

Case No: 22-1771

United States Court of Appeals for the Sixth Circuit

In re: SETTLEMENT DOW CORNING TRUST

Debtor

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KOREAN CLAIMANTS

Interested Parties - Appellant

v.

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES;

CLAIMANTS' ADVISORY COMMITTEE

Interested Parties - Appellees

FINANCE COMMITTEE

Movant - Appellee

**Reply of Appellant Korean Claimants**

Yeon-Ho Kim esq.  
Yeon-Ho Kim International Law Office  
Suite 4105, Trade Tower, 511 Yeongdong-daero, Kangnam-ku  
Seoul 06164 South Korea  
Tel: +82-2-551-1256  
Fax: +82-2-551-5570

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## I. REPLY TO INTRODUCTION

The Korean Claimants filed the Motion for Order Eliminating Dow Corning Corporation and the Debtor's Representatives from Appellee with this Court on November 10, 2022 so that the Korean Claimants do not file a reply to the Response of Dow Corning Corporation and the Debtor's Representatives and do file a reply to the Response of the Claimants' Advisory Committee and the Finance Committee.

In the Response, the Claimants' Advisory Committee and the Finance Committee assert that the separate appeal of District Court's underlying order approving final Premium Payments is moot because the challenged payments have all been made and this appeal, *a fortiori*, challenging the District Court's refusal to stay its Premiums order pending appeal, is moot as well. The Claimants' Advisory Committee and the Finance Committee further assert that this appeal is also meritless and, frankly, an unfortunate waste of this Court's time and the parties' resources.

It has been broadly accepted among the attorneys representing foreign Claimants that the Claimants' Advisory Committee ("the Tort Committee" prior to the confirmation of the Proposed Dow Corning Reorganization Plan) were

emphasizing the Class 5 Claimants' interests only and failed to act for the foreign Claimants, ignoring the requests of the foreign Claimants, although the Claimants' Advisory Committee was an agency of *all* Claimants. In addition, the Claimants' Advisory Committee failed to include one member of foreign attorney although the Plan and the Documents contemplated the inclusion of a foreign attorney into the Claimants' Advisory Committee, a clause favorable to the foreign Claimants in the Plan Documents that the Korean Claimants succeeded in getting through negotiation with the Debtor during confirmation hearing.

On the other hand, the Finance Committee turned away from its own-offered mediation after it failed to respect the settlement agreement drafted by itself and signed on by the Korean Claimants in September 2012. Because the Finance Committee offered to settle the Korean Claimants' Claims as a group through mediation, counsel for the Korean Claimants was forced to prepare a thousand pages of briefs and supporting evidences to submit to the mediator and even to fly to Washington DC to attend mediation conferences. After this Court affirmed the District Court's denial of the Korean Claimants' Motion for Recognition and Enforcement of Settlement Agreement, the Finance Committee did not reimburse counsel the expenses and the costs incurred for mediation and even did not say, "Sorry." The Settlement Agreement that the Finance Committee

failed to respect had been distributed to the Korean Claimants so that some of them did not file their individual claims with the Settlement Facility until this Court finally decided on the Motion for Recognition and Enforcement on June 1, 2020.

The underlying issue of this appeal is as to the Premium Payments (called as the Second Priority Payments, “the SPPs”). The Second Priority Payments were authorized by the District Court twice, in 2018 and in 2021. 50% of Premiums were paid in 2018 and then on an ongoing basis. (*See* page 3 of the Response) The Korean Claimants did not receive the 50% of Premiums. It was because before the payment, the Settlement Facility asked counsel to provide the updated and confirmed address of each Claimant, who could not or did not file. The Settlement Facility’s request was well before Closing Order 5 of March 9, 2019 that the District Court ordered the Claimants to file their updated and confirmed address before payment. On its own with no basis, the Settlement Facility refused to pay the first 50% of Premiums to the Korean Claimants. The Korean Claimants filed the Motion for Premium Payments which aimed at the first 50% of the Premium Payments. (RE1545 Pg ID:#24488-24490) While the Motion for Premium Payments was pending the District Court, the Finance Committee filed the Motion for Authorization to Make 50% of *other* Second Priority Payments with the District Court. In addition to the filing of the Korean

