

Case No: 22-1771

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT DOW CORNING TRUST

Debtor

KOREAN CLAIMANTS

Interested Parties - Appellant

v.

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES;

CLAIMANTS' ADVISORY COMMITTEE

Interested Parties - Appellees

FINANCE COMMITTEE

Movant - Appellee

Brief of Appellant Korean Claimants

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

The Korean Claimants filed Motion to Stay the District Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments with The United District Court for the Eastern District of Michigan pending appeal on July 20, 2021. The Finance Committee filed Response in opposition to the Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments on August 3, 2021. The Claimants' Advisory Committee filed Response in opposition to the Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments pending appeal on August 3, 2021. Dow Silicones Corporation and the Debtor's Representatives did not file anything regarding the Korean Claimants' Motion to Stay.¹

The District Court issued Order denying the Korean Claimants' Motion to Stay the Court's Ruling regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments and the Korean Claimants' Motion for Order

¹ But Dow Corning Corporation and the Debtor's Representatives filed a notice of appeal to the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments and then filed Motion to Dismiss their appeal voluntarily.

Vacating Decision of the Settlement Facility regarding address update/confirmation on August 12, 2022.²

The District Court in this Order ruled that the Korean Claimants' Motion to Stay (ECF No. 1651) was denied.

The Korean Claimants appealed on August 30, 2022. The Korean Claimants did not have a chance to be heard for Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments. Therefore, the Korean Claimants request this Court to provide an oral argument.

II. STATEMENT OF JURISDICTION

The United States District Court Eastern District of Michigan has jurisdiction over the Amended Joint Plan of Reorganization of Dow Corning Corporation effective on June 1, 2004 ("the Plan") to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan

² The District Court held the case of the Korean Claimants' Motion to Stay pending appeal over a year. During that time, the Settlement Facility finished all of processing for paying Second Priority Payments and consummated to make Second Priority Payments in full.

Documents including the SFA.

On June August 12, 2022, the District Court issued Order Denying the Korean Claimants' Motion to Stay the Court's Ruling 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. The Korean Claimants filed a notice of appeal in a timely manner. The Order of the District Court is the final order which cannot be contested in the District Court. Therefore, the United States Court of Appeals for the Sixth Circuit has jurisdiction over this appeal.

III. STATEMENT OF ISSUES

The issue is whether the Korean Claimants who filed Motion to Stay the District Court's Ruling 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 demonstrated the basis for Motion to Stay the District Court's Ruling pending appeal.

IV. STATEMENT OF CASE

The District Court issued Order denying the Motion for Recognition and Enforcement of Settlement Agreement Filed by the Korea Claimants on December 12, 2018. (RE1461 Pg ID:#24002-24017)

The Korean Claimants appealed. On January 14, 2019, this Court dismissed the Korean Claimants' appeal to the Order of the District Court denying Motions for Reversal of the Settlement Facility's Product of Manufacturer Decision and Re-Categorization. (RE1569 Pg ID:#26315-26325)

On January 29, 2019, the District Court issued Order that the Settlement Facility must promptly execute processing and payments of fifty (50) percents of all Second Priority Payments. (RE1569 Pg ID:#26327-26328)

On March 13, 2019, the Settlement Facility sent a letter titled as Specific Notice of June 3, 2019 Deadline via email and regular mail to counsel indicating that certain Claims would not be issued any payments for which they might be eligible and counsel must provide address in the format as recommended by the US Postal Service and all Claimants eligible for partial premium payments must confirm their current address and partial premium payments could be issued only after the Settlement Facility received address in

the proper format described and Korean Claimants with deficiencies as described would be adversely affected if counsel failed to take an action as required by Notice and Closing Orders and all deficiencies must be resolved by the June 3, 2019 deadline or the claims will be denied. (RE1569 Pg ID:#26330-26331, RE1546 Pg ID:#24833-24834)

On April 4, 2019, the Settlement Facility mailed a letter titled as Second Priority Payments-Immediate Action Required including a list of the Korean Claimants to counsel. (RE1569 Pg ID:#26348-26395) This letter was delivered in mid-July 2019. The US Postal Service took over three months to be delivered to counsel. This letter of the Settlement Facility was delivered to counsel after the deadline of June 3, 2019.

This letter did not explain that the form included in the letter was structured so that counsel could fill in language to confirm whether the identified address for each Claimant was correct or to provide an update address or to indicate if counsel no longer represented Claimants.

