, but rather a reimbursement for plan and litigation expenses incurred in the bankruptcy case. (See In re Cajun, 150 F.3d at 518) Therefore, the favorable treatment was permissible because the payments were made for a purpose other than to satisfy the claimants' claims against the debtor.

The Eight Circuit is the most recent circuit to adopt this interpretation of the equal treatment rule. The Eight Circuit found that a reorganization plan may treat one set of claim holders more favorably than another so long as the treatment is not for the claim but for distinct, legitimate rights or contributions from the favored group separate from the claim. (See In re Peabody, 933 F.3d at 925) The Eight Circuit laid out three essential criteria that must be met in order to satisfy section 1123(a)(4). (See In re Peabody, 933 F.3d at 926) First, the claimant that is treated less favorably must not be excluded from any opportunity that is afforded to the claimant that receives preferential treatment. Second, the creditors that receive

preferential treatment must give up something of value in exchange for said preferential treatment. Finally, the debtor must consider alternative ways to raise capital other than providing preferential treatment.

Therefore, notwithstanding that under section 1123(a)(4) of the Bankruptcy Code, a plan of reorganization must 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, the circuit courts are beginning to carve out a way for debtors to provide certain creditors with special treatment. The eighth Circuit has laid out the three requirements that are needed to satisfy the requirement under the developing interpretation: (1) the claimant that is treated less favorably must not be excluded from any opportunity that is afforded to the claimant that receive preferential treatment; (2) the creditors that receive preferential treatment must give up something of value in exchange for said preferential treatment, and (3) the debtor must consider alternative ways to raise capital other than through preferential treatment.

C. This Motion is Not an Unauthorized Appeal Prohibited by the Plan

This motion is permissible rather than impermissible because it is an appeal from the decision of the SF-DCT to close the claims of the Korean claimants for failure to abide by the terms of this court's Closing Orders.

The Korean claimants agree that the provisions of the Plan are binding on claimants as a matter of federal bankruptcy law. The Korean claimants agree that 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. (See In re Settlement Facility Dow Corning Trust, No.00-0005, 2017 WL 7660597 at 1(E.D.Mich.Dec.28,2017)) The Korean claimants are aware that only certain 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) The Korean claimants are also aware that to the extent that a claimant seeks to challenge any substantive decisions of the Claims Administrator with respect to any particular claims, such review is beyond the scope of the Plan which provides no right of appeal to the court. (See In re Settlement Facility Dow Corning Trust, 760 Fed. Appx.406 (6th Cir. 2019)

The provisions of the Plan are also binding on the settlement facility as well as the Claims Administrator.

However, the SF-DCT applied the provisions of the Plan to the Korean claimants regarding the address update and confirmation arbitrarily.

First of all, the SF-DCT imposed the address update and confirmation requirement on the Korean claimants without any founding under the Plan from 2015 to 2019 before Closing Order 2 set in place. Second, the SF-DCT rejected ALL of submitted address update forms which counted over eight hundred (800) from 2017 to 2019 with no reasonable ground. The Claims Administrator declared that according to the audit conducted secretly without notice to the AOR, 600 out of eligible 1,382 claimants who had correspondence sent directly to the claimants that has been returned as undeliverable, 39.2% of mailings of 2,476 claimants were returned as undeliverable, and 50% of the mailings to updated addresses provided by the AOR in January 2018 were returned as undeliverable. (See Exhibit G, Ann Phillips' Declaration) From the Declaration, the Claims Administrator decided on the basis of percentage. We shall not talk about statistics but we shall talk about law. Even if the Claims Administrator's statement that 39.2% or 50% of mailings sent to the Korean claimants were returned as undeliverable was true (She refused to show the data to the AOR), the other mailings which were not returned as undeliverable must be respected so that those claimants with their mailings not returned should have received the payments of approved claims. However, the Claims Administrator did not send the checks for their approved claims and the

second priority payments to the AOR. Finally, the SF-DCT imposed an excessive sanction on the AOR that the AOR was prohibited from submitting the address update form for his clients (claimants) with no founding under the Plan. No such sanction was imposed on an attorney other than the AOR for the Korean claimants. The Korean claimants lost their opportunity under the Plan to update their addresses due to that sanction since the deadline for Closing Order 5 already lapsed.

These kinds of manifest violations of gist and spirit of the Plan are entitled to be appealed to the court because the provisions of the Plan are binding on the SF-DCT and the Claims Administrator. This motion is not to seek to challenge substantive decisions of the Claims Administrator with respect to any particular claims. This motion is to seek to correct the Claims Administrator's decisions which violated the provisions of the Plan so that such review by the court is within the scope of the Plan.

D. This Motion is Persuasive and has Not been Rejected for Reasons Stated in this Motion

This motion is persuasive. First of all, the SF-DCT did not impose, or loosely imposed, the address update and confirmation requirement on the US claimants. What the SF-DCT was delinquent in imposing the address update and confirmation requirement can be illustrated the result of the request for address update from the AORs regarding Closing Order 4. The AOR was supposed to receive the check for the claimant. If the AOR did not update the AOR's address, the claimant inevitably did not update the claimant's address because the check sent to the AOR would not be delivered to the claimant. Had not the claimant received the check for claim through the AOR, the claimant who had updated the address would have contacted the SF-DCT which would request the AOR to update the address of the AOR. If the AOR did not update the address of the AOR, it is strong and unavoidable evidence that the claimant did not update the address as well.

