Case No. 21-2665

In the 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 REPRESENTATIVES,

Interested Parties - Appellees.

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

BRIEF OF APPELLEE CLAIMANTS' ADVISORY COMMITTEE

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STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

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The Claimants' Advisory Committee does not believe that oral argument is necessary to resolve this appeal, but does not object to the Korean Claimants' request for argument.

INTRODUCTION

For the third time, this Court is asked to review the District Court's decision that sufficient funds are available in the Settlement Facility – Dow Corning Trust ("SF-DCT") to authorize issuing Premium Payments to thousands of settling breast implant claimants who have been waiting since the last millennium for their bargained-for compensation. The difference this time is that the settlement program is over; all uncertainty over funding adequacy has been eliminated; and even Dow Corning[1] has dropped its objections to finally paying all outstanding claims. This appeal is prosecuted only by a group of dissatisfied Korean Claimants with a host of alleged beefs with the SF-DCT – none of which has anything to do with the only issue relevant to approval of Premium Payments: funding adequacy.

Back in 1999, settling breast implant claimants under the Dow Corning reorganization plan (the "Plan") were offered rupture payments of $25,000 and disease payments of up to $300,000, portions of which were designated as Premium Payments (or "Premiums") that would be delayed for a few years until adequate funding could be confirmed. The Plan established the process for determining when such adequate funding exists: The neutral Independent

[1] Dow Corning is now known as Dow Silicones Corp. and will be referred to for convenience herein as "Dow." Certain capitalized terms not otherwise defined have the meanings assigned in the cited Dow Corning Plan documents.

Assessor ("IA") prepares annual projections based on an analysis of past claim payment history; the Finance Committee ("FC") established under the Plan determines, based on these projections, when to recommend to the District Court that Second Priority Payments ("SPPs") (including Premiums) be authorized; and the District Court confirms, based on that recommendation and other input from the parties, when adequate funding has been demonstrated to pay SPPs while assuring payment of all remaining base claims without threatening the negotiated settlement cap.

The two fiduciaries charged with balancing the interests of current and future claimants – the FC and the Claimants' Advisory Committee ("CAC") – concluded a decade ago that adequate funding existed to pay all future First Priority Payments, plus (acting cautiously) a 50% installment of accrued and future Premiums. The District Court ordered payment of 50% Premiums in 2015 over Dow's objection. This Court reversed, holding that the District Court should have applied a stricter "virtual guarantee" standard in determining adequate funding. *See In re Settlement Facility Dow Corning Tr.*, 592 F. App'x 473 (6th Cir. 2015).

After several more years of claims experience and a new FC recommendation, the District Court (again over Dow's objection) found under the heightened standard that sufficient funding existed to complete payment of 50%

Premiums and other categories of SPPs, and this Court affirmed that decision. *See In re Settlement Facility Dow Corning Tr.*, 754 F. App'x 409 (6th Cir. 2018).

The 16-year settlement program ended in June 2019, and the SF-DCT stopped taking new claims – eliminating the only uncertainty that provided a colorable basis to question funding adequacy: the possibility of an unexpected crush of valid claims at the filing deadline. Following a careful analysis of the finite set of remaining claims, the IA found that 100% of SPPs could be paid along with all First Priority Claims, with a vast funding cushion left over. The FC therefore recommended that the District Court authorize payment of 100% of SPPs. The District Court adopted that recommendation in a Memorandum Opinion and Order dated June 24, 2021 (the "June 24 Order"). RE 1607, Page ID # 28631.

Although it had initially opposed the most recent FC recommendation and filed an appeal of the June 24 Order, Dow has withdrawn its appeal and now does not oppose payment of all remaining qualified claims in the SF-DCT. The only challenge to the approval of SPPs is the appeal of certain Korean Claimants represented by Mr. Yeon-Ho Kim (the "Korean Claimants"). The appeal should be rejected for two separate and independently sufficient reasons.

First, the Korean Claimants lacked standing to object to the FC recommendation in the first place and thus have no basis to take an appeal from the

decision approving it. Only Dow and the CAC (and, theoretically, non-settling claimants in the Litigation Facility, of which none remain) were entitled under the Plan to notice and an opportunity to be heard on the FC's motion. Individual *settling* tort claimants like the Korean Claimants are given no say in this decision, which does not address whether any particular claimants are entitled to Premiums – only whether there is enough funding available to authorize payments to those who do qualify.

Moreover, the Korean Claimants were not injured by granting the FC Recommendation, nor would denial of the recommendation remedy any of the other harms of which they complain. They thus lack Article III standing. But even if such standing could be established based on the highly theoretical injury of funds for base claims running out because of the approval of SPPs, the Korean Claimants lack real party in interest status under Fed. R. Civ. P. 17, because they contractually delegated to the CAC the right to be heard on this issue.

The Korean Claimants argue that they should have standing because the CAC refused to follow their direction to oppose the FC recommendation, thus breaching a fiduciary duty to them as their "agent in fact." This argument misconstrues the CAC's role – which is to advocate, like a bankruptcy committee, for the *general* interests of all tort claimants rather than to directly represent any *particular* claimants. And the CAC certainly had no fiduciary duty to disregard

the best interests of thousands of claimants waiting for years for their Premiums to serve the misguided desire of one group of claimants to hold those payments hostage for unrelated purposes.

