

**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, THE CLAIMANTS' ADVISORY COMMITTEE AND  
THE FINANCE COMMITTEE TO THE KOREAN CLAIMANTS'  
ATTORNEY'S MOTION FOR ORDER TO ALLOW THE KOREAN  
CLAIMANTS' ATTORNEY TO RECEIVE ATTORNEY'S FEES AND  
EXPENSES REGARDING RETURNED CHECKS NOT CASHED**

For the reasons set forth in the attached memorandum, Dow Silicones Corporation (“Dow Silicones”),<sup>1</sup> the Debtor’s Representatives (the “DRs”), the Claimants’ Advisory Committee (the “CAC”), and the Finance Committee (the “FC”) (collectively, Respondents”) hereby oppose the Korean Claimants’ Attorney’s Motion for Order to Allow the Korean Claimants’ Attorney to Receive Attorney’s Fees and Expenses Regarding Returned Checks Not Cashied, ECF No. 1789 (“Motion”) and respectfully submit that the Motion should be denied.

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<sup>1</sup> Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

Dated: October 8, 2024

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE RESPONSE  
OF DOW SILICONES CORPORATION, THE DEBTOR'S  
REPRESENTATIVES, THE CLAIMANTS' ADVISORY COMMITTEE AND  
THE FINANCE COMMITTEE TO THE KOREAN CLAIMANTS'  
ATTORNEY'S MOTION FOR ORDER TO ALLOW THE KOREAN  
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### **CONCISE STATEMENT OF ISSUES PRESENTED**

1. Should the Court deny the Motion for Order to Allow the Korean Claimants' Attorney to Receive Attorney's Fee and Expenses Regarding Returned Checks Not Cashed where counsel seeks fees that are barred under the Amended Joint Plan of Reorganization?

Respondents' Answer: Yes

2. Should the Court deny counsel's request for fees and expenses where counsel failed to follow any of the procedures established by the Court that are necessary to seek such fees and expenses?

Respondents' Answer: Yes

3. Should the Court deny counsel's request for fees and expenses based on the allegation that counsel cannot locate the claimants where (1) counsel has consistently represented to the Court that he is in contact with all his clients; and (2) where the only reason the claimants were not paid is because the payments were rejected and the claimants and counsel failed to seek reissuance of the payments?

Respondents Answer: Yes

## **CONTROLLING OR MOST APPROPRIATE AUTHORITY**

- Closing Order 2, (Regarding Additional Procedures For Incomplete And Late Claims; 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
- Dow Corning Amended Joint Plan of Reorganization
- Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A
- Order Establishing Procedures for the Review of Asserted Liens against Settling Implant Claimants, ECF No. 1413
- *In re Settlement Facility Dow Corning Trust*, 760 Fed. Appx. 406, 411-412 (6th Cir. 2019)
- Order Regarding Motions Filed by the Korean Claimants (ECF Nos. 1752, 1757, 1758, 1767, 1776), ECF No. 1783

Dow Silicones Corporation (“Dow Silicones”)<sup>1</sup>, the Debtor’s Representatives (the “DRs”), the Claimants’ Advisory Committee (the “CAC”), and the Finance Committee (the “FC”) (collectively, “Respondents”) respectfully request that the Court deny the Motion for Order to Allow the Korean Claimants’ Attorney to Receive Attorney’s Fee and Expenses Regarding Returned Checks Not Cashed, ECF No. 1789 (“Motion”) filed by the Korean Claimants’ Attorney (“Movant”).

### INTRODUCTION

In this Motion, counsel for Korean Claimants seeks payment of his *own* fees and expenses for expedited release claim awards that were not paid to his clients because he *rejected* and returned the payment checks to the Settlement Facility. Having forfeited the claimants’ right to obtain an expedited release payment, counsel now (incredibly) seeks fees based on the value of the forfeited expedited payments. There is no authority or basis in the Plan or any Court order that would support the payment of fees and expenses under such circumstances. More importantly, however, and dispositively, the Plan bars attorney fees for Expedited Release payments – the type of payment at issue in this Motion.

For these reasons, as more fully outlined below, the Motion should be denied.

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<sup>1</sup> Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.



## **BACKGROUND**

### **I. Plan and Applicable Orders**

#### **1. Controlling Plan Documents**

This Court is, of course, familiar with the relevant facts. In 1999, Dow Corning and the representatives of the tort claimants – the Tort Claimants’ Committee – filed the Dow Corning Amended Joint Plan of Reorganization (“Plan”) (Exhibit A). The Plan became effective over 20 years ago on June 1, 2004. The Court retains the jurisdiction and obligation under the Plan to implement its terms and supervise the operation of the Settlement Facility established to receive and pay the claims of Settling Person Injury Claims – such as those of the Korean Claimants.

