

Case No.: 15-2548

United States Court of Appeals for the Sixth Circuit

*The Claimants' Advisory Committee, Dow Corning Corporation and Debtor's  
Representatives, Appellees*

v.

*The Class7 Korean Claimants, Appellants*

**RESPONSE TO DISMISS CERTAIN APPELLANTS FOR LACK OF  
STANDING**

The Appellees moved to dismiss certain Appellants from the appeal on the basis of the lack of standing on April 11, 2016.

I. Background of the Appellants

Around 1,600 Koreans who had received the surgery of breast implantation using silicone bags or silicone gel participated in the MDL-926 Program in 1994 when they were aware through the media that the Global Settlement Program was distributed by the United States Court. They submitted the

documents necessary for compensation including doctor's diagnosis and the proof of implantation to the MDL-926 Office. They received the claimants' identification number from the Office.

However, Dow Corning Corporation filed the bankruptcy Chapter 11 with the Court in their home jurisdiction. After that, the Revised Settlement Program and the Foreign Settlement Program were set up and took their courses.

Dow Corning Corporation took all of the files of the Korean Claimants over from the MDL-926 Office. The Korean Claimants received the new claimants' identification number from Dow Corning Corporation.

Dow Corning Corporation submitted the Reorganization Plan to the Bankruptcy Court and solicited the votes of the Korean Claimants who were more than forty five percents of the Class 6.2. The Korean Claimants cast the votes in favor of the Plan and Dow Corning Corporation succeeded in getting the approval of the Plan.

During and after the hearings in 1999, the additional Korean Claimants submitted the documents necessary for compensation including doctor's diagnosis and the proof of implantation to the SF-DCT. They received the

claimants' identification number. As the result, the Korean Claimants made up over 2,600 claimants in the SF-DCT.

After the arrival of the Effective Date on June 1, 2004, all of the Korean Claimants filed claims forms with the SF-DCT immediately. Under the Plan documents, the process of claims filed is the FIFO in order. The First In is the First Out. But the SF-DCT did not observe it. The SF-DCT processed the claims of the citizens of the United States first. The SF-DCT delayed the process of claims of the Korean Claimants with no explanation given to them.

Accordingly, the Korean Claimants just waited for the news from the SF-DCT until 2009. Five years were consumed to receive the news from the SF-DCT.

Since then, the SF-DCT changed their decisions on the Proof of Identification of manufacturer many times and prolonged the process of claims of the Korean Claimants.

In 2012, the retired Claims Administrator, the late David Austern, and the Claims Administrators, Ann M. Phillips, of the SF-DCT proposed the Korean Claimants to settle the claims through mediation. The mediator, Professor Francis McGovern, was selected. He is a member of the Finance Committee.

Both Parties, the SF-DCT and the Korean Claimants, presented their arguments to the mediation committee charged by the mediator in the Washington D.C.

Both Parties agreed to settle the whole claims of the Korean Claimants. The SF-DCT promised to pay five million dollars and the Korean Claimants promised to release the whole claims. The Korean Claimants signed on the agreement of settlement(See Exhibit 1) drafted by the SF-DCT and sent it back to the SF-DCT.

But the SF-DCT did not respect the result of mediation. The Claims Administrators of the SF-DCT responded that Dow Corning Corporation did not agree to it. Dow Corning Corporation explained the Korean Claimants that the Claims Administrators were not authorized to settle the claims of the Korean Claimants and so Dow Corning Corporation was not responsible for the result of mediation. The SF-DCT and Dow Corning Corporation did not act in a good faith evidently. Dow Corning Corporation sold over 20,000 silicone bags in Korea and is taking a lot of profits from the other businesses in Korea now.

Following the disregard of the mediation result, the Korean Claimants filed the Motion for Re-Categorization in 2014 and the Motion for Extension of Deadline

for the Class 7 Korean Claimants <sup>1</sup>in 2015 with the District Court.

Soon after the Motions, the Appellees filed the Proposed Consent Order with the Court. The Appellees distributed the notice and asked for objection if anybody concerned felt in disagreement.

All of the Korean Claimants received the notice of the Proposed Consent Order. The Consent Order was in regard to the Class 7.

Out of over 2,600 Korean Claimants, about thirty five percents are Class 7 Claimants because they did not receive the surgery of breast implantation with silicone bags manufactured by Dow Corning Corporation. Some of them are the Claimants who received the surgery of breast implantation with silicone gels. The remaining sixty five percents of the Korean Claimants were mostly Class 6.2 except a few Class 5 Claimants.