Nor can the Korean Claimants claim "derivative" standing to sue in the name of the SF-DCT. Even if such standing were available here, the Korean Claimants are not asserting a claim that will bring more resources into the "estate" of the claimant trust. To the contrary, they seek to reverse a holding that would compel Dow to *add* funds as necessary to pay approved claims.

The Korean Claimants' separate motions to alter certain SF-DCT procedures and to compel the issuance of Premiums to *them* (both also denied by the June 24 Order) did not give them standing to oppose the FC Recommendation. Those motions were groundless for the reasons stated in the brief filed by Dow, which arguments the CAC adopts here by reference. Among other things, the Plan bars individual settling claimants from seeking judicial review of the denial of their claims.

Second, even if the Korean Claimants had the right to object to the District Court's approval of SPPs, the grounds they assert to overturn that aspect of the June 24 Order are frivolous. The adequacy of funding can no longer be questioned in good faith. The IA – which has always applied a conservative methodology – leaned even more heavily in that direction by assuming that *every*

pending claim would be paid at the maximum amount sought, even claims that have been denied and are on appeal, as well as other categories of claims highly unlikely to be paid. This exercise still yielded a surplus – and thus, an *understated* margin of error – of more than $172 million. It is thus not just unlikely but now truly *impossible* for funding to fall short.

Against this backdrop, the Korean Claimants' conclusory assertion that the IA's projection is "not reliable" (Brief of Appellant Korean Claimants ("App. Br.") at 20) carries zero weight. The Korean Claimants argue that 500 of their own claims have not been counted, but (1) that argument was not advanced below and thus was waived; (2) Mr. Kim chose not to file these claims before the June 2019 deadline, so they will never be eligible for payment, and (3) the Korean Claimants do not even argue, much less prove, that this group of claims would affect the ability of the SF-DCT to pay all claims under the funding cap. Indeed, the Korean Claimants themselves argued, in seeking a stay pending appeal of the June 24 Order, that all relevant claims *had* been counted and that plenty of funds existed to pay all claims.

The Korean Claimants' only other argument – that the FC was not empowered to issue its recommendation because one of the three members had passed away – was correctly rejected below. The FC is authorized to act through *two* members, and the District Court properly declared the issue moot because the

FC had been fully reconstituted before the Court ruled and no member opposed the FC Recommendation.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the Korean Claimants have standing to contest the approval of SPPs when the Plan documents expressly provide that only the CAC, Debtor, Debtors' Representatives, and non-settling personal injury claimants – and *not* claimants who elected to participate in the settlement – would have notice and an opportunity to be heard on the question, and the Korean Claimants were not injured but actually were benefitted by approval of the FC Recommendation.

2. Whether the District Court clearly erred in finding that the $172 million funding cushion under the Independent Assessor's projections establishes a virtual guarantee of adequate funding to pay all remaining base claims as well as 100% of SPPs.

3. Whether the District Court correctly held that the FC Recommendation was properly issued by a two-person majority and that the issue was in any event moot because the FC was fully reconstituted prior to the June 24 Order.

STATEMENT OF THE CASE AND FACTS

The Premium Payments at issue here are an integral part of the settlement embodied in the Plan. The CAC's predecessor, the Tort Claimants'

Committee, joined with Dow Corning to solicit claimant support for a settlement that included no cost-of-living increases despite years of bankruptcy-related delay. Claimants were induced to support the settlement, in part, by the promise that they would receive Premiums if, as was expected and has proven true, there was enough money to pay both base and Premium claims. It was expected that Premiums would be paid *during* the settlement. Now that the program has concluded, there is unquestionably enough money remaining to pay all claims, as the District Court correctly ruled.

A. Background and Prior Proceedings

The Plan provides funding of up to $2.35 billion (determined on a net present value ("NPV") basis by discounting all payments 7% annually back to 2004), $400 million NPV of which is set aside for litigation, leaving a funding sub-cap of $1.95 billion NPV to be used to pay settlements (the "Settlement Fund"). June 24 Order, RE 1607, Page ID # 28610.

To encourage tort claimants to vote for the Plan in 1998, Dow Corning promised them Premium Payments of $5,000 for rupture claims and 20% of the base payment for disease claims, when and if it was determined that sufficient funding existed to cover all First Priority Payments (mainly consisting of breast implant base claims, along with certain smaller categories like Other Product Claims). Claimants were told that Premiums would likely be issued a few

years into the program, which began paying claims in 2004. *See* Dow Corning Amended Joint Disclosure Statement at 10 (RE 1285-2, Page ID # 20020) (Premiums likely "delayed for several years"); *id.* at 97 (*id.*, Page ID # 20021) (Premiums to begin "some years after the Effective Date," such that earliest approved claimants might have to wait "several years" for second payment).