The procedures for the submission of claims for benefits and for the review and resolution of such claims are set forth in the Settlement Facility and Fund Distribution Agreement (“Settlement Facility Agreement” or “SFA”) (Exhibit B) and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA (“Annex A” or the “Claims Resolution Procedures”) (Exhibit C). The Court retains exclusive jurisdiction over the implementation of the Plan, specifically, *inter alia* – “to resolve controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents”, Plan, § 8.7.3, and “to enter orders in aid of this Plan and the Plan Documents including, without limitation, appropriate orders (which may include contempt or other sanctions) to protect the Debtor, the Reorganized Debtor, the Released Parties, the

Parties, the Tort Committee and any of the Joint Ventures and Subsidiaries from actions prohibited under this Plan and to enforce the terms of the Funding Payment Agreement”. Plan at § 8.7.5

The SFA, along with Annex A, establish the detailed rules and guidelines for determining the eligibility of claims for the settlement program and for the submission, evaluation, and payment of Breast Implant claims that qualify for a settlement under the Plan. The Settlement Facility, through the Claims Administrator, manages the Plan’s administrative settlement program. The Claims Administrator is responsible for ensuring that claims are reviewed and evaluated in accordance with the strict criteria set forth in the Claims Resolution Procedures and has no discretion to apply other criteria in reviewing and allowing claims. This Court has supervisory authority over the Settlement Facility and is authorized “to act in the event of disputes or questions regarding the interpretation of Claim eligibility criteria, management of the Claims Office or the investment of funds by the Trust.” SFA at § 4.01.

The Claims Resolution Procedures provide that to be compensable, a disease claim must meet the eligibility criteria set forth in the Plan. The Claims Resolution Procedures require that the Settlement Facility issue a Notification of Status letter to all claimants advising whether the claim is approved or is deficient. Under the terms of the Claims Resolution Procedures, claimants asserting a disease claim have one

year from the date of the Notification of Status letter to cure any deficiencies. Annex A at § 7.09(b)(ii). If a disease claim is not cured timely, the Settlement Facility may issue an Expedited Release payment to the claimant. Annex A at § 7.09 (b)(ii)(2). If the disease claim is not cured timely, the claimant has the alternative option to seek compensation for a *new* compensable disease that manifests after the one-year cure period, provided that the claimant has not released all claims. Annex A at § 7.09(b)(ii)(3).

The decisions of the Settlement Facility are subject to an administrative appeal process. A claimant who disagrees with a decision of the Settlement Facility may seek a review by the Claims Administrator and then, if the Claims Administrator denies the appeal, the claimant may appeal the decision to the Appeals Judge. *Id.* at §§ 8.04, 8.05. The Appeals Judge issues written opinions and the “decision of the Appeals Judge will be final and binding on the Claimant.” *Id.* at § 8.05. There is no right of appeal to any court. *See id.* at § 8.05. This limitation on appeals to this Court (or any court) has been affirmed in multiple orders of this Court and of the United States Court of Appeals for the Sixth Circuit. *See e.g. 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)).

Attorney fees are authorized by the Plan subject to certain limitations. The Plan sets limits on attorney fees based on the dollar amount awarded to the claimant.<sup>2</sup> Attorneys are not permitted to receive fees for awards issued for expedited release payments:

Amounts paid pursuant to either the Expedited Payment Option or the Explant Payment Option under the Settlement Facility shall not be counted as amounts paid to a Settling Personal Injury Claimant for purposes of this section and no fees shall be paid with respect to such amounts.

Plan at § 5.10.2.

## **2. Lien Resolution Procedures**

On April 13, 2018, this Court approved and entered the Amended Stipulation and Order Establishing Procedures for the Review of Asserted Liens against Settling Implant Claimants (“Lien Resolution Procedures”). Lien Resolution Procedures, ECF No. 1413, PageID.23407-23424 (Attached as Exhibit D). The Lien Resolution

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<sup>2</sup> For claimants in Class 5, the Plan provides that Attorneys are allowed fees of 10% of the first \$10,000 paid to the claimant; 22.5 % of the next \$40,000 and 30% of the amount paid to the claimant in excess of \$50,000. Plan at § 5.10. This Court entered an order on July 16, 2004, confirming the adjustment in these amounts applicable to claims in Class 6.1. Under that Order, attorneys may obtain payment equal to 10% of the first \$6000; 22.5% of the next \$24,000, and 30% of amounts in excess of \$30,000. The Order simply adjusts the dollar amount thresholds for payment and does not alter the prohibition on payment of fees for Expedited Release Claims set forth in the Plan.

