

Case No. 18-2446

**United States Court of Appeals
for the Sixth Circuit**

In re: SETTLEMENT FACILITY DOW CORNING TRUST

**KOREAN CLAIMANTS,
*Interested Parties – Appellants,***

v.

**CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE;
DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVE
*Defendants – Appellees.***

**On Appeal from the United States District Court
for the Eastern District of Michigan**

**APPELLEE FINANCE COMMITTEE'S MOTION TO CORRECT
MISREPRESENTATION OF APPELLANTS, OR ALTERNATIVELY,
MOTION TO STRIKE MISREPRESENTATION OF APPELLANTS**

SMYSER KAPLAN & VESELKA, L.L.P.
Karima Maloney
Sydney A. Scott
State Bar No. 24041383
700 Louisiana Street, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 (Fax)
kmaloney@skv.com
sscott@skv.com

*Counsel for Appellee the Finance
Committee*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ARGUMENT	1
CONCLUSION.....	4
CERTIFICATE OF COMPLIANCE.....	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Page

CASES

<i>Berger v. Medina Cty. Ohio Bd. of Cty. Comm’r</i> , 295 F. App’x 42 (6th Cir. 2008)	3
<i>United States v. Richardson</i> , 385 F.3d 625 (6th Cir. 2004)	3

STATUTES

FED. R. APP. P. 10(e)	3
FED. R. APP. P. 27	1

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Appellee the Finance Committee requests that this Court consider the Declaration of Kimberly Smith, Claims Operations Manager for the Settlement Facility-Dow Corning Trust (“Settlement Facility”), submitted herewith to correct a material misrepresentation made by Appellants Korean Claimants in their opening brief. Alternatively, the Finance Committee moves to strike the material misrepresentation made by Korean Claimants in their opening brief.

ARGUMENT

This appeal involves the Dow Corning¹ Amended Joint Plan of Reorganization (the “Plan”). In this appeal, Korean Claimants challenge the district court’s order denying their motion to enforce an unsigned draft memorandum of understanding that was neither permissible under the clear terms of the Plan nor enforceable under well-established contract principles. The Korean Claimants assert that their counsel received the draft memorandum of understanding on September 28, 2012, following a mediation that was held on August 9, 2012. *Order Denying Motion for Recognition and Enforcement of Mediation Filed by Korean Claimants*, RE 1461, Page ID # 24003.

¹ Dow Corning Corporation changed its name to Dow Silicones Corporation, effective February 1, 2018. For the Court’s and parties’ convenience, the Finance Committee will still refer to Dow Silicones as Dow Corning.

The district court correctly found that the unsigned draft memorandum of understanding was unenforceable because the Finance Committee, the committee responsible for financial management of the Settlement Facility, lacked actual or apparent authority under the Plan to negotiate any ad hoc global settlement of claims. *Id.* at Page ID ## 24015–16.

To challenge the district court’s finding on apparent authority on appeal, Korean Claimants assert that they changed their position to their detriment by not filing any Explant Claims² by the June 2, 2014 deadline for filing such claims, purportedly in reliance on the unsigned draft memorandum of understanding. Korean Claimants Br. at 50. Specifically, Korean Claimants represent: “No Claimants would prepare to file documents for the Explant Claims after they knew that the settlement agreement was executed.” *Id.* This is a misrepresentation of fact.

As set forth in the attached Declaration of Kimberly Smith, Korean Claimants filed 160 Explant Claims after the failed mediation and receipt of the draft document but before the June 2, 2014 deadline. Indeed, all 160 Explant Claims were filed on May 23, 2014. Korean Claimants’ contention that they did not submit Explant Claims in reliance on a purported settlement agreement is a

² Under the Plan, an Explant Claim is one of three payment options available to claimants whose claims satisfy the Plan’s exclusive eligibility criteria. SFA § 6.01(a), Page ID # 19532.

misrepresentation of fact that should be corrected. Indeed, while not on all fours, Rule 10 of the Federal Rule of Appellate Procedure permits correction of misstatements in the record that occur by error or accident. Fed. R. App. P. 10(e). The misstatement here did not occur in Korean Claimants' opening brief by error or accident—it was intentional. Accordingly, the Finance Committee respectfully asks this Court to consider the Declaration of Kimberly Smith in its evaluation of Appellants' appeal.