Premiums are one of three categories of Second Priority Payments that require court authorization.[2] Section 7.03(a) of the Settlement Facility and Fund Distribution Agreement ("SFA") provides that "the Finance Committee shall file a recommendation and motion with the District Court requesting authorization to distribute Second Priority Payments." RE 1566-1, Page ID # 25990. The motion must be accompanied by a detailed accounting of claims payments and distributions and a projection and analysis of the cost of making all current and future First Priority Payments, prepared by the IA pursuant to Section 7.01(d). *Id.*, Page ID # 25990, 25986-87. The SFA requires that the recommendation and motion be served on the CAC; Dow, its then-shareholders, and the designed

[2] The other two are Class 16 Claims, reimbursing Dow Chemical (Dow's parent) for certain settlement payments made during Dow Corning's bankruptcy, and Increased Severity Payments to claimants who receive base disease payments below the maximum amount and later submit documentation qualifying them for a higher category of disease payment. Increased Severity Claims under Option 1 are capped at $15 million NPV. Option 2 claims are not capped but have more rigorous medical criteria. *See* SFA § 3.02(b)(i), SFA Annex A § 6.02(d)(viii-xi), RE 1566-1, Page ID # 25966, 26025-26.

Debtor's Representatives (the "Debtor-Related Parties"); and non-settling tort claimants (*i.e.*, those who opted out of the settlement and chose to have their claims resolved in the Litigation Facility) and states that "*such parties* shall have the opportunity to be heard with respect to the motion." *Id.*, § 7.03(a), Page ID # 25990 (emphasis added). Second Priority Payments may be made upon a finding by the District Court "that all Allowed and allowable First Priority Payments and all Allowed and allowable Litigation Payments have been paid or that adequate provision has been made to assure such payment (along with administrative costs) based on the available assets." *Id.*

In 2011, after seven years of claims experience demonstrating the reliability of the IA's methodology, the FC conservatively recommended that the Court authorize 50% installments on Premiums already earned and to be earned in the future based on approved and paid disease and rupture claims. After briefing and a hearing, the District Court in 2013 authorized the 50% installments. *See In re Settlement Facility Dow Corning Tr.*, No. 00-00005, 2013 WL 6884990, at *10 (E.D. Mich. Dec. 31, 2013), *rev'd and remanded*, 592 F. App'x 473 (6th Cir. 2015). As a result, starting in April 2014, approximately $92.2 million ($46.2 million NPV) was paid out over several months to thousands of claimants. 2016 IA Report at 15, RE 1279-2, Page ID # 19740. To put this in perspective, these

partial payments commenced nearly *sixteen years* after claimants were asked to vote and a decade after the Settlement Facility began paying claims.

This Court reversed early in 2015, holding that the District Court should have applied a higher, "virtual guarantee" standard of funding adequacy rather than one of "reasonabl[e] assur[ance]." *See In re Settlement Facility Dow Corning Tr.*, 592 F. App'x 473, 479 (6th Cir, 2015). The Court confirmed, however, that the Dow Corning Plan intended to allow payment of Premiums *during* the course of the settlement. *Id.* at 480 (virtual guarantee standard "does not require absolute certainty"); *id.* at 479 ("Because it is impossible to account for all possible future uncertainties, we will not impose an 'absolute guarantee' standard of confidence, as that would make SFA § 7.03(a) superfluous.").

Following this decision, Premium Payments remained frozen for more than three years, during which claims experience continued to confirm the accuracy (indeed, conservatism) of the IA's projections. The IA's 2016 Report, issued approximately two years before the end of the settlement program, projected (based on a series of conservative assumptions) that the SF-DCT could complete all 50% Premiums and other SPPs as well as covering all remaining base claims projected to be filed, with a remaining cushion of approximately $100.4 million NPV. 2016 IA Report at 18, RE 1279-2, Page ID # 19743. Based on the IA's Report, the FC recommended that the District Court authorize the SF-DCT to issue

50% installment payments on all categories of allowed and approved SPPs. Initial FC SPP Recommendation, RE 1279, Page ID # 19674. Over Dow's objection (based primarily on the possibility of an unexpected filing surge at the final 2019 deadline), the District Court adopted the FC's recommendation and authorized ongoing 50% installment payments on all SPPs, holding that funding adequacy had been established to the requisite level of a "virtual guarantee." Order Granting Initial FC SPP Recommendation, RE 1346, Page ID # 21589. This Court affirmed. *In re Settlement Facility Dow Corning Tr.*, 754 F. App'x 409 (6th Cir. 2018).

B. Proceedings Leading to the Current Appeal

On June 3, 2019, the SF-DCT stopped accepting new claim filings, eliminating all uncertainty about future filings and fixing a limited universe of already-filed claims that needed to be processed and paid. This vastly simplified the process of projecting the funds needed to pay all claims and thus establishing whether there is a "virtual guarantee" of adequate funding to issue all First *and* Second Priority Payments.

Over an 18-month period, the remaining baskets of claims were inventoried, and the IA issued a report concluding that even if all pending claims (including those denied and on appeal) were paid in full, at the amounts sought, there would still be more than $172 million left over in the Settlement Fund – making it impossible for the cap to be exceeded. *See* Finance Committee's

Recommendation and Motion For Authorization to Make Second Priority Payments ("FC Recommendation"), January 14, 2021, RE 1566, Page ID # 25948-51. Based on the IA report, the FC recommended that the District Court authorize payment of 100% of all SPPs. *Id*., Page ID # 25952-54.