However, the 289 Claimants out of thirty five percents of the Korean Claimants only objected to the Proposed Consent Order. The Class 7 Korean Claimants on

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<sup>1</sup> This Motion is in regard to the 71 Class 7 Korean Claimants. They filed this Motion because they were denied the eligibility for the reason of [outside of the eligible date range] by the SF-DCT. Although this Motion was pending, the Appellees did not take into consideration that they were eligible under the Proposed Consent Order.

the record are more than 289. The reason that the 289 Korean Claimants only objected to the Proposed Consent Order was because the Claimants who received the surgery of breast implantation with silicone bags manufactured by a manufacturer other than Dow Corning Corporation wanted to object. The other Claimants who either received the surgery of breast implantation with silicone gels or received the surgery of breast implantation with silicone bags manufactured by a manufacturer which could not identified did not object to the Proposed Consent Order.

The 289 Korean Claimants who submitted the objection are the Class 7 Claimants. They received the surgery of breast implantation with silicone bags manufactured by a manufacturer other than Dow Corning Corporation.

## II. Arguments

### 1. The Motion to Dismiss for the Lack of Standing is Too Late

The Appellees said that they received information from the SF-DCT demonstrating that this statement(meaning, "all of them are Class 7 Claimants") is incorrect shortly before this filing.

However, the Appellees had a plenty of time in the level of the District Court. They never questioned the Lack of Standing to the Appellants. They even allowed numerous Domestic Claimants who had nothing to do with the Proposed Consent Order to submit miscellaneous documents. The Appellees allowed them to present verbal arguments before the District Court. The Appellees wasted times in the level of the District Court to thrust out the appearance of 'no objection' to the Proposed Consent Order.

On the contrary, The Appellants counted a large portion of the objectors. The Appellees knew how many Class 7 Claimants objected and the composition of the objectors to the Proposed Consent Order. The Appellees should have known whether the 289 Korean Claimants who objected were the Class 7 Claimants.

The Appellees failed to screen whether the objectors were the Class 7 Claimants in the level of the District Court.

Therefore, this Motion must be dismissed because it is too late.

## 2. All of the Korean Claimants are Affected by the Consent Order

The Consent Order is designed to dispose the Class 7 Claimants as a whole.

All of the Korean Claimants who received the surgery of breast implantation with silicone bags manufactured by a manufacturer other than Dow Corning Corporation and who received the surgery of breast implantation with silicone gels manufactured by Dow Corning Corporation are affected by the Consent Order.

Basically, the Consent Order is to lift off the marshalling requirements and to give the benefits to the Class 7 Claimants who could not marshal from/against the manufacturers which were supplied the silicone materials from Dow Corning Corporation. In addition, the fund assigned to the Class 7 Claimants under the Plan is capped. Accordingly, if one group within the Class 7 is advantaged, the remaining groups are disadvantaged. In this respect, the Consent Order affects every Claimant of Class 7 including the Korean Class 7 Claimants.

Therefore, all of the Class 7 Korean Claimants are affected by the Consent Order.

### 3. Declaration of Ann M. Phillips is Unreliable and Incorrect

The Appellees said that the 152 Appellants are not Class 7 Claimants on the basis of the Declaration of Ann M. Phillips, the Claims Administrator of the SF-DCT.

She was in attendance at mediation held in 2012. She assisted the principal representative, the retired Claims Administrator, the late David Austern, in preparing the data and the analysis of the claims of the Korean Claimants for arguing in favor of Dow Corning Corporation. She argued for Dow Corning Corporation too.

After that, she ignored the result of mediation which had been agreed by herself as the Claims Administrator of the SF-DCT. She explained later that mediation for settlement of the Korean claims had not been authorized by Dow Corning Corporation. She is a member of the Finance Committee and so she should be responsible for the result of mediation whether or not Dow Corning Corporation was unwilling to agree to the result of mediation.

Some of the Korean Claimants were angry at the fact that the Claims Administrator of the SF-DCT betrayed mediation that she had proposed. The Declaration is not reliable because she declared.

In addition, the Claims Administrator is responsible for appeals on dissatisfaction from the Claims Office(See Annex A-53 of Dow Corning Settlement Program and Claims Resolution Procedures). Because the Claims Administrator is empowered to decide the appeals, she/he is in the position of judicial capacity thus should act neutrally and impartially.

However, Mrs.Phillips acted differently to the Korean Claimants.

She presented the Declarations to the District Court on several occasions to harm the merits in the Motions of the Korean Claimants. This Declaration is one of them.

Therefore, this Declaration is fundamentally unreliable.

Furthermore, the contents of the Declaration are incorrect.

She said in the Declaration that the SF-DCT maintains a comprehensive claims database that contains information about each claimant, and the status of each claimant's claim submissions and the database enables her to examine and conclusively determine the filing status of each 289 Korean Claimants, and based on that examination, 152 of the Korean Claimants have filed claims in

Classes 5, 6.1 or 6.2 and so they are not Class 7 Claimants.