Claimants' Response to object the Finance Committee (and the Claimants' Advisory Committee)'s Motion for 50% of other Second Priority Payments, the Korean Claimants filed the Motion for Stay regarding the Second Priority Payments with the District Court *after* the District Court approved the Finance Committee's Motion for Authorization to Make the Second Priority Payments (50% of other Second Priority Payments). (RE1610 Pg ID:#28637-28642)

The Finance Committee and the Claimants' Advisory Committee assert that the District Court did not immediately rule on the stay motion but the Korean Claimants took no further action to seek a stay in this Court even as payments of full Premiums commenced. The Finance Committee and the Claimants' Advisory Committee further assert that there is no suggestion that those payments should or even could be clawed back and there is therefore nothing for this Court to address and no meaningful relief that could be fashioned.

First of all, the Finance Committee should not have approved the Settlement Facility to pay the Second Priority Payments (50% of other Second Priority Payments) after the District Court's June 24, 2021 Order was issued because the Korean Claimants appealed thus the Order of the District Court was not yet final and conclusive. The Finance Committee made the same mistake to approve the Settlement Facility to pay the Second Priority Payments (50% of

*first* Second Priority Payments) after the District Court's Order for approval. The District Court's Order was overturned in this Court so that the payments of the Second Priority Payments have been withheld over two years.

Second, the Finance Committee and the Claimants' Advisory Committee's argument that the Korean Claimants should have sought a stay in this Court as payments of the Second Priority Payments (50% of other Second Priority Payments) commenced is ludicrous. The Korean Claimants were unaware that the Settlement Facility commenced the Second Priority Payments following the District Court's Order. Even if the Korean Claimants knew or should have known it, the decision of the Finance Committee to approve the Settlement Facility to make the Second Priority Payments (50% of other Second Priority Payments) was beyond its power and breaching the laws because the June 24, 2021 Order was not and is still not final and conclusive because the Korean Claimants' appeal is pending.

There is no obligation imposed upon the Korean Claimants who filed the Motion for Stay the June 24, 2021 Order to file a motion for stay in this Court even if the Korean Claimants knew that the Second Priority Payments



commenced.<sup>1</sup> The District Court should be blamed for not being able to decide on the Korean Claimants' Motion for Stay quickly but for delaying over a year since the Korean Claimants' filing of the Motion for Stay. The Korean Claimants should not be blamed for not filing a motion for stay in this Court immediately.

Third, the Finance Committee and the Claimants' Advisory Committee's argument that the Second Priority Payments already paid should or even could not be clawed back is factually wrong. There have been numerous examples in the Settlement Facility that the payments made, whether rupture, explant, and disease, have been clawed back when the Settlement Facility found that the payments were a mistake. Even recently, the Settlement Facility was quite successful to claw back the payments which had not been distributed to the Claimants by counsels.

Finally, the Finance Committee and the Claimants' Advisory Committee's argument that there is nothing for this Court to address and no meaningful relief

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<sup>1</sup> The Finance Committee asserts that Premiums have been paid to those Korean Claimants who responded to address verification requests. (See page 14 of the Response) However, there are only seventeen (17) Claimants who received Premiums, out of over a thousand Claimants approved. They did not respond to the Settlement Facility's address verification requests. The settlement Facility just mailed payment checks to counsel.

that could be fashioned is ludicrous. Closing Order 5 of June 13, 2022 specifies, “The Settlement Facility *is also distributing* Second Priority Payments to eligible claimants who previously received a base payment and have verified their current addresses in accordance with Closing Order 2.” The Settlement Facility *is now distributing* the Second Priority Payments so that there is a meaningful relief that this Court could fashion, even if *some* of the SPPs authorized by the District Court’s June 24, 2021 Order have been paid.