Dow and the Korean Claimants filed objections to the FC Recommendation (Dow Objection, RE 1581; Korean Claimants Objection, RE 1584), and the CAC and FC filed replies noting, among other things, that neither objection seriously challenged the adequacy of funding and arguing that the Korean Claimants lacked standing to oppose the FC Recommendation (CAC Reply, RE 1587, Page ID # 27354, 27356-57; FC Reply, RE 1588, Page ID # 27364). The Korean Claimants also filed motions seeking an order awarding them Premium Payments (Motion for Premium Payments, RE 1545) and to vacate a decision of the SF-DCT regarding the requirement that claimants update and confirm their addresses (Motion to Vacate Address Decision, RE 1569) (together, the "Korean Claimant Motions"). The CAC and Dow filed joint responses to both motions (Joint Response to Motion for Premium Payments, RE 1546; Joint Response to Motion to Vacate Address Decision, RE 1595) and the FC also responded (FC Response to Motion for Premium Payments, RE 1547; FC Joinder in Response to Motion to Vacate Address Decision, RE 1596). The Korean

Claimants filed a reply on the latter motion. Reply to Responses to Motion to Vacate Address Decision, RE 1599.

The District Court granted the FC's motion and adopted the FC Recommendation in the June 24 Order. RE 1607, Page ID # 28631. The court noted that any uncertainty about future filed claims "has been eliminated" by passage of the claim filing deadline (Page ID # 28621) and found that the IA's "conservative and overinclusive methodology in estimating the remaining unpaid claims" (Page ID # 28626) – which included counting claims with deficiencies that could be cured, under appeal, with bad addresses, and with returned or stale checks (Page ID # 28622) – resulted in a "'virtual guarantee'" of funding adequacy (Page ID # 28628). The court stressed that neither Dow nor the Korean Claimants actually argued against such a finding. *Id.*, Page ID # 28625-26. The District Court rejected the argument that the FC motion should be denied because one member of the FC had passed away, noting that the requisite majority of the committee (two members) issued the FC Recommendation, and no member of the fully reconstituted FC objected to it, rendering the issue "moot." *Id.*, Page ID # 28626-27.

The court did not expressly rule on the Korean Claimants' argument for standing to challenge the FC Recommendation, but noted that they chose to settle their claims rather than opt for the Litigation Facility – which would have put

them in the category of claimants given notice and an opportunity to be heard under the SFA. *Id.*, Page ID # 28627-28. The court also denied the Korean Claimant Motions, noting that the Korean Claimants did not appeal Closing Order No. 2, which requires address verification; that Premiums have been paid to those Korean Claimants who responded to address verification requests; that the SF-DCT is not authorized to pay claimants who do not verify their addresses; and that claimants are not authorized to appeal from the denial of claims on that ground. *Id.*, Page ID # 28629-31.

Both Dow and the Korean Claimants filed notices of appeal from the June 24 Order. Dow Notice of Appeal, RE 1611; Korean Claimants Notice of Appeal, RE 1608. Dow thereafter voluntarily dismissed its appeal, which had been assigned Case No. 21-2788.

SUMMARY OF ARGUMENT

Under the terms of the settlement they accepted, the Korean Claimants lack standing to challenge the approval of SPPs. The CAC – the party charged with advocating for the interests of settling claimants generally – receives notice and an opportunity to be heard on whether SPPs should be authorized, but individual settling claimants do not. The Korean Claimants are not harmed by the approval of SPPs – indeed, those with verified addresses will *benefit* from the June 24 order – and thus could have obtained no meaningful relief by defeating the FC

Recommendation. Whether viewed as a matter of Article III standing or real party in interest status under Fed. R. Civ. P. 17, they simply have no business litigating this issue either in the District Court or this Court. The Korean Claimants cannot obtain standing based on the suggestion that the CAC violated its fiduciary duty by refusing to oppose the FC Recommendation, because the CAC does not represent individual claimants and was duty-bound to seek *approval* of SPPs for the many thousands of claimants whose collective interests it does represent. Nor can the Korean Claimants assert "derivative" standing. Even if such standing was available in this setting, the Korean Claimants are not seeking relief that will benefit all claimants or bring more assets into the SF-DCT "estate."

Even if the Korean Claimants were the proper party to challenge approval of SPPs, the District Court did not clearly err in finding that there is a "virtual guarantee" of adequate funding to pay all claims remaining in the SF-DCT, including 100% of SPPs. Indeed, the issue was essentially undisputed below and could not be disputed in good faith, given that the final claim deadline has passed; only a finite basket of claims remains; and even assuming all pending claims were paid in full there would be more than $172 million remaining under the settlement cap. The Korean Claimants' belated allegation that the IA did not count certain claims that Mr. Kim chose not to file before the deadline does not affect that result. And the Korean Claimants' argument that the FC was not

authorized to act through a majority of two members is flatly contradicted by the Plan documents and in any event moot.