The Finance Committee asserted in the Declaration of the Claims Administrator, “Mr. Kim did not return the form sent with the April 4, 2019 mailing.” (RE1613-1 Pg ID:#28690-28697) But the letter of the Claim Administrator was not delivered by the deadline of June 3, 2019. It was

delivered in mid-July 2019. In addition, the Settlement Facility has already said to counsel in the letter of March 13, 2019 that all Claimants eligible for partial premium payments must confirm their current address with the proper format by the June 3, 2019 deadline. (RE1569 Pg ID:#26330-26331, RE1546 Pg ID:#24833-24834) Even if counsel had returned the form with the April 4, 2019 mailing, it must have been useless because of lapse of June 3, 2019.

On June 3, 2019, counsel submitted address update application/correction form (RE1569 Pg ID:#26405) for six hundred seventy six (676) Korean Claimants that had received a Missing or Invalid Address Notice from May 2015 up to that time. (RE1569 Pg ID:#26281)

On January 13, 2020, the Settlement Facility sent counsel a letter titled as Notice of Payment Hold for Invalid Claimant Address by indicating, “Correspondence sent to confirm the updated address, provided by you, was returned as undeliverable.” (RE1569 Pg ID:#26457-26480) This letter was delivered on September 1, 2020, eight months late.

On March 3, 2020, the Settlement Facility sent counsel a letter titled as Closing Order 2 Required Claimant Confirmation of Current Address with a list of the Korean Claimants and Closing Order 2. (RE1569 Pg ID:#26408-26465) This letter was delivered on July 3, 2020, four months later. The US Postal

Service took four months for delivery to counsel.

This letter of Settlement Facility imposed a significant new restriction on counsel that payments shall be sent to counsel for distribution to the Korean Claimants after the Claimants *directly confirmed* that they currently resided at the address that counsel has provided.

The Finance Committee asserted in the Declaration of the Claims Administrator, “The Settlement Facility has not received any additional address information for the Korean Claimants since the notification was sent to Mr. Kim in March.” Logically, it was impossible to receive any additional address information for the Korean Claimants because not only did the June 3, 2019 deadline expire but also the Korean Claimants did not want to update their current address.

During an important period around 2019, the Korean Claimants and counsel were delivered the mailings of the Settlement Facility several months later than they were supposed to.

On June 1, 2020, this Court dismissed the Korean Claimants’ appeal to the District Court’s Order denying Recognition and Enforcement of Mediation Agreement. (RE 1569 Pg ID:#26482-26494)

On June 6, 2020, the Korean Claimants, noting that it became useless to wait for settlement as a group, filed Motion for Premium Payments. (RE1569 Pg ID:#26496-26498, RE1545 Pg ID:#24488-24489)

On December 23, 2020, the Finance Committee filed Recommendation and Motion for Authorization to Make Second Priority Payments. (RE1560, Pg ID:#25620-25631) This Motion of the Finance Committee is a violation of 4.08 (a) the Settlement Facility and Fund Distribution Agreement. (RE1584 Pg ID:#26656-26695)

On January 15, 2021, the Korean Claimants filed Motion for Vacating Decision of Settlement Facility regarding Address Update/Confirmation (RE1569 Pg ID#26261-26273).

On June 24, 2021, the District Court issued Memorandum Opinion and Order regarding Finance Committee's Motion for Authorization to Make Second Priority Payments, Korean Claimants' Motion for Premium Payments and Korean Claimants' Motion for Order Vacating Decision of Settlement Facility regarding Address Update/Confirmation. (RE1607 Pg ID#28602-28632). The Korean Claimants filed a notice of appeal.

Along with the appeal, the Korean Claimants filed Motion to Stay the District

Court's Ruling granting the Finance Committee's Motion for Authorization to Make Second Priority Payments pending appeal on July 20, 2021. (RE1610 Pg ID:#28637-28642)

The Finance Committee filed Response in opposition to the Korean Claimants' Motion to Stay the Court's Ruling granting the Finance Committee's Motion for Authorization to Make Second Priority Payments. (RE1613 Pg ID:#28679-28698)

The Claimants' Advisory Committee filed Response in opposition to the Korean Claimants' Motion to Stay the Court's Ruling granting the Finance Committee's Motion for Authorization to Make Second Priority Payments. (RE1614 Pg ID:#28699-28714)

After about a year, the District Court issued Order Denying the Korean Claimants' Motion to Stay the Court's Ruling 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. (RE1651 Pg ID:#29345-29348)

V. SUMMARY OF ARGUMENT

The Korean Claimants argue that the Korean Claimants have demonstrated the basis of four factors for Motion to Stay pending appeal.