## **II. REPLY TO ARGUMENT**

### **A. Whether the Korean Claimants Did Not Establish a Likelihood of Success**

#### **1. Whether the Korean Claimants Lacked Standing to Oppose the Recommendation to Approve Premium Payments**

The Finance Committee and the Claimants’ Advisory Committee assert, “The Korean Claimants lacked standing to object to approval of SPPs before the District Court and thus have no basis to appeal the portion of the June 24 Order approving those payments”, and ““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. Having given up “any legal right of enforcement” they might have had, the Korean Claimants lacked standing as the real parties in interest under Fed. R. Civ. P. 17.”” (See page 21 of the

Response)

The Finance Committee did not serve on the Korean Claimants to file Recommendation and Motion for authorization to make Second Priority Payments with the District Court. To obtain authorization to distribute Second Priority Payments, the Finance Committee shall serve on the Claimants' Advisory Committee, the Debtor's Representatives, the Shareholders, and all Non-Settling Personal Injury Claimants with pending claims and such parties shall have the opportunity to be heard with the respect to the motion. §7.03(a) the SFA

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 has extensive powers. The powers of Claimants' Advisory Committee include matters of foreign Claimants' claim even if there is no member who is able to understand the foreign Claims.

The Claimants' Advisory Committee acted as an agent-in-fact for the foreign Claimants although not specifically empowered in writing.

The Claimants' Advisory Committee's agency relationship with the foreign Claimants including the Korean Claimants is supported by the facts that the decisions of the Claimants' Advisory Committee have influenced the foreign Claimants extensively. The Claimants' Advisory Committee has sent out several booklets explaining what benefits the 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 opened a homepage and SNS and has distributed periodical leaflets.

The Finance Committee's recommendation regarding the SPPs was not shared with counsel of the Korean Claimants. Counsel asked the Claimants' Advisory Committee to oppose the Finance Committee's Motion. (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.

Even if the Korean Claimants delegated to the CAC the power to speak on behalf of the Korean Claimants, the Korean Claimants are not precluded from objecting the Finance Committee's recommendation and Motion to make Second Priority Payments as creditors under Bankruptcy laws. ("W[w]e hold that a creditor or creditors' committee may have derivative standing to initiate

an avoidance action where: 1) a demand has been made upon the statutorily authorized party to take action; 2) the demand is declined; 3) a colorable claim that would benefit the estate if successful exists, based on a cost-benefit analysis performed by the court, and 4) the inaction is an abuse of discretion (“unjustified”) in light of the debtor-in-possession's duties in a Chapter 11 case. A creditor has met its burden to show standing to file an avoidance action if it has fulfilled the first three requirements and the trustee or debtor-in-possession declined to take action without stating a reason. The burden then shifts to the debtor-in-possession to establish, by a preponderance of the evidence, that its reason for not acting is justified.” *In re The Gibson Group, Inc.* 66 F.3d 1436, 1440 (Sixth Cir. 1995))

The Korean Claimants had a colorable claim that would benefit the estate if successful exists. The Finance Committee’s Motion to Make the Second Priority Payments inevitably lessens the possibility of receiving benefits by the Korean Claimants. Therefore, the Korean Claimants had a standing.

The Finance Committee and the Claimants’ Advisory Committee assert, “Nor did the Korean Claimants establish that authorizing Premiums *injured* them in any way, or that delaying Premiums would cure any of their other grievances with the Settlement Facility, suggesting a failure even of Article III standing. The only conceivable injury to the Korean Claimants of a premature approval of the SPPs would be if available funding ran out before all base payments could be issued, but the Korean Claimants failed to present any evidence that this was

possible, and the record before the District Court overwhelmingly foreclosed that possibility.” The Finance Committee is overseeing the Settlement Facility. The Settlement Facility did not pay 50% of the Second Priority Payments which was authorized by the District Court in 2018. The District Court ordered the Finance Committee overseeing the Settlement Facility to pay the authorized SPPs promptly to *all* Claimants. But the Settlement Facility did not pay the SPPs of 2018 to the Korean Claimants on the basis of address. The requirement of address update/confirmation was neither prescribed in the Plan and the Documents nor authorized by the District Court *at that time*. (Closing Order 2 regarding address update/confirmation was entered in March 2019.) While the Finance Committee was precluding the Settlement Facility from paying the court-authorized SPPs to the Korean Claimants, the Finance Committee requested to pay the SPPs (50% of *other* Second Priority Payments) to the District Court in 2021. By violating the Court’s Order to pay the authorized SPPs promptly, and the Plan and the Documents which have never authorized the refusal of the payments including the court-authorized SPPs of 2018 on the basis of address, the Finance Committee *injured* the Korean Claimants through the filing of the Motion for Authorization to Make the SPPs (50% of other Second Priority Payments) *itself* in 2021. In addition, the authorization of the SPPs in 2021 hinges on whether adequate funding was guaranteed but the failure of the payments of the court-authorized SPPs of 2018 to the Korean Claimants, which was not calculated as an expenditure of the Settlement Facility’s Funds, is an *injury* to the Korean Claimants while the Finance Committee filed the Motion for Authorization to Make the SPPs on the basis of

the IA's report in 2021.