STANDARD OF REVIEW

The District Court's factual application of this Court's "virtual guarantee" standard is entitled to deference unless clearly erroneous. *In re Settlement Facility Dow Corning Tr.*, 754 F. App'x at 415 (funding adequacy is mixed question of law and fact, but evidence-based assessment of IA projections under "virtual guarantee" standard is primarily factual and thus reviewed only for clear error); *see also Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 585-86 (6th Cir. 2015) (factual findings set aside only if "based on the entire record, we are left with the definite and firm conviction that a mistake has been committed") (citation omitted).

The District Court did not expressly rule on the CAC's argument that the Korean Claimants lacked standing to oppose the FC Recommendation, and standing issues are in any event subject to de novo review. *See American Fed'n of Gov't Emps. v. Clinton*, 180 F.3d 727, 729 (6th Cir. 1999). The District Court's ruling with respect to the FC's authority requires construction of Plan language in the context of a unique negotiated settlement. As this Court recognized in *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 772 (6th Cir. 2010), because Judge Hood "has presided over this bankruptcy case continuously since 1995" in

various capacities and has "acted as the court of first resort for nine," now twenty years, "[t]here is simply no denying that she is much more familiar with this Plan – and with the parties' expectations regarding it – than [this Court is]," and as a result her readings of the Plan documents warrant "a measure of deference." *Id.* Relatively less deference is owed to the District Court's interpretation of Plan language and more, indeed almost complete, deference is given to its weighing of extrinsic evidence. *Id.*

ARGUMENT

I. THE KOREAN CLAIMANTS LACK STANDING TO CONTEST THE FINANCE COMMITTEE'S RECOMMENDATION TO AUTHORIZE SECOND PRIORITY PAYMENTS

The Korean Claimants lacked standing to object to approval of SPPs before the District Court and thus have no basis to appeal that portion of the June 24 Order approving those payments. No party with a right to contest that approval now objects to paying all remaining claims. Individual claimants should not be permitted to throw a wrench in the works for their own unrelated tactical reasons and prevent thousands of other claimants (including, ironically some of their own group) from receiving long overdue settlements.

The SFA, part of the Plan settlement agreed to by the Korean Claimants, specifies which parties are to receive notice and an opportunity to be heard on the FC's recommendation to authorize SPPs: The CAC (the designated

fiduciary for the interests of settling tort claimants); the Debtor-Related Parties (including Dow, which alone is obligated to make any further necessary payments to the SF-DCT to fund approved claims); and any remaining *non*-settling tort claimants (those who chose to resolve their claims in the Litigation Facility). *Settling* claimants like the Korean Claimants, whose interests as tort claimants are collectively represented by the CAC, are *not* given notice or an opportunity to be heard. *See* above at 9-10.

For this reason alone, the Korean Claimants had no right to be heard below and have no right to appeal the approval of SPPs in the June 24 Order. The Plan and related Plan documents (including the SFA) together constitute a contract binding on all claimants, including the Korean Claimants, who chose to settle and enter the Settlement Facility. *See Korean Claimants v. Claimants' Advisory Comm.*, 813 Fed. App'x 211, 216-17 (6th Cir. 2020) (confirmed plan is contract between debtor and creditors, and Plan documents set forth "exclusive rules" governing distribution of settlement funds). By settling, the Korean Claimants delegated to the CAC the power to speak on behalf of all settling claimants in connection with any recommendation to authorize SPPs.

Indeed, the Korean Claimants fail to satisfy basic elements for Article III standing with respect to the FC Recommendation, because approval of SPPs did not threaten to inflict an injury in fact, nor would rejection of the recommendation

have redressed any injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (describing elements of Article III standing). Authorization to pay SPPs does not injure the Korean Claimants in any way – indeed, it *benefits* them by making them eligible to receive 100% instead of 50% Premiums upon verifying their addresses. The Korean Claimants set forth a raft of grievances against the FC and SF-DCT, including the denial of 50% Premiums for some Korean Claimants (because of a failure to verify addresses) and that the Settlement Facility has allegedly been biased against the Korean Claimants and set up various "administrative obstacles" to delay or deny their claims. *See* App. Br. at 26-27. Some of these issues were already addressed in the Korean Claimants' prior appeal. *See Korean Claimants*, 813 Fed. App'x at 220 (affirming denial of motion to enforce alleged result of mediation with FC). But in any event, none of the Korean Claimants' complaints would be remedied by denying authorization to pay SPPs. The Korean Claimants simply did not and do not have a stake in the SPP issue – except on the side of *approving* the FC Recommendation.

The only conceivable injury to the Korean Claimants of a premature approval of SPPs would be if available funding ran out before all base payments could be issued and as a result any Korean Claimant failed to receive their full base payment. As discussed below at 25-26, the Korean Claimants have already acknowledged that this result is impossible. This injury is thus too ephemeral to

convey Article III standing. *See Lujan*, 504 U.S. at 560 (harm must be "actual or imminent, not 'conjectural' or 'hypothetical'") (citation omitted).