The Korean Claimants argue that the District Court took away an opportunity of the Korean Claimants eligible for receiving the Motion for Stay pending appeal before the Settlement Facility finished making Second Priority Payments.

The Korean Claimants request that this Court overturn the District Court's Order Denying the Korean Claimants' Motion to Stay the Court's Ruling regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments and the Korean Claimants' Motion for Order vacating Decision of the Settlement Facility regarding address update/confirmation because the opinion of the District Court has no founding.

VI. ARGUMENT

A. Basis for four factors

The Standard of review for argument is an abuse of discretion.

Pursuant to Fed.R.Civ.P.62(c), stay of proceedings to enforce a judgment or an

order can be sought by a losing party. Pursuant to E.D.Mich.L.R.7.1(a)(1), the Korean Claimants must ascertain whether the contemplated Motion will be opposed by the Finance Committee and the Claimants' Advisory Committee. Both Parties opposed the Motions of the Korean Claimants so the procedure for occurrence is not necessary.

Whether a stay is granted is required four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal (2) the likelihood that the moving party will be irreparably harmed absent a stay (3) the prospect that others will be harmed if the court grants the stay and (4) the public interest in granting the stay. *See Grutter v. Bollinger* 247 F.3d 631, 633 (6th Cir. 2001) and *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog* 945 F.2d 150, 151 (6th Cir. 1991)

“These factors should be balanced in light of the overall circumstances of the case.” *See In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (Sixth Cir. 1985)

B. Likelihood to prevail

The District Court found that while the first factor was the most critical inquiry of the four criteria the Korean Claimants would not likely prevail on the merits because a third member of the Finance Committee who was appointed did not

object to the request to authorize the Second Priority Payments so that the factor does not weigh in the Korean Claimants' favor.

However, the Korean Claimants do not agree.

First of all, the Finance Committee's recommendation to Make Second Priority Payments breached the Plan.

The Finance Committee shall be composed of three members consisting of individuals holding the following positions: Special Master, Appeals Judge, and Claims Administrator. §4.08 (a) the SFA The three members are a requirement for composition of the Finance Committee. If any position of three members is vacant, the Finance Committee's decisions shall be invalid. The position of Special Master is vacant because the Special Master passed away. There were only two members remaining in the Finance Committee when the Finance Committee recommended to the District Court.

The Supreme Court explained with respect to the composition of National Labor Relations Board that the composition of the Board shall not be confused with quorum provision. ("We thus hold that the delegation clause requires that a

delegee group maintain a membership three in order to exercise the delegated authority of the Board.” *New Process Steel, L.P. v. National Labor Relations Board*, 130 S.Ct. 2635, 687-688 (Supreme Court, 2010); “*New Process Steel* renders the three-member-composition requirement “a threshold limitation” on the scope of the power delegated to the Board by the NLRA; the Board cannot exercise its power through a delegee group if that group has fewer than three members. This statutory mandate is therefore jurisdictional.” *National Labor Relations Board v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 212 (third Cir. 2014))

Likewise,³ the three-member-composition requirement under the Plan must be interpreted a threshold limitation on the scope of the power delegated to the Finance Committee. §4.08 (c) the SFA, “The Finance Committee shall act by majority vote”, would not modify the three-member-composition requirement under §4.08 (a) the SFA, “The Finance Committee shall be composed of three members consisting of the individuals holding the following positions: the Special Master, a single Appeals Judge, and the Claims Administrator.”

³ The difference of the Finance Committee and the National Labor Relations Board is that the Finance Committee is not a statutory entity. The Finance Committee was set up by the agreement of creditors and debtor and debtor’s representatives in bankruptcy setting. In comparison with private sector employees under the National Labor Relations Board, creditors under the Finance Committee should be considered in a bigger weight.

The District Court emphasized that a third member did not object to the request to authorize Second Priority Payments. The Finance Committee did not show whether a third member who was not existent when the Finance committee recommended to Make Second Priority Payments objected or not objected to authorize the second priority payments. That is what the District Court only knew about. The fact demonstrated that a third member was not neutral. Therefore the emphasis of the District Court that a third member did not object has no weight.