First, the database of the SF-DCT is not the same as the database of Yeon-Ho Kim Int'l Law Office. The latter is more accurate than the former as far as the Korean Claimants are concerned because they are the clients of the Law Office. The database of the SF-DCT is comprehensive but is not correct one hundred percents.

Secondly, the 152 Korean Claimants have never filed in any Classes 5, 6.1 or 6.2. They just submitted their claims to the MDL-926 Office. They submitted their claims to either RSP or the FSP Program later on.

However, they never submitted any claim or any document to the SF-DCT. Mrs. Phillips insisted that the 152 Korean Claimants have filed claims in any Classes 5, 6.1 or 6.2. It means that they filed the claims with the SF-DCT. It is incorrect.

Moreover, the Declaration is off the mark. This appeal by the Appellants is to contend the Consent Order that the District Court approved in that the 71 the Korean Claimants were excluded from the benefits under the Consent Order(See page 25 of the Consent Order titled as "Claims Not Eligible Because They Do Not Meet Eligibility Criteria").

However, Mrs. Phillips said in the Declaration that 71 of the Korean Claimants assert that they fall into Class 7 but their implants were implanted outside the date range for eligibility for Class 7 established by the Plan and they are not eligible for Class 7. She was suggesting that even 71 of the Korean Claimants are not noteworthy in the process of this appeal. Her suggestion is biased in favor of the Appellees.

In addition, she concluded in the Declaration that 274 out of the 289 Korean Claimants have no pending claims under Class 7 and only 15 Claimants remain pending. This conclusion is biased and incorrect too.

### III. Conclusion

For the foregoing reasons, the Appellants request that this Court dismiss the Appellees' Motion to dismiss the 152 Appellants from the Appellants' appeal on the basis of the lack of standing.

Date: October 31, 2016

Respectfully submitted,

(signed) Yeon Ho Kim

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For the Class 7 Korean Claimants

**EXHIBIT 1**

**DRAFT**

**MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding (“Memorandum”) entered into on \_\_\_\_\_ between Yeon-Ho Kim (“Kim”) and the Finance Committee of the Settlement Facility – Dow Corning Trust (“SF-DCT”) (collectively, “the Parties”) is made pursuant to a negotiated resolution of claims that have been filed by Kim with the SF-DCT and which are listed on Exhibit B to this Memorandum (the “Korean Claims”).

- A. The Parties have agreed to resolve the Korean Claims pursuant to which, and subject to the terms of the Release attached as Exhibit A to this Memorandum and all of which Release terms are incorporated herein by reference, the SF-DCT will pay to Kim the sum of five million dollars U.S. (\$5,000,000) (the “Korean Claims Payment”) to resolve the Korean Claims which are listed on Exhibit B.
- B. Kim has represented that he is authorized to accept the Korean Claims Payment on behalf of the Korean Claimants and that the Release attached as Exhibit A is fully binding on the Exhibit B claimants, and that he is authorized to execute the Release on behalf of the Exhibit B claimants.

- C. The Parties agree that distribution of the Korean Claims Payment to the Exhibit B claimants, as well as the distribution of attorneys' fees and expenses due to Kim or others, will be Kim's responsibility and will be undertaken by Kim pursuant to Korean law. The Parties further agree that the SF-DCT will have no responsibility or liability to any person or entity with respect to the distribution of the Korean Claims Payment.
- D. The SF-DCT agrees that the Korean Claims Payment does not include any Common Benefit funds authorized by the United States District Court for the Eastern District of Michigan, Northern Division, to be paid to Kim.
- E. Kim agrees for himself and the Korean Claimants that he will take whatever steps are necessary to dismiss any pending actions or appeals, and that he will file in the Courts of the United States and Korea any pleadings or other documents that are necessary to effectuate the purposes of this Memorandum.

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Yeon-Ho Kim, for himself and  
all Exhibit B claimants

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Ann Phillips, for the  
Finance Committee

**EXHIBIT A**

**SETTLEMENT FACILITY – DOW CORNING TRUST  
RELEASE FOR KOREAN CLAIMANTS REPRESENTED BY  
YEON-HO KIM AND SETTLED PURSUANT TO THE  
MEMORANDUM OF UNDERSTANDING DATED \_\_\_\_\_  
BETWEEN YEON-HO KIM AND THE SETTLEMENT FACILITY – DOW  
CORNING TRUST**

**1. Recitals**

- A. On May 15, 1995, Dow Corning Corporation filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division ( references to Dow Corning include the Reorganized Debtor). Thereafter, an Amended Joint Plan of Reorganization of Dow Corning Corporation dated as of February 4, 1999, as further amended, modified or supplemented from time to time (the “Plan”), in case number 95-20512 was Confirmed pursuant to the Bankruptcy Code. As part of the Confirmation Order, the Settlement Facility – Dow Corning Trust (“SF-DCT”) was established on March 27, 2001 to administer the financial operations required under the Reorganized Plan. Among the Plan documents is the Settlement Facility Agreement that describes the procedures for paying claims.
- B. On April 2, 2004, an Order was entered establishing June 1, 2004 as the “Effective Date” of the Plan. It was further ordered that the SF-DCT, as of the Effective Date, was authorized to make payments to allowed claimants and such other payments as were authorized pursuant to the

Plan and/or the Settlement Facility Agreement. The payment described in this Release is made pursuant to the Settlement Facility Agreement.