But even if this theoretical injury were somehow enough to eke out Article III standing, the Korean Claimants nevertheless lack standing as the real parties in interest under Fed. R. Civ. P. 17. In accepting the Settlement, the Korean Claimants agreed that only the CAC would be entitled to object to a FC recommendation on behalf of tort claimants. Thus, the Korean Claimants have given up any "legal right of enforcement" that they might otherwise have had with respect to these issues. *See Cranpark, Inc. v. Rogers Grp., Inc.*, 821 F.3d 723, 731-32 (6th Cir. 2016) (party that suffered economic injury may lack ability to seek redress as real party in interest under Rule 17 where it has assigned right to pursue claim to third party).

The Korean Claimants appear to argue that they should have standing to object to the FC Recommendation because the CAC declined to follow their request to oppose it, thus allegedly breaching a fiduciary duty to the Korean Claimants, for whom the CAC is supposedly an "agent in fact." App. Br. at 29-30.

This argument fundamentally misconceives the CAC's role and responsibilities. The CAC, similarly to a bankruptcy committee, acts generally as a fiduciary for the interests of settling tort claimants, but does not directly represent or have fiduciary duties to individual claimants or groups of claimants. *See In re*

Dow Corning Corp., 255 B.R. 445, 485 (E.D. Mich. 2000) (creditors' committees owe fiduciary duties to class as whole, not individual members), *aff'd and remanded*, 280 F.3d 648 (6th Cir. 2002). Indeed, when the overall interests of claimants require, the CAC can (and often does) oppose claims or arguments advanced by individual claimants – for example, in connection with the Korean Claimants' 2020 appeal discussed above. *See also In re EBP, Inc.*, 171 B.R. 601, 603 (Bankr. N.D. Ohio 1994) ("It is hornbook law that a creditor's committee may object to claims of other general unsecured creditors . . . .") (quoting *Matter of Levy*, 54 B.R. 805, 807-08 (Bankr. S.D.N.Y. 1985)).

The CAC thus is not an "agent in fact" for the Korean Claimants; does not owe them a direct fiduciary duty; and certainly did not *breach* any duty by supporting a motion to pay valid claims held by tens of thousands of tort claimants (*including* the Korean Claimants). Rather, it would have been a severe breach of duty for the CAC to *oppose* the FC Recommendation and harm the vast bulk of its constituents merely to serve the Korean Claimants' unfortunate and futile attempt to gain leverage on other issues.

The Korean Claimants also argue that they have standing based on an analogy from the derivative standing that may be asserted by creditors in certain circumstances where a bankruptcy debtor (usually because of conflicts of interest) fails to pursue valid claims. App. Br. at 30-31. Such standing may be available,

for example, where a debtor has declined to pursue a colorable avoidance action that would benefit the estate. *See In re Gibson Grp., Inc.*, 66 F.3d 1436, 1441 (6th Cir. 1995). No such situation exists here: The CAC is not declining to pursue a claim or make an argument that would benefit the "estate" (here, presumably, the SF-DCT). To the contrary, rejecting the FC Recommendation would only delay payment of claims that would be the trigger for requiring Dow to contribute additional funds to the SF-DCT – harming the so-called "estate" and all tort claimants with outstanding claims.

In short, the Korean Claimants had no standing to oppose the FC's motion below, and thus have no basis to contest the granting of the motion on appeal. *See Prima Tek II, L.L.C. v. A-Roo Co.*, 222 F.3d 1372, 1376 (Fed. Cir. 2000) ("If no party had standing in the district court, then jurisdiction is not proper on appeal.").

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN HOLDING THAT ADEQUATE FUNDING WAS VIRTUALLY GUARANTEED

Even if the Korean Claimants had standing, they make no serious attempt to show that the District Court erred in approving the FC Recommendation and authorizing the SF-DCT to pay all remaining First and Second Priority Claims. As the only parties still seeking to delay payment of 100% Premiums two years after the end of the Dow Corning settlement program, the Korean Claimants offer only two, equally weak arguments on the merits: the conclusory and

unsubstantiated assertion that the IA's assessment of the highest possible amount necessary to pay all remaining claims is "unreliable" (App. Br. at 25) and the baseless argument that the FC Recommendation was improper because any action taken by a two-person majority of the FC while the third committee seat remained vacant was "invalid" (*id*. at 22-23).

A. The Korean Claimants Fail to Establish That the Independent Assessor's Analysis Was Unreliable

The District Court's holding that adequate funding was virtually guaranteed was solidly grounded in the factual record. The Korean Claimants' conclusory criticism is wholly unsubstantiated.

As discussed above (at 12), the major uncertainty over which the CAC and Dow litigated for nearly a decade – the possibility, however slight, of a huge barrage of valid claim filings at the June 2019 deadline – has been eliminated.

That deadline has passed, and it was thus no longer necessary for the IA to project the rate of future claim filing; all claims that could possibly be paid have already been filed. The IA's analysis was thus more of an administrative and arithmetical exercise: first confirming that all claims on file in the SF-DCT were properly accounted for, and then multiplying each subgroup of claims by the highest amount such category could be awarded under the Plan.

