UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Settlement Facility Dow Corning Trust.

Case No. 00-00005
Honorable Denise Page Hood

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ORDER GRANTING JOINT MOTION TO RENDER MOOT MOTIONS FILED ON BEHALF OF THE KOREAN CLAIMANTS

I. BACKGROUND

This matter is before the Court on a Joint Motion filed by the Reorganized Debtor Dow Corning Corporation ("Dow Corning") and the Claimants' Advisory Committee ("CAC") (jointly, "Movants") for an Order finding moot the following Korean Claimants motions: 1) Motion for Re-Categorization of Korean; 2) Motion for Reversal of Decision of the SF-DCT Regarding Korean Claimants; and, 3) 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. (Doc. No. 1020) The Korean Claimants filed a response to the motion and a reply was filed to the response.

The Movants argue that since the filing of the Korean Claimants' motions, certain actions and events have occurred which render the motions moot. In their

response, the Korean Claimants agree that while some issues raised in the motions are now moot, other issues remain. The Movants reply that the Korean Claimants' response does not contest any facts set forth in the Declaration of Ann M. Phillips submitted to support the Movants' motion for mootness and that the new arguments raised were not subject to the original motions.

II. ANALYSIS

A. Court's Jurisdiction and Standard of Review

On June 1, 2004, the Amended Joint Plan of Reorganization ("Plan") governing the Dow Corning Corporation bankruptcy matter became effective. The Court retains jurisdiction over the Plan "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow, disallow, estimate, liquidate or determine any Claim, including Claims of a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, §§ 8.7.3, 8.7.4, 8.7.5) The Plan Documents pertinent to this matter include the Settlement Facility and Fund Distribution Agreement ("SFA") and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA ("Annex A").

The Settlement Facility-Dow Corning Trust ("SF-DCT") implements the claims of those claimants who elected to settle their claims under the Settlement Program of

the Plan. (Plan, § 1.131) The SF-DCT was established to resolve Settling Personal Injury Claims in accordance with the Plan. (Plan, § 2.01) The SFA and Annex A to the SFA establish the exclusive criteria by which such claims are evaluated, liquidated, allowed and paid. (SFA, § 5.01) The process for resolution of claims is set forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01) Section 5.05 of the SFA provides that Dow Corning and the CAC may submit joint interpretations and clarifications regarding submissions of claims to the Claims Administrator. (SFA, § 5.05) The Court may approve an amendment to the SFA after notice and hearing as directed by the Court. (SFA, § 10.06) Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) 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.

An action will become moot when the requested relief is granted or no live controversy remains. *See, Thomas Sysco Food Serv. v. Martin*, 934 F.2d 60, 62 (6th Cir. 1993). An actual controversy must exist at all stages of review and not simply on the date the action is initiated. *Id.*

B. Motion for Re-Categorization (Doc. No. 965)

The Korean Claimants' Motion for Re-Categorization requested that the Court order the Finance Committee to adjust the compensation category of Korea for

purposes of determining the applicable amount of compensation for eligible claimants, that the SF-DCT pay additional sums to Korean claimants who have already been paid, and that the parties not influence the SF-DCT to give administrative disadvantages to Korean Claimants while their claims are being processed. On December 4, 2014, the Finance Committee notified the Korean Claimants that their request for re-categorization was granted.

The Korean Claimants agree that the Finance Committee re-categorized the Korean Claims. The Korean Claimants, however, argue that the Finance Committee should formally revise Schedule III of Annex A to the SFA to provide that Korea is a category 2 country and that the re-categorization should apply to all "Korean claimants who have not received compensation yet." (Resp., Doc. No. 1025)

Based on the submissions by the Movants, as requested by the Korean Claimants, the Korean Claims were re-categorized and that the re-categorization applies to all pending Korean Claims effective in 2015. The December 4, 2014 email from the Claims Administrator states that "your request for re-categorization is granted." (Doc. No. 1020-2, Pg ID 17052; Doc. No. 1025, Ex. A, Pg ID 17238) "Beginning in calendar year January 2015, South Korean is re-categorized to Category 2." (*Id.*) The email further states that the "re-categorization shall apply to all Claimants residing in such country whose Claims are paid in the year of re-

categorization or thereafter." (*Id.*)

It appears now that the Korean Claimants argue that the revised payment category should apply retroactively to all Korean Claims. However, the Korean Claimants do not submit any support for such a retroactive application. The Korean Claimants do not have the authority under the Plan to seek a redrafting of the Plan or seek an interpretation of the Plan. The Plan only provides that Dow Corning and the CAC may jointly amend or modify the Plan, upon order of the Court. (Plan, § 11.4) Any new request by the Korean Claimants to interpret the Plan and the SFA to retroactively apply the re-categorization to previously paid Korean Claims cannot be considered by the Court.

Because the Movants have properly shown and supported that the Korean Claimants received the relief sought in their Motion for Re-Categorization, the Court finds that the motion is resolved and is now rendered moot.

C. Motion for Reversal (Doc. No. 810) and Cross-Motions to Dismiss the Korean Claimants' Motion for Reversal (Doc. Nos. 816, 820)

In their Motion for Order of Reversal of the SF-DCT Decision Regarding Korean Claimants, the Korean Claimants requested the Court reverse the decision by the SF-DCT Claims Administrator declining to accept Affirmative Statements as Proof of Manufacturer ("POM") and placing a "hold" on processing the Korean Claims pending further review of the claims. In January 2014, the SF-DCT

completed a review of the Korean Claims and notified the Korean Claimants that the "hold" on the claims relying on Affirmative Statements as POM had been lifted. The SF-DCT thereafter continued processing the Korean Claims.