Should the Court decline review of the Declaration of Kimberly Smith, the Finance Committee alternatively moves to strike Korean Claimants' above-referenced misrepresentation. Korean Claimants failed to present its detrimental reliance argument to the district court, and it is therefore waived on appeal. *United States v. Richardson*, 385 F.3d 625, 631 (6th Cir. 2004) (“[C]ourts of appeals generally should decline to consider arguments that were not raised below and were not passed on by the district court.”). Further, Korean Claimants rely on matters outside of the record to support their misrepresentation concerning their failure to file Explant Claims. Such matters should not be considered on appeal. *See Berger v. Medina Cty. Ohio Bd. of Cty. Comm’r*, 295 F. App’x 42, 46 (6th Cir. 2008) (“This court does not consider non-record materials.”).

CONCLUSION

For the reasons stated herein, Appellee the Finance Committee requests that this Court consider the Declaration of Kimberly Smith submitted herewith to correct the misrepresentation of fact made in the Appellants Korean Claimants' opening brief when resolving the instant appeal. Alternatively, the Finance Committee requests that the Court strike the misrepresentation of fact made in the Korean Claimants' opening brief.

Dated: May 9, 2019.

Respectfully submitted,

SMYSER KAPLAN & VESELKA, LLP

/s/ Karima Maloney

Karima Maloney

Sydney A. Scott

700 Louisiana Street, Suite 2300

Houston, Texas 77002

(713) 221-2300

(713) 221-2320 (Fax)

kmaloney@skv.com

sscott@skv.com

*Counsel for Appellee the
Finance Committee*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face volume limitation of Rule 27(d)(2) of the Federal Appellate Rules of Procedure. According to Microsoft Word, the word processing program used to prepare this brief, this brief contains 699 words. This motion also complies with the typeface requirements of Rule 32(a)(5) of the Federal Appellate Rules of Procedure and the type style requirements of Rule 32(a)(6) of the Federal Appellate Rules of Procedure.

/s/ Karima G. Maloney
Karima G. Maloney

CERTIFICATE OF SERVICE

I certify that on May 9, 2019, I electronically filed a copy of the foregoing Brief of Appellee the Finance Committee with the Clerk of Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

/s/ Karima G. Maloney
Karima G. Maloney

Case No. 18-2446

**United States Court of Appeals
for the Sixth Circuit**

In re: SETTLEMENT FACILITY DOW CORNING TRUST

**KOREAN CLAIMANTS,
*Interested Parties – Appellants,***

v.

**CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE;
DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVE
*Defendants – Appellees.***

**On Appeal from the United States District Court
for the Eastern District of Michigan**

Declaration of Kimberly Smith

SMYSER KAPLAN & VESELKA, L.L.P.
Karima Maloney
Sydney A. Scott
State Bar No. 24041383
700 Louisiana Street, Suite 2300
Houston, Texas 77002
(713) 221-2300
(713) 221-2320 (Fax)
kmaloney@skv.com
sscott@skv.com

*Counsel for Appellee the Finance
Committee*

I, Kimberly Smith, declare as follows based upon my recollection and review of certain data and documents:

1. I am the Claims Operations Manager for the Settlement Facility-Dow Corning Trust (the "Settlement Facility").

2. As Claims Operations Manager, I have knowledge of past and present Settlement Facility decisions, including decisions made concerning the processing, evaluation, and payment, if eligible, of Explant Claims.

3. Under the Dow Corning Amended Joint Plan of Reorganization (the "Plan"), claimants who elect to settle their claims with the Settlement Facility may file an Explant Claim to seek compensation to offset costs incurred to remove a Dow Corning silicone implant.

4. I have also reviewed, am familiar with, and have personal knowledge of the Appellant Brief filed by the Korean Claimants in the matter styled *In re Settlement Facility*, No. 18-2446 (6th Cir. Dec. 31, 2018).

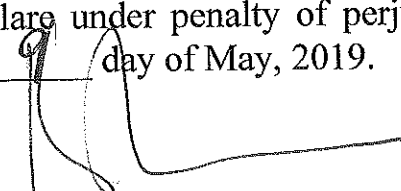
5. I understand that the Korean Claimants have represented that after the August 2012 mediation, no Korean Claimant filed an Explant Claim by the June 2, 2014 deadline for filing such claims established by the Plan.

6. The Settlement Facility maintains a comprehensive claims database that contains information about each claimant and the status of each claimant's claim submissions.

7. That database contains information that enables me to examine and conclusively determine the filing status of each claim submitted by the Korean Claimants and the status of processing, evaluation, and payment, if eligible.

8. Based on that examination, I was able to determine that after the August 2012 mediation but before the June 2, 2014 deadline for filing Explant Claims under the Plan, Korean-Claimants filed 160 Explant Claims. All 160 of these Explant Claims were filed on May 23, 2014.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9 day of May, 2019.



Kimberly Smith