To eliminate any meaningful uncertainty in this exercise and ensure that the resulting funding cushion was *understated*, the IA assumed that every

claim in every category – including claims that had already been denied or for other reasons were unlikely actually to be paid – would be paid at the full amount sought. Even with this conservative thumb on the scale, the IA found that every single First and Second Priority Claim could be paid for approximately $432 million. Based on the funds available and the amounts needed for administrative costs and to complete Class 16 Payments to Dow Chemical, this would leave a funding surplus of more than $172 million. FC Recommendation, RE 1566, Page ID # 25949. In fact, the cushion is even *larger*, because the amount available was calculated as of October 31, 2020 and the Plan provides that payments to the SF-DCT are present-valued back to 2004, meaning that the nominal dollar value of the unused portion of the Settlement Fund continues to increase 7% per year until drawn in 2021 or 2022. *Id.*; CAC Reply, RE 1587, Page ID # 27351. The District Court carefully reviewed this evidence and did not clearly err in finding that adequate funding was virtually guaranteed. June 24 Order, RE 1607, Page ID # 28621-28.

The Korean Claimants do not seriously challenge this conclusion. Indeed, in seeking a stay pending appeal of the June 24 Order, the Korean Claimants argued that other claimants would not be harmed by a stay because "[a]ll of [the] claims for all of [the] Claimants have been filed and counted in full. There is no claim which has not been taken into account by the Finance

Committee. The funds held by the Settlement Facility exceed the funds necessary for distributing second premium payments." Motion to Stay, RE 1610, Page ID # 28639.

On appeal, the Korean Claimants try to walk back this admission and raise questions about the IA's analysis by arguing for the first time that the IA's report "did not include full potential claims pending [in] the Settlement Facility" because the IA did not include 500 claims that are subject to the Korean Claimants' motion to extend the June 2019 deadline. App. Br. at 25. This argument goes nowhere for three reasons.

First, the Korean Claimants never raised this issue (or any other specific challenge to the reliability of the IA's analysis) before the District Court, and the argument was therefore waived. *See Korean Claimants*, 813 Fed. App'x at 219 (declining to address arguments raised for first time on appeal).

Second, the Korean Claimants fail to establish that they are likely to prevail on their groundless motion to extend the well-publicized deadline to submit claims at the conclusion of the 16-year Dow Corning settlement program. These 500 claims will therefore never be paid and were properly omitted from the IA analysis.

Finally, even if these claims *were* accepted and paid, the Korean Claimants point to no evidence even suggesting, much less proving, that the

additional resulting expenditure could remotely threaten the huge funding cushion found by the IA's analysis and reasonably relied upon by the District Court.

The Korean Claimants' argument on the reliability of the IA's projections mentions several other unsubstantiated allegations, boiling down to an assertion that the FC has exhibited bias against the Korean Claimants and has acted to frustrate payment of their settlements. App. Br. at 25-27. None of these issues establishes any reason to question the District Court's recognition of the obvious fact that sufficient funds exist to approve full SPPs. The Korean Claimants thus fail to demonstrate the District Court clearly erred in finding that adequate funding is now virtually guaranteed.

B. The Korean Claimants Fail to Establish That the Finance Committee Lacked Power to Recommend Payment of Second Priority Claims

The Korean Claimants further argue for reversal on the ground that the FC was not properly constituted and thus was powerless to issue its recommendation to authorize SPPs. This argument is based on a misreading of the Plan documents and, as the District Court properly found, is in any event moot.

The FC, which oversees the financial operation of the SF-DCT, is comprised of three individuals with other distinct roles under the Plan: the Claims Administrator (who runs the SF-DCT); the Appeals Judge (who is the exclusive adjudicator of appeals with respect to individual settlement claims); and the

Special Master (who has primary responsibility for claims resolution in the Litigation Facility and an advisory role with respect to the SF-DCT). *See* SFA § 4.08, RE 1566-1, Page ID # 25973-76. The FC is expressly authorized to "act by majority vote." *Id.*, Page ID # 25975.

The current IA, the Claro Group, was retained by the FC and provided consulting services for more than eight years before being appointed as successor IA, including "working closely with the SF-DCT, the Finance Committee, the CAC, Dow, and the Financial Advisor" for more than two years as part of the "Closing Committee" preparing to wind down the SF-DCT. 2020 IA Report at 4, RE 1567, Ex. C to RE 1566, filed under seal. While the IA was already engaged in these efforts, the original Special Master, Francis McGovern, passed away suddenly in February 2020. Acting through the remaining two members, the FC filed its recommendation on January 14, 2021. FC Recommendation, RE 1566. Shortly thereafter, on February 11, 2021, the District Court appointed a successor Special Master as well as a successor Claims Administrator, thus fully reconstituting the FC. Order Approving Appointments, RE 1590, Page ID # 27377-79.

The Korean Claimants argue that, because the SFA calls for a three-member FC, upon Professor McGovern's death, the remaining two members were powerless to conduct any business until the Court appointed his replacement. App.

Br. at 23. In support, the Korean Claimants cite two decisions concerning the statutory power of the National Labor Relations Board ("NLRB") to act through a "delegee group" of three members, which held that such groups must "maintain a membership of three in order to exercise the delegated authority of the Board." *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010); *see also NLRB v. New Vista Nursing and Rehab.*, 719 F.2d 203, 208-09 (3d Cir. 2013) (three-member composition is jurisdictional requirement for delegee group to have statutory power to act).