The Claims Administrator declared in the Declaration that (1) the Dow Silicones team researched email addresses for 2,424 AORs, (2) the SF-DCT emailed the Audit Survey form on September 7, 2021 via Survey Monkey to 1,660 AORs who were issued and had cashed on behalf of a claimant, (3) the SF-DCT received the following results from emailing the Audit Survey: (i) 219 completed Audit Survey forms (13% response rate) (ii) 32 AORs opted-out the survey (iii) 259 email bounce back and (iv) 1,150 no response, (4) the SF-DCT mailed via U.S. Mail, an envelope containing Closing Order 4, the court-mandated Audit Survey form, and a cover letter to each of 4,230 AORs who had cashed payment from the SF-DCT on behalf of a claimant, and who had not previously responded to the email Audit Survey, (5) from the April 28, 2022 mailing to 4,230 AORs, the SF-DCT received the following result: (i) 1,655 responses (39% response rate) and (ii) 833 pieces of returned mail, (6) the SF-DCT conducted the second mailing which went to 1,899 AORs, (7) the SF-DCT received the following results from the second mailing: (i) 905 responses (48% response rate) and (ii) 22 pieces of returned mail with no forwarding address, and (8) the SF-DCT agreed with the Finance Committee that the list of 814 AORs be included to the Finance Committee's Motion for Order to Show Cause. (Exhibit U, Declaration of Kimberly Smith-Mair)

The Korean claimants found that the rate of returned emailing and mailing to the AORs of the United States (Class 5 claimants) was remarkable. It is an obvious fact, which is not challengeable, that the SF-DCT did not request, or loosely requested, the address update from the AORs. Since the SF-DCT did not request the AORs, it is obvious that the SF-DCT did not request the address update and confirmation from the SF-DCT to the Class 5 claimants.

However, the SF-DCT pinpointed the Korean claimants to sanction by camouflaging its intent to discriminate them with the address update and confirmation requirement from 2015.

Second, the arguments set forth in this motion have not been addressed nor resolved by

the court. The court held that Closing Order 2 required the Korean claimants to update their address and receive confirmation from the SF-DCT but the Korea claimants did not update their address. The court held that the SF-DCT was bound by this Order and if it cannot properly verify a claimant's address as required by this Order, then no payment is authorized to issue to any claimant whose address cannot be verified. The court held that the Korean claimants had no authority to appeal any determinations by the Claims Administrator regarding payment if the Claims Administrator and/or the SF-DCT were not authorized to issue any payment and if the requirement in Closing Order 2 is not followed. (Exhibit V)

However, the court did not address the issue as to whether the Claimant Information Guides was the part of the Plan and whether the provisions regarding claimant' address under the Claimant Information Guides had anything to do with the address update and confirmation requirement for payment. The court did not address the issue as to the Korean law regarding claimants' address which had implication of personal information protection of Korea. (Exhibit W)

The Korean claimants are aware that 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. (See In re Dow Corning Corp., 287 B.R. 396, 412 (E.D. Mich. 2002))

The Korean claimants know that they are subject to Closing Order 2. However, Closing Order 2 does not authorize either the Claims Administrator or the SF-DCT to discriminate a particular class of claimants. The Korean claimants found the misconducts of the SF-DCT on the basis of the records from the beginning and requested or sometimes protested the SF-DCT to treat the Korean claimants equally as the other claimants like the Class 5 claimants and claimants of other countries.

E. This Motion Does Not Ask this Court to Amend the Plan

The Korean claimants do not ask this court to amend the Plan by eliminating the discharge and release terms. This motion is not to seek to modify the Plan that this court cannot amend or alter the terms of a confirmed plan of reorganization.

This 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 or funds and all determinations regarding the prioritization or availability of payments, specifically including all functions related to Article III, VII, and VII 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…").

This court thus has the plenary authority 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. This 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.

Therefore this court has jurisdiction and authority to grant this motion to lift off the address update and confirmation requirement imposed by the SF-DCT on the Korean claimants arbitrarily and discriminatorily. Even if this court grants this motion, it does not mean modification of the Plan or amendment or alteration of the terms of a confirmed plan of reorganization.

A bankruptcy court's confirmation of a reorganization plan discharges the debtor from any debt that arose before the date of the confirmation, regardless of whether the proof of debt is filed, the claim is disallowed, or the plan is accepted by the claim's holder. 11. U.S.C. § 1141(d)(1)(A).

The Korean claimants who did not receive a penny from the SF-DCT passed a threshold of proof of debt because their product of manufacturer was approved as a Dow Corning product. Their claim was allowed claim because their disease claim was approved by the SF-DCT and their injury caused by a Dow Corning product was proven. Their credit against the manufacturer (the debtor) is manifest. The debtor is delinquent on the basis of the address update and confirmation requirement. There are many claimants who did not receive any request to update their address and receive confirmation from the SF-DCT.

Whether the debtor was discharged or not is not a matter. The matter is whether the Korean court would have jurisdiction over the delinquency of the approved payment. If the Korean court holds that the debtor was discharged from the debts because of the confirmation of a reorganization plan, the debtor is free of the debts from the Korean claimants and if not, the debtor is responsible for paying the debts. Therefore, this motion, alternatively requesting this court to grant provided that this court denies or dismisses this motion to lift off the address update and confirmation requirement, is not a violation of 11 U.S.C. § 1141(d)(1)(A).

III. Conclusion

The SF-DCT's Response that the Finance Committee, the Debtor's Representative and Dow Corning Corporation and the Claimants' Advisory Committee joined in unanimity has no basis for justification denying this motion to lift off the address update and confirmation requirement and, alternatively, to allow the Korean claimants to file a lawsuit for the purpose of collection of payments from approved claims and other claims with the Korean court.

Date: February 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2024, 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 15, 2024 Signed by Yeon-Ho Kim