Second, the conclusion that the Finance Committee's recommendation to Make Second Priority Payments was made on the premise of virtual guarantee but the Independent Assessor's report was not reliable.

The conclusion of the Independent Assessor that there would be a \$172,595,097 surplus of funds even after making First and Second Priority Payments and paying administrative expenditures through 2024 is unreliable. The conclusion was made from claims data of the Settlement Facility. What the Independent Assessor has done for report did not include full potential claims pending the Settlement Facility. For example, the Korean Claimants were two thousand six hundred (2,600) Claimants pending the Settlement Facility. Over four hundred (400) Korean Claimants filed Motion for Extension the Deadline for filing Claim with the District Court pending appeal. (RE1586 Pg ID#:27065-27072) The Korean Claimants who filed the Motion were not counted by the

Independent Assessor for its report.

The Finance Committee proposed mediation to counsel and reached a settlement agreement with Korean Claimants but walked away. The Finance Committee caused the Korean Claimants to spend a lot of expenses and costs during mediation process and has never reimbursed to them. The Finance Committee did not apply re-categorization of South Korea based upon change of GDP per capita in accordance with the Plan on time. The Finance Committee caused the Korean Claimants to lose over one million two hundred thousand (120) dollars by delaying re-categorization.

Furthermore, the Finance Committee did not respect the District Court's Order of January 29, 2019 that the Settlement Facility was directed to promptly proceed First Priority Payments. The Settlement Facility denied it on the basis of Closing Order 2. However, Closing Order 2 was issued on March 19, 2019, two months later than the District Court's Order. The founding that the Finance Committee relied on to Make Second Priority Payments is not reliable. The conclusion of the Independent Assessor that there would be a \$172,595,097 surplus of funds even after making First and Second Priority Payments and paying administrative expenditures through 2024 was not reliable.

Third, the Claimants' Advisory Committee consists of three members to fulfill

the functions under the SFA and Litigation Facility Agreement, Funding Payment Agreement, and other Plan Documents. (§4.09 (b) the SFA) Three members are two American lawyers and one Class 5 Claimant unknown whether she is still alive. (RE1584 Pg ID:#26697-26698) The Claimants' Advisory Committee had extensive powers. The powers of Claimants' Advisory Committee include foreign Claimants' claim even if there is no member with an understanding as to foreign claims. The Claimants' Advisory Committee acted as an agent in fact for the Korean Claimants although not specifically empowered in writing. The Claimants' Advisory Committee's agency relationship with the Korean Claimants is supported by the facts that the decisions of the Claimants' Advisory Committee have influenced the Korean Claimants extensively. The Claimants' Advisory Committee has sent out several booklets explaining what benefits Claimants would receive under the Settlement Program if the Korean Claimants participated in settlement program and how the Claimants could submit the documents for benefit to the Settlement Facility and has distributed periodical leaflets. The Korean Claimants asked the Claimants' Advisory Committee to oppose the Finance Committee's recommendation and the Motion to Make Second Priority Payments. (RE1584 Pg ID:#26808) But the Claimants' Advisory Committee rather supported it. The Claimants' Advisory Committee breached a fiduciary duty. The District Court relied on Claimants' Advisory Committee's support heavily in ruling in favor of the Finance Committee and therefore the outcome of breach of fiduciary duty was extremely harmful to the Korean Claimants. The District Court failed to find that the Claimants' Advisory Committee was an agent in fact for Korean

Claimants. The District Court rather found that some of the Korean Claimants' grievances have been resolved by the District Court and the Sixth Circuit of Appeals. Any grievances of the Korean Claimants have never been resolved by the District Court. The Korean Claimants lost all of the Motions filed with the District Court which has been questioned by the Korean Claimants whether it has done a supervisory role.

Conclusively, the Korean Claimants are likely to prevail on the merits of the appeal. The District Court's finding that the Korean Claimants were not able to show that they will likely prevail on the merits on appeal has no founding.

C. Likelihood to be irreparably harmed

The District Court found that the purpose of the authorization of the Second Priority Payments is to pay all eligible claimants the payments required under the Plan and the Claimants' Advisory Committee on behalf of the Claimants have long sought to have Second Priority Payments be paid so that it would harm other claimants if they were unable to receive the Second Priority Payments at this time.

The Korean Claimants cannot understand the finding of the District Court.

