

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

IN RE: SETTLEMENT FACILITY -
DOW CORNING TRUST,

SETTLEMENT FACILITY MATTERS.

Case No. 00-00005

Hon. Denise Page Hood

**ORDER DENYING MOTION FOR ORDER TO ALLOW
KOREAN CLAIMANTS' ATTORNEY TO RECEIVE
ATTORNEY'S FEE AND EXPENSES REGARDING
RETURNED CHECKS NOT CASHED (ECF NO. 1789)**

I. BACKGROUND

This matter is before the Court on the Korean Claimants' Motion for Order to Allow Korean Claimants' Attorney to Receive Attorney's Fee and Expenses Regarding Returned Checks Not Cashed. (ECF No. 1789) A response has been filed.

The Korean Claimants' attorney, Yeon-Ho Kim, seeks attorneys' fees and expenses incurred since Mr. Kim returned the checks to the Settlement Facility-Dow Corning Trust ("SF-DCT") pursuant to Closing Order 2, which was entered on March 19, 2019. Mr. Kim asserts that he returned over 100 checks before March 19, 2019 and several dozen checks after March 19, 2019. He claims that Closing Order 2 required the SF-DCT to send to him a copy of the Lien Resolution

Procedures and the lien form to be completed in order to obtain fees and expenses. Because the SF-DCT failed to send Mr. Kim a copy of the Lien Resolution Procedures and lien form, even after requesting whether he could file an attorney's lien, which was denied by the SF-DCT, Mr. Kim was unable to file lien for attorney's fees. Mr. Kim asserts that because the SF-DCT violated Closing Order 2, he should be allowed to receive attorneys' fees and expenses he incurred.

The Response filed by the Dow Silicones Corporation, the Debtor's Representatives, the Claimants' Advisory Committee, and the Finance Committee opposes the Korean Claimants' motion stating that the Plan bars payment of fees for expedited release claims and Closing Order 2 does not apply to Mr. Kim's situation.

Although Mr. Kim does not identify the type of payments which were returned to the SF-DCT in his motion, the Response claims that the SF-DCT records show that the only claim payments returned by Mr. Kim consist of 109 Expedited Release claim payments. (Decl. Smith-Mair, at ¶ 9, ECF No. 1790, PageID.42176) The Expedited Release payments were awarded to the 109 Korean claimants because they had filed disease claims but had failed to cure the deficiencies in those disease claims, as required by the Plan. *Id.* at ¶ 11. Mr. Kim rejected and returned the Expedited Release payments asserting that the claimants

wanted to pursue disease claims. (ECF No. 1754, PageID.34263-34264.) On September 22, 2024, Mr. Kim inquired whether he could file a lien for attorney fees based on the Expedited Release payments and was advised that he could not do so because all the Korean claims had a status of closed. (ECF No. 1790, PageID.42177) No lienholder claim has been filed by Mr. Kim for any of the claimants he represents. *Id.*

II. ANALYSIS

A. Plan Provisions and Interpretation

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.

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))

Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). Section 1127(b) is the sole means for modification of a confirmed plan which provides that the proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of the plan. 11 U.S.C. § 1127(b). “In interpreting a confirmed plan courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors.” *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); 11 U.S.C. § 1141(a). “An agreed order, like a consent decree, is in the nature of a contract, and the interpretation of its terms presents a question of contract interpretation.” *City of Covington v. Covington Landing, Ltd. P’ship*, 71 F.3d 1221, 1227 (6th Cir. 1995). A court construing an order consistent with the parties’ agreement does not exceed its power. *Id.* at 1228.

The Court has held on several occasions that the Plan provides no right of appeal to the Court by claimants who do not agree with the decisions of the SF-DCT, the Claims Administrator and/or the Appeals Judge. *In re Settlement Dow Corning Trust*, No. 12-10314, 2012 WL 4476647, at *2 (E.D. Mich. Sept. 28, 2012). Certain parties to the Plan are able to seek review of decisions “regarding the interpretation and implementation of the Plan.” *In re Settlement Facility Dow Corning Trust*, No. 18-1040, 760 F. App’x 406, 412 (6th Cir. Jan. 14, 2019) (citing *In re Clark-James*, No. 08-1633, 2009 WL 9532581, at *2 (6th Cir. Aug. 6, 2009). The Court has no authority to review substantive decisions regarding particular claims. *Id.*, 760 F. App’x at 412 (The Sixth Circuit affirmed the Court’s finding that the Korean claimants are not a party to the Plan and the relief sought by the Korean claimants were unavailable under the Plan.).