In contrast to these cases, the FC is not a body created by statute to exercise delegated power from a larger official body. It is simply a group of three advisors contractually retained by the parties to assist in implementing a settlement, and empowered to act through two members, as the District Court noted. June 24 Order, RE 1607, Page ID # 28627. Significantly, the principal parties to the settlement agree with this reading of the SFA. Even in initially opposing the FC Recommendation, Dow admitted that action taken by two members of the FC with the third seat vacant "is no less valid than if those same two members agreed and a third dissented." Dow Objection, RE 1581, Page ID # 26554.[3] No other party has advanced the extreme suggestion that the mechanisms

[3] Dow suggested that the FC Recommendation was procedurally flawed because one of the remaining members was less than fully engaged, but failed to submit any evidence to substantiate this vague assertion. Dow Objection, RE 1581, Page

established by the parties to administer this settlement needed to grind to a halt because one of the three advisors constituting the FC passed away.

In any event, the District Court correctly held that the issue was moot, because the court's February 11, 2021 Order Approving Appointments, RE 1590, fully reconstituted the FC with three active members – none of who objected to the pending FC Recommendation. June 24 Order, RE 1607, Page ID # 28627. None of the parties with standing to object to the FC Recommendation have ever argued that the three-member FC composition is jurisdictional, *i.e.*, that all three positions must be filled for the Committee to act. Moreover, with a fully reconstituted FC supporting the motion prior to the court's ruling and on appeal, the issue is truly moot and the Korean Claimants have suffered no conceivable harm from the court acting on a recommendation initially promulgated by two FC members.

ID # 26554. As noted above, Dow is no longer appealing from the June 24 Order's approval of SPPs.

CONCLUSION

For the reasons stated above and in Dow's brief, the June 24 Order should be affirmed.

Dated: October 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word) this brief contains 7,104 words.

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CERTIFICATE OF SERVICE

I certify that on October 12, 2021, I electronically filed a copy of the foregoing Brief of Appellee Claimants' Advisory Committee with the Clerk of the 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.

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ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-0005)

Record Entry	Filing Date	Description	Page ID
1279	12/30/2016	Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	19674-19683
1279-2	12/30/2016	Report of Independent Assessor End of Second Quarter 2016 – Final Report, October 18, 2016	19726-19816
1285-2	02/10/2017	Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization	20019-20021
1346	12/27/2017	Memorandum Opinion and Order Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments	21562-21589
1545	07/06/2020	Motion for Premium Payments to Korean Claimants	24488-24490
1546	07/20/2020	Response of Dow Silicones Corporation, the Debtor's Representatives and the Claimants' Advisory Committee to Motion for Premium Payments to Korean Claimants	24491-24517
1547	07/20/2020	Finance Committee's Response to Motion for Premium Payments to Korean Claimants	24912-24914
1566	01/14/2021	Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	25944-25956
1566-1	01/14/2021	Settlement Facility and Fund Distribution Agreement	25958-26121

Record Entry	Filing Date	Description	Page ID
1567	01/14/2021	Report of Independent Assessor Prepared for the Finance Committee, December 21, 2020 (Exhibit C to RE 1566)	Sealed (NA)
1569	01/15/2021	Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	26261-26274
1581	01/27/2021	Response of Dow Silicones Corporation and The Debtor's Representatives to the Revised Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	26525-26579
1584	01/27/2021	Response of Korean Claimants to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	26643-266653
1587	02/10/2021	Reply of Claimants' Advisory Committee to Response of Dow Silicones Corporation and the Debtor's Representatives to the Revised Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	27349-27358
1588	02/10/2021	Finance Committee's Reply in Support of the Recommendation and Motion for Authorization to Make Second Priority Payments	27364-27371

Record Entry	Filing Date	Description	Page ID
1590	02/11/2021	Order Approving Appointment of Nancy M. Blount as Special Master for Closing and Kimberly D. Smith-Mair as the Successor Claims Administrator for the Settlement Facility-Dow Corning Trust	27377-27379
1595	02/26/2021	Response of Dow Silicones Corporation, The Debtor's Representatives, and the Claimants' Advisory Committee to the Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	27839-27871
1596	02/26/2021	Finance Committee's Joinder in Response of Dow Silicones Corporation, the Debtor's Representatives, and the Claimants' Advisory Committee to the Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	28218-28219
1599	04/02/2021	Korean Claimants' Reply to Response of Dow Corning Corporation, the Debtor's Representatives, Claimants' Advisory Committee and Finance Committee to Motion for Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	28299-28320

Record Entry	Filing Date	Description	Page ID
1607	06/24/2021	Memorandum Opinion and Order Regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments, the Korean Claimants' Motion for Premium Payments and the Korean Claimants' Motion for Order Vacating Decision of the Settlement Facility Regarding Address Update/Confirmation	28602-28632
1608	06/28/2021	Notice of Appeal to Order Regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments, the Korean Claimants' Motion for Premium Payments and the Korean Claimants' Motion for Order Vacating Decision of the Settlement Facility Regarding Address Update/Confirmation	28633-28635
1610	07/20/2021	Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments	28637-28642
1611	07/26/2021	Dow Silicones Corporation's and Debtor's Representatives' Notice of Appeal to the Sixth Circuit	28643-28677