When this Order Denying the Korean Claimants' Motion to Stay the Court's Ruling 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 was issued on August 12, 2022, all of Second Priority Payments were paid out in full so that there was no possibility that it would harm any claimants because there was no claimant who was unable to receive Second Priority Payments at that time.

On the other hand, the Settlement Facility cut off any possibility that the Korean Claimants could receive even First Priority Payments. Therefore the Korean Claimants were likely to be ignored and disregarded by the Finance Committee. It became a reality since the Korean Claimants did not receive the Second Priority Payment. The Settlement Facility declared to close at the end of 2022, which was changed to 2023 or the early 2024.⁴ By that time, the Korean Claimants who did not receive First and Second Priority Payments are likely to be irreparably harmed although the District Court found that this factor does not weigh in favor of the Korean Claimants.

D. Prospect that other claimants will be harmed

⁴ The Dow Corning Corporation, the Debtor's Representatives, the Claimants' Advisory Committee and the Finance Committee changed the schedule for closing the Settlement Facility in accordance with their arguments against the Korean Claimants.

Although not reviewed by the District Court, the third factor favors the Korean Claimants. All of claims for all of the Claimants have been filed and processed and paid and counted in full. There is not a claim which has not been taken into account by the Finance Committee and not yet paid by the Settlement Facility. The Funds held by the Finance Committee exceed the funds necessary for distributing Second Priority Payments. It is evident for \$172,595,097 surplus of funds to be remained after payments for claims in full. Therefore there is no possibility that other Claimants would be harmed.

E. Public interest for stay

The District Court found that the public has a strong interest in implementing a bankruptcy plan and this factor does not weigh in the Korean Claimants' favor.

The Korean Claimants served the Reorganization Plan of Dow Corning Corporation. Forty (40) percents of the total population of Class 6.2 which were the Korean Claimants voted for the Proposed Dow Corning Reorganization Plan. The Appellees betrayed the expectations of the Korean Claimants by ignoring several verbal commitments made to the Korean Claimants for confirmation of the Proposed Plan. The Settlement Facility raised numerous technical issues in processing the Korean Claims and denied or overturned the eligibility of the

Korean Claimants' Claims.

To implement the bankruptcy plan, the Korean Claimants must be treated equally by the Settlement Facility which must follow the Plan. The Plan must be interpreted as originally agreed by the Claimants. The public interest will be served if this Court overturn the District Court's Order and grants the stay.

VII. Conclusion

For the forgoing reason, the Korean Claimants request this Court to OVERTURN the District Court's Order Denying the Korean Claimants' Motion to Stay the Court's Ruling regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments and the Korean Claimants' Motion for Order vacating Decision of the Settlement Facility regarding address update/confirmation and GRANT the Motion to Stay filed by the Korean claimants..

Date: September 28, 2022

Respectfully submitted,



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APPENDIX

- RE.1461 Order denying Motion for Recognition and Enforcement of Mediation filed by the Korean Claimants Page ID:#24002-24017
- RE.1569 Motion for Vacating Decision of Settlement Facility regarding Address Update/Confirmation Page ID:#26261-26505
- RE.1546 Response of Dow Silicones Corporation, the Debtor's Representatives and Claimants' Advisory Committee
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- RE.1560 Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments
Page ID:#25620-25632
- RE.1584 Response of Korean Claimants to Finance Committee's Recommendation to Make Second Priority Payments
Page ID:#26643-27062
- RE.1545 Motion for Premium Payments to Korean Claimants
Page ID:#24488-24490
- RE.1607 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 Vacating Decision of the Settlement Facility regarding Address Update/Confirmation

Page ID:#28602-28632

RE.1610 Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments Page ID:#28637-28642)

RE.1613 Finance Committee's Response in opposition to the Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments Page ID:#28697-28698

RE.1614 Response of the Claimants' Advisory Committee in opposition to the Korean Claimants' Motion to Stay the Court's Ruling Granting the Finance Committee's Motion for Authorization to Make Second Priority Payments Page ID:#28699-28714

RE.1651 Order Denying the Korean Claimants' Motion to Stay the Court's Ruling 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 Page ID:#29345-29348

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2022, I have electronically filed the above document with the Clerk of Court by ECF system that will notify to all relevant parties in the record.

A handwritten signature in black ink, appearing to read 'Yeon-Ho Kim', with a long horizontal flourish extending to the right.

Date: September 28, 2022

Signed by Yeon-Ho Kim

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/s/ Yeon Ho Kim

Attorney for Korean Claimants

Dated: September 28, 2022