- C. Yeon-Ho Kim ("Kim") represents and agrees that he is an attorney admitted to practice in Korea. He also warrants that he represents the SF-DCT claimants with unsettled claims attached as Exhibit B (hereinafter, "Exhibit B Claimants") to the Memorandum of Understanding dated \_\_\_\_\_ between Kim and the SF-DCT Finance Committee. Kim further represents that pursuant to Korean law, he is authorized to accept the payment described below on behalf of the Exhibit Claimants and, further, that he is authorized to execute this Release on their behalf and that such execution will irrevocably bind the Exhibit B claimants to the terms of this Release.
- D. Kim and the SF-DCT Finance Committee agree that this Release or covenant not to claim or sue releases any and all Exhibit B Claimants including, but not limited to personal injury and wrongful death claims filed with the SF-DCT pursuant to the Settlement Facility Agreement by Kim on behalf of the Exhibit B claimants.
- E. The "Korean Claims Payment" for all claims subject to this Release is five million US dollars (\$5,000,000).

## **2. RELEASE**

- A. Kim accepts receipt of the Korean Claims Payment on behalf of all Exhibit B claimants as full settlement of all of the claims filed with the SF-DCT by the Exhibit B claimants. Kim understands that there will be no further payments of any kind by the SF-DCT to Exhibit B claimants. Kim further releases the spouses, heirs, representatives, successors or assigns of all Exhibit B claimants, known or unknown. Kim understands that this release extends to all rights

of the Exhibit B claimants against the SF-DCT whether based in tort, contract, fraud or any other legal or equitable theory, whether possessed by Exhibit B claimants now or in the future.

- B. In accepting the Korean Claims Payment, Kim agrees that it is his responsibility to divide the Korean Claims Payment among the Exhibit B claimants and further, it is his responsibility to collect any and all legal fees and/or expenses owed to him or any other party by the Exhibit B claimants. The Korean Claims Payment, Kim agrees, includes all such legal fees and expenses.
- C. Kim declares and represents that no promise or inducement other than the payment of the Korean Claims Payment has been made to him or the Exhibit B claimants in connection with this Release, and that this Release contains the entire agreement between Kim on behalf of himself, his law firm, and the Exhibit B claimants. Kim further declares and represents that the terms of this Release are not a mere recital but are contractual and are to be interpreted, construed and enforced under the Plan and the laws of the State of New York. Kim also declares and represents that all disputes relating to or arising under this Release shall be heard by the United States District Court for the Eastern District of Michigan, Northern Division, and specifically, before the Honorable Denise Page Hood.
- D. Kim declares, represents and agrees that for himself and the Exhibit A claimants, and as further consideration of the Settlement Payment, he will take whatever steps are necessary to dismiss any pending actions or appeals, and that he will file in the Courts of the United States and Korea any pleadings or other documents that are necessary to effectuate the purposes of this Release.
- E. Kim declares and represents for himself and the Exhibit B claimants that this Release has been entered into in good faith and that he will cooperate with the SF-DCT and the SF-DCT Finance

Committee in any proceedings to determine the good faith of this Release. Kim further declares and represents for himself and the Exhibit B claimants that no change or alteration of the language of this Release is effective unless expressly agreed to and acknowledged in writing by both the SF-DCT Finance Committee and Kim.

- F. In addition to the foregoing, pursuant to Section 6.05 of the [Settlement Fund Agreement], the acceptance by Kim for himself and the Exhibit A claimants of the Korean Claims Payment shall be deemed to serve as additional documentation of the Release of the SF-DCT and the SF-DCT Finance Committee , and the Released Parties, as specified in Section 8.3 of the Amended Joint Plan of Reorganization referenced in Paragraph 1. A. above

\_\_\_\_\_  
Yeon-Ho Kim, on behalf of himself  
And all Exhibit A claimants

\_\_\_\_\_  
Date

\_\_\_\_\_  
Ann Phillips, for the Finance Committee

\_\_\_\_\_  
Date

**EXHIBIT B**

**Korean Claimants**

**CERTIFICATE OF SERVICE**

I certify that on October 31, 2016, I electronically filed a copy of the Response to the Motion to Dismiss Certain Appellants for Lack of Standing with the Clerk of Court through the Court's electronic filing system, which can send notice and a copy of this document to all relevant counsels in this case.

(signed) Yeon Ho Kim

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