Procedures “apply solely and exclusively to asserted lien claims against settling claimants. More specifically, these Procedures apply to disputes between: (1) Personal Injury Claimants who elect to settle their claim in the SF-DCT and whose claims have been reviewed and (1) determined to be eligible and (2) had an Allowed Amount determined (referred to generally in these Procedures as "Claimants"), and (2) persons or entities who assert the right to receive all or a portion of the payment(s) to Claimants from the SF-DCT[.]” *Id.* at § 1.01. The Lien Resolution Procedures thus apply to attorneys who seek to recover fees and expenses resulting from a settlement payment made to a claimant. The Lien Resolution Procedures require the Alleged Lienholder to file an Alleged Lienholder Claim. *Id.* at § 4.01(a). “If the Alleged Lienholder fails to comply with [the requirements of submitting an Alleged Lienholder claim], the Alleged Lienholder shall be barred from asserting the lien.” *Id.* at § 4.01(d). The Lien Resolution Procedures allow attorneys to receive fees and expenses for a claim that has been approved but not paid *only* if the attorney demonstrates that the client cannot be located despite reasonable efforts by the attorney. *Id.* at § 6.07. When submitting a claim for fees and expenses where the client cannot be located, the attorney must, if they have already received a payment for the Claimant, return the full amount of the payment. *Id.* Upon receipt of an Alleged Lienholder Claim, the Settlement Facility is required to send a Notice and a Proof of Lien form to the Alleged Lienholder. *Id.* The Alleged Lienholder must

return the completed Proof of Lien form and supporting documentation to the Settlement Facility within 30 days of the date of the Notice from the SF-DCT. *Id.* The attorney is required to specify the fees and expenses sought and to provide a written explanation of the steps taken to locate the claimant. *Id.* at PageID.23415-16.

## **II. Factual Background of Motion**

The Motion seeks payment for fees and expenses based on over 100 claim payments that counsel asserts were returned to the Settlement Facility before March 2019. Motion at PageID.41852. The Settlement Facility records show that the only claim payments returned by counsel for Korean claimants consist of 109 *expedited release* claim payments that were returned to the Settlement Facility on February 14, 2019. *See* Exhibit E, October 7, 2024 Declaration of Kimberly Smith-Mair, at ¶ 9. In accordance with the Plan, these Expedited Release payments were awarded to the 109 claimants because they had filed disease claims but had failed to cure the deficiencies in those disease claims. *Id.* at ¶ 11. (These 109 claims are the subject of an earlier motion – entitled Motion for Order to Correct the Disposition of the SF-DCT Regarding the Korean Claimants (“Motion to Correct”), ECF No. 1752, PageID.33812-13 which was denied by this Court on July 31, 2024 (ECF No.

1783).<sup>3</sup> Counsel for Korean Claimants rejected and returned those Expedited Release payments asserting that the claimants wanted to pursue disease claims. When the payments were returned the Settlement Facility sent Acknowledgment Letters to counsel noting that counsel had represented that the clients wished to pursue further disease claims. *See* December 21, 2023 Declaration of Kimberly Smith-Mair, ECF No. 1754-4, PageID.34263-64. The letters clearly informed the claimants and counsel that under the Plan, the claimants could only pursue a *new* disease claim and could not at that point seek to pursue their original disease claim. Smith-Mair Dec. at ¶ 13. Counsel failed to submit a new disease claim as mandated by the Plan and instead, shortly before the final deadline for filing claims, sought to renew the disease claim that had been rejected, an action that is barred by the terms of the Plan. *Id.* at ¶ 14; *See also* Annex A at § 7.09(b)(ii)(3). The Settlement Facility – as required by the Plan, - denied the effort to renew the previously deficient disease claims.<sup>4</sup> Counsel for Korean Claimants did not request reissuance of the Expedited Release payments that had been rejected. Smith-Mair Dec. at ¶ 14.

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<sup>3</sup> The Korean Claimants filed an appeal of this Court’s Order denying the Motion to Correct. That appeal is pending before the Sixth Circuit. *In re Settlement Facility Dow Corning Trust*, Case No. 24-1653.