The Korean Claimants agree that the "hold" placed on the Korean Claims was lifted and that the SF-DCT has since and continues to process the Korean Claims. The Korean Claimants argue that the Motion for Reversal is not moot because the Court has not reversed the Claims Administrator's decisions regarding certain claimants. The Korean Claimants also note that mediation did not resolve the issues.

The Movants respond that the Claims Administrator has canceled the POM approvals of these claims and therefore the relief requested by the Korean Claimants has been granted. The Movants further claim that the mediation discussion by the Korean Claimants is not relevant to the issue of mootness.

After reviewing the submissions of the parties, the Court finds that the Motion for Reversal has been rendered moot because the SF-DCT lifted the "hold" placed on the submitted Korean Claims. The Claims Administrator stated that after review and investigation, "the SF-DCT and the Finance Committee determined to lift the 'hold' previously placed by the Quality Management Department on Mr. Kim's claims that rely on Affirmative Statements as Proof of Manufacturer and that – consistent with the obligations of the Plan – the SF-DCT could review claims individually to

determine whether they satisfy the Claims Resolution Procedures." (Doc. No. 1020-2, Pg ID 17047) The SF-DCT notified the Korean Claimants of its decision on January 17, 2014. (Doc. No. 1020-2, Pg ID 17055)

If the Korean Claimants are now arguing that the Court should reverse any decision made by the Claims Administrator on the substance of any claim, as opposed to an order reversing the Claims Administrator's placement of a "hold" on a certain claim, the Court must look to the Plan to determine whether it has such authority.

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))

The Korean Claimants have not submitted any evidence that they have sought review under the Individual Review Process. Even if they did, the Plan provides that

the decision of the Appeals Judge is final and binding and there is no provision allowing a claimant to appeal to or request reversal of any decision by the Appeals Judge. The Court finds that any relief sought by the Korean Claimants as to any substantive decision on any Korean Claim made by the Claims Administrator is denied. The Cross-Motions to Dismiss the Korean Claimants' Motion for Reversal filed by Dow Corning and the Claims Administrator are granted.

D. Motion for the Settlement Facility to Locate Qualified Medical Doctor of Korea (No. 77)

The Korean Claimants sought an order for the SF-DCT to appoint and pay for a Qualified Medical Doctor ("QMD") in Korea to evaluate the Korean disease claims. The Korean Claimants believed that a QMD would not be found in Korea to adequately review the disease claims in Korea. The Korean Claimants have since located QMDs, which the SF-DCT has confirmed meet the qualifications specified in Annex A to the SFA. Numerous disease awards have been issued to Korean Claimants based on the evaluations by these QMDs.

In their response, the Korean Claimants assert that this motion is not moot since the QMDs previously found are no longer able to provide disease evaluations. The Movants argue that the Korean Claimants did not support this new argument and, even if they did, the SF-DCT has processed over 800 Korean Claims based on the evaluations submitted by the Korean Claimants reviewed by the QMDs.

The Korean Claimants admit that the QMDs have evaluated the disease claims, which the Court finds renders their motion moot. The Claims Administrator stated that as of December 31, 2014, approximately 860 Korean Disease Claims have been approved which were submitted with QMD statements. (Doc. No. 1020-2, Pg ID 17048) The SF-DCT independently confirmed the physicians providing the QMD statements met the requirements of a QMD under Schedule II of Annex A to the SFA. (*Id.*) The Korean Claimants' Motion for the SF-DCT to hire a QMD is now moot.

As to the new argument that the QMDs are now unable to Review the disease claims, this argument is not supported by the Korean Claimants. Annex A to the SFA requires a determination by a QMD under certain circumstances to evaluate claims for the disease option payment. (SFA, Annex A) The SFA does not provide that the SF-DCT must hire or pay for a QMD. The Korean Claimants are unable to show that the SF-DCT has the authority to hire or pay for a QMD in order to evaluate the Korean Claimants' (or any other claimants') disease claims. The Korean Claimants' Motion for the SF-DCT to hire or pay for a QMD is denied.

IV. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Joint Motion for Mootness **(No. 1020)** is **GRANTED**.

IT IS FURTHER ORDERED that the Korean Claimants' Motion for Re-Categorization **(No. 965)** is **MOOT** and **DISMISSED**.

IT IS FURTHER ORDERED that the Korean Claimants' Motion for Reversal of SF-DCT Decision Regarding Korean Claims **(No. 810)** is **MOOT** regarding the "Hold" issue and **DENIED** as to any request to review the substantive decision made by the Claims Administrator.

IT IS FURTHER ORDERED that the Cross-Motion by Dow Corning to Dismiss Motion for Reversal of SF-DCT Decision **(No. 816)** and the Cross-Motion by the Claims Administrator to Dismiss Motion for Reversal of SF-DCT Decision **(No. 820)** are **GRANTED**.

IT IS FURTHER ORDERED that the Motion for SF-DCT to Appoint/Hire a Qualified Medical Doctor **(No. 77)** is **MOOT** as to previous claims already evaluated by a QMD and **DENIED** as to appointing or hiring a new QMD.

S/DENISE PAGE HOOD
DENISE PAGE HOOD
Chief Judge

DATED: December 28, 2017