B. Attorney Fees under the Plan

The Claims Resolution Procedures provides that a claimant asserting a disease claim have one year from the date of the Notification of Status letter to cure any deficiencies. Annex A, § 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, § 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, § 7.09(b)(ii)(3). As to Expedited Release payments to a claimant, the Plan provides:

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 (italics added).

Based on the Plan's language expressly stating that no fees shall be paid under the Expedited Payment Option, Mr. Kim is not entitled to any attorney fees relating to the Expedited Release payments which were returned to the SF-DCT by Mr. Kim. The Motion for Attorney Fees and Expenses is denied because the Plan does not allow for such payments under the Expedited Payment Option.

C. Attorney Fees under Closing Order 2

As to attorney fees under Closing Order 2, paragraph 10 provides,

10. An attorney who is *unable to locate a claimant* for whom a payment has been issued and who has returned the full amount of the payment check to the SFDCT may apply for payment of allowable fees and expenses through the lien process. (ECF Number 1413). Upon receipt of the returned check or payment, the SF-DCT will send the attorney a copy of the Lien Resolution Procedures and notify the attorney that, to obtain fees or expenses, (s)he must submit a completed lien form to the SF-DCT on or before 30 days from the date the form was sent to the attorney by the SF-DCT. Attorneys,

however, can assert a lien at any time prior to receipt of the letter from the SF-DCT as well. *See Revised Exhibit 1 to Agreed Stipulation and Order: Procedures for the Review of Asserted Liens Against Settling Implant Claimants (ECF Number 1413-1) at Paragraph 4.01a.* If the claimant or authorized representative is subsequently located, the SF-DCT shall reissue a payment net of attorney fees and expenses, if any, allowed by the Lien Judge, to the claimant or representative, subject to certain deadlines for reissuance of checks as provided herein and any other applicable Order.

(ECF No. 1482, PageID.24088) (*italics added*).

In this case, Mr. Kim returned the checks because the Claimants “opposed to the expedited payment.” (ECF No. 1752, PageID.33812-33813) The Acknowledgment Letter to counsel after the payments were returned to the SF-DCT noted that the payments were returned because counsel’s clients wished to pursue further disease claims. (ECF No. 1754-4, PageID.34263-64) Mr. Kim has represented to this Court that he has contact with his clients. (ECF No. 1421, PageID.23837)

Closing Order 2, paragraph 10 therefore does not apply in Mr. Kim’s situation since the payments were returned because his clients wanted to pursue disease claims and not because Mr. Kim was unable to locate his clients. Because the checks were not returned because Mr. Kim was unable to locate his clients, the SF-DCT had no duty under Closing Order 2 to provide Mr. Kim with the Lien

Resolution Procedures and related form to file an attorney lien. Mr. Kim's Motion for Attorney Fees and Expenses under Closing Order 2 is denied.

D. Attorney Fees under the Procedures for Review of Asserted Liens

The Chart of Attorney Fees and Expenses set forth in the Procedures for the Review of Asserted Liens Against Settling Implant Claimants expressly provides "No" Attorney Fees for Expedited Release and Explant. (ECF No. 1413, PageID.23420) Even if Mr. Kim was able to submit the appropriate lien form, he would not be entitled to Attorney Fees related to the returned checks under the Expedited Option Payment since the Procedures for the Review of Asserted Liens do not allow for such fees, in conformance with the express language under the Plan. Mr. Kim's Motion for Attorney Fees, even if he was able to submit a lien form, is denied.

E. Court's Review of Decisions by the Claims Administrator

In addition, as this Court has previously ruled, the Plan has no provision which allows the Court to review a claim which was denied by the Claims Administrator. Mr. Kim asserts that his request for attorney fees or filing a lien form was denied by the SF-DCT. The Plan provides for no right of appeal to the Court from a Claims Administrator's decision, nor a right to seek any advisory opinions from the Court. The Court is without authority to review the decision of

the SF-DCT and the Claims Administrator. The Motion for Attorney Fees and Expenses is denied.

III. CONCLUSION/ORDER

For the reasons set forth above,

IT IS ORDERED that the Motion for Order to Allow Korean Claimants' Attorney to Receive Attorney's Fee and Expenses Regarding Returned Checks Not Cashed (**ECF No. 1789**) is DENIED.

S/DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: December 5, 2024