

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

IN RE: §
§
DOW CORNING CORPORATION, § **CASE NO. 00-CV-00005-DPH**
§ **(Settlement Facility Matters)**
§
REORGANIZED DEBTOR § **Hon. Denise Page Hood**

**RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE
IN OPPOSITION TO MOTION FOR
RECATEGORIZATION OF KOREA**

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STATEMENT OF ISSUES PRESENTED

1. Whether, under the terms of Dow Corning's Amended Plan of Reorganization and its associated documents, a Foreign Claimant may move this Court to recategorize her country of residence, based on that country's changed economic circumstances, without first requesting an adjustment from the Finance Committee.
2. Whether adjustments to the categorization of countries apply only to claimants whose claims are paid in the year of recategorization and thereafter or whether such adjustments may also apply retroactively for the benefit of claimants whose claims have already been paid.

STATEMENT OF CONTROLLING AUTHORITY

Annex A to the Settlement Facility and Fund Distribution Agreement, § 6.05(h)(ii)

The Claimants' Advisory Committee ("CAC") respectfully submits this response in opposition to the Motion for Recategorization of Korea (the "Motion") brought on behalf of an unidentified and unquantified set of claimants described in the Motion as residing "*mostly* in Korea" (the "Movants"). Because Movants have ignored the procedural mechanism set forth in the Plan documents that might otherwise permit them to obtain the primary relief that they desire, and because the further relief that Movants seek is both unavailable under the Plan and wholly unwarranted, the Motion should be denied.

Background

Schedule III of Annex A to the Settlement Facility and Fund Distribution Agreement ("Annex A") provides that settling Foreign Claimants shall receive settlements expressed as a percentage of the corresponding settlement amounts offered to Domestic Claimants.¹ Foreign Claimants who reside in any of the countries listed in Category 1 or Category 2 can receive 60 percent of the amounts offered to Domestic Claimants for the same category of claims; those who reside in Category 3 and Category 4 countries can receive 35 percent. Australia, Canada, New Zealand, and the United Kingdom are Category 1 countries based on their status as common law jurisdictions. Annex A, § 6.05(h)(i). Every other country is categorized based on the proportional size of its per capita gross

¹ Capitalized terms not defined herein have the meanings assigned to them under the Plan and Plan documents.

domestic product (“GDP”) relative to that of the United States. *Id.* Countries with a per capita GDP greater than 60 percent of the United States’ per capita GDP are Category 2 countries; those with a relative per capita GDP between 30 percent and 60 percent are Category 3 countries; all others are Category 4 countries. *Id.* For the purpose of calculating relative per capita GDP, “the most current version of The World Factbook” is the controlling source of economic data. *Id.*

Noting that the current version of The World Factbook reveals that the estimated per capita GDP of South Korea is now greater than 60 percent of the United States’ estimated per capita GDP, Movants ask the Court to “re-categorize” Korea from Category 3 to Category 2. Mot. at 4.² They further seek an order requiring the Settlement Facility-Dow Corning Trust (“SF-DCT”) to (1) retroactively compensate Korean Claimants who have received 35 percent (rather than 60 percent) payments and (2) pay all future Korean Claimants at a 60 percent rate. *Id.* Finally, Movants ask the Court to enjoin Dow Corning and the CAC from pressuring the SF-DCT into “giv[ing] administrative disadvantages to the Korean Claimants.” *Id.*

² Movants allege that The World Factbook shows that South Korea’s 2012 estimated per capita GDP is \$32,800, that the United States’ 2012 estimated per capita GDP is \$50,700, and that the latter is 64.9% of the former. Mot. at 3. However, \$32,800 is 64.7%, not 64.9%, of \$50,700. Additionally, Exhibit 1 to the Motion, which purports to summarize data from The World Factbook, lists the United States’ per capita GDP as \$52,800 and South Korea’s as \$33,200. Whereas \$33,200 is still greater than 60% of \$52,800, these inconsistencies are immaterial.

Annex A vests in the Claims Administrator — not this Court — primary authority to recategorize countries based on changed economic circumstances. *See* Annex A, § 6.05(h)(ii) (confronted with “changed economic conditions,” “[t]he Claims Administrator, with the agreement of the Claimants’ Advisory Committee and the Debtor’s Representatives, may adjust the categorization of countries in Schedule III”). Provided that the CAC and the Debtor’s Representatives consent, the Finance Committee may also adjust a country’s categorization based on the request of a Foreign Claimant who resides in that country. *Id.* Only if the Finance Committee, CAC, and/or Debtor’s Representative fail to agree to a country’s recategorization may a Foreign Claimant file a motion in this Court to obtain an adjustment. *Id.* All adjustments to a country’s categorization apply prospectively, not retroactively. *Id.* (“any re-categorization shall apply to all Claimants residing in such country whose Claims are paid in the year of re-categorization or thereafter”).

Argument

Foreign Claimants may move this court to recategorize a country only if two conditions have been satisfied: (1) the Foreign Claimant has “submit[ted] to the Finance Committee a request for re-categorization” and (2) “the Debtor’s Representatives and/or the Claimants’ Advisory Committee and/or the Finance Committee do not agree to re-categorization.” Annex A, § 6.05(h)(ii). Movants

have not even attempted a showing on either score. Instead, Movants concede that they never raised the issue or requested the CAC, Debtor's Representatives, Claims Administrator, or Finance Committee to consider it. Mot. at 3. In an effort to excuse their inaction, Movants claim to have "realized through experiences" that obtaining the mutual consent of the CAC and Debtor's Representatives "is far beyond feasibility." *Id.* This conclusory allegation ignores the significant time spent by all the parties responding to demands and requests of counsel for the Korean claimants and seeking to reach accommodations, notwithstanding significant issues regarding the validity of their claims and even concerns regarding fraud in connection with some of them. In any event, this type of unsubstantiated complaint cannot excuse Movants' self-confessed failure to adhere to the procedure prescribed by Annex A. The burden of demonstrating the futility of a required course of conduct falls on the party who seeks to circumvent it. *See, e.g., Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 937 (6th Cir. 1989). Having demonstrated no such futility, Movants must follow the dictates of the Plan documents and seek the consent of the Finance Committee, CAC, and Debtor's Representatives before resorting to judicial intervention.

Even if Movants' motion were properly before the Court, denial — at least in part — would be appropriate. Section 6.05(h)(ii) of Annex A is clear: only those claims paid "in the year of re-categorization or thereafter" can be adjusted

upward or downward based on a change to a country's category. The Plan documents contain no mechanism by which this Court can give effect to Movants' demand for an additional payment to "Korean Claimants who have already received compensation." Mot. at 4. Furthermore, Movants have neither demonstrated the need for nor identified any authority by which this Court can issue an order directing the CAC and Dow Corning to refrain from influencing the SF-DCT's interactions with Movants.

Conclusion

For the foregoing reasons, the Motion should be denied.

Dated: New York, New York
April 24, 2014

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 24, 2014, I electronically filed a copy of the foregoing Response of Claimants' Advisory Committee in Opposition to Motion for Recategorization of Korea with the Clerk of the Court through the Court's electronic filing system, which will send notice and copies of the aforementioned document to all registered counsel in this case.

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