<sup>4</sup> Korean Claimants sought relief with the Appeals Judge – who interpreted the appeal as a request to extend the deadline to cure deficiencies. That appeal was denied.

On or about September 22, 2024, counsel for Korean Claimants sent an inquiry to the Claims Administrator asking whether it would be possible to file lien claims for the expedited release payments that were returned. *Id.* at ¶ 15. The Claims Administrator advised that it was no longer possible to file a lien. *Id.* This Motion followed. Notably, the Settlement Facility records show that counsel for Korean Claimants did not file an Alleged Lienholder Claim. *Id.* at ¶ 16.

### ARGUMENT

**I. The Motion Should be Denied: The Plan Bars the Payment of Fees for Expedited Release Claims and There is No Authority for the Payment of any Fees and Expenses Under These Circumstances Regardless of the Type of Claim Payment at Issue**

The Movant argues that under paragraph 10 of Closing Order 2, he is entitled to fees because the Settlement Facility failed to provide to counsel the Alleged Lienholder Claim documents when the claim payments were returned to the Settlement Facility. Paragraph 10 of Closing Order 2 references the Court-approved lien process (described above) and states only that an attorney who cannot locate a client may seek fees under the terms of the lien resolution process if the attorney returns the payment check issued to the client. Counsel maintains that the Settlement Facility erred by not providing the lien resolution notice and forms to counsel in response to the return of the checks. But, of course, this provision of Closing Order 2 applies to situations where the check is returned *because* the claimant cannot be located. Counsel for Korean Claimants never asserted and has never asserted (until



this Motion) that he could not locate his clients. *Id.* at ¶ 12. The Korean Claimants’ stated reason for returning the checks was not that the clients could not be located but rather that they were “opposed to the expedited payment.” Motion to Correct, ECF No. 1752, PageID.33812-33813.<sup>5</sup> This provision of Closing Order 2 does not in any way alter the requirements of the Plan or the Lien Resolution Procedures. The Plan prohibits counsel’s effort to resubmit disease claims that were previously denied as deficient. The Plan prohibits payment of attorney fees and expenses for Expedited Release claims. The Lien Resolution Procedures prohibit payment of fees

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<sup>5</sup> In this Motion, counsel for the first time asserts that he is unable to locate the relevant clients. Counsel has consistently stated for more than 7 years that he maintains direct contact with all of the Korean Claimants through cell phones. For example, in a June 8, 2017 letter to Ms. Ellen Bearicks, the head of Quality Management for the SF-DCT, Mr. Kim stated “[The Korean Claimants] left their smart phone numbers to me and I have them for all. So I have no problem to contact them whenever it is necessary and to distribute the payments to them. It is not true that I cannot locate the enclosed Claimants so I cannot distribute the payments to them.” *See* ECF No. 1546-8, PageID.24826 (Attached as Exhibit F). Further, during hearing proceedings before this Court, Mr. Kim has insisted that he has direct contact with the Korean Claimants. During the March 22, 2018 hearing, Mr. Kim stated “I’m responsible for distributing the funds because I have [the] money. I can contact them, they can receive the money from me.” March 22, 2018 Motions Hearing Transcript, ECF No. 1421 at PageID.23837. He went on to argue that he had copies of the Korean Claimants’ ID Cards stating: “If I don’t know whereabouts of the claimant, how can I get the ID card?... I cannot know where they live, I cannot know where they’re working. How can I get that ID card to make the acknowledgement [that the claimant’s received the money]?” *Id.* Mr. Kim, similarly, at a February 25, 2021 hearing, stated “I just connect over the phone. I have any individual claimants, Korean Claimants, their phone number or smart phone number.” February 25, 2021 Hearing on Motions ECF Numbers 1566 and 1545, ECF No. 1597 at PageID.28238.

and expenses in the absence of the required submissions. To the extent that counsel seeks to use Closing Order 2 as a basis to justify his attempt to obtain payment of fees, or to excuse his failure to follow the mandatory procedures, or to resurrect previously denied disease claims, the argument must fail.

The Motion should be denied for the simple reason that the fees and expenses sought are barred by the Plan. Even if the Plan did not bar payment, there is no basis to consider an award of fees and expenses because counsel failed to follow the procedures and actions mandated by the Court in the Lien Resolution Procedures.

### CONCLUSION

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

Dated: October 8, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 8, 2024, 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: October 8, 2024

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