## **2. Whether the Korean Claimants Failed to Establish That the Independent Assessor's Analysis Was Unreliable**

The Finance Committee and the Claimants' Advisory Committee assert, "T[t]he 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 - was eliminated when the deadline passed. ... This argument, ["The IA's analysis did not include full potential claims pending in the Settlement Facility"], goes nowhere for three reasons. First, the Korean Claimants never raised this issue before the District Court. ... 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.... 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." First of all, this argument as to the IA's report's reliability, was contested by both objectors in the District Court, Dow Corning Corporation and the Korean Claimants. Even if the Korean Claimants did not raise this issue before the District Court directly, the Korean Claimants could have taken the argument of Dow Corning Corporation regarding the IA's report as the Korean Claimants' behalf because the Korean Claimants took the same position as Dow Corning Corporation

regarding the Finance Committee's recommendation based upon the IA's report. Second, whether the Korean Claimants fail to establish that they are likely to prevail on their motion to extend the deadline to submit claims is pending this Court, which will be determined soon, so that it is not certain now whether the Korean Claimants would fail to establish that they are likely to prevail on their motion. Finally, whether the Korean Claimants can prove that the additional resulting expenditure from the extension of the deadline for filing claims including 400 claims of the Korean Claimants could threaten the funding cushion found by the IA's analysis and reasonably relied upon by the District Court was not concluded yet. There are several impacts on the reliability of the IA's report if the 400 claims of the Korean Claimants were accepted and paid. There would be other claims following the examples of the Korean Claimants. The Settlement Facility failed to pay 50% of the court-authorized SPPs of 2018, which was not counted by the IA's report. Much more significantly, Dow Corning Corporation and the Debtor's Representatives assert that if the 400 claims of the Korean Claimants, which were filed after the deadline of June 3, 2019, were accepted and paid, Dow Corning Corporation and the Debtor's Representatives cannot avoid filling the additional funding. The assertion of the Debtor itself strikes down the credibility of the argument of the Finance Committee and the Claimants' Advisory Committee that the major uncertainty over whether adequate funding was virtually guaranteed was eliminated when the deadline passed.

### **3. Whether the Korean Claimants Failed to Establish That the**



### **Finance Committee Lacked Power to Recommend Payment of Second Priority Claims**

To counter the Korean Claimants' argument that the Finance Committee was not properly constituted and thus powerless to issue its recommendation to authorize the SPPs, the Finance Committee and the Claimants' Advisory Committee assert, "In contrast to these cases [the cases regarding the National Labor Relations Board], the Finance Committee is not a body created by statute to exercise power delegated 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."

First of all, whether the Finance Committee is not a statutory body does not permit a violation or a breach of the Plan and the Documents. The Finance Committee's members were appointed by the District Court and the Finance Committee's decision-making is strictly prescribed in the Plan. Even three members are uniquely empowered their responsibilities. If one of the three members is not existent, a major function of the Dow Corning settlement program cannot be implemented. In addition, the creditors' interests and the debtor's interests are strongly in collision in the setting of bankruptcy. The procedures agreed by the creditors and the debtor must be observed as written in a reorganization plan so that the composition of the Finance Committee and the quorum requirement for the Finance Committee's resolutions must be abided by strictly. In particular, the quorum requirement shall not be moot by a following

action in nature so that the District Court's interpretation of the clause regarding the Finance Committee is not right.

**B. Whether the Korean Claimants Did Not Establish that They Would Have Been Irreparably Harmed Pending Appeal Absent a Stay**

The Finance Committee and the Claimants' Advisory Committee assert, ““The Korean Claimants articulated no harm that could flow to them from the denial of a stay. The Korean Claimants failed at the outset to offer “specific facts and affidavits supporting assertions that these factors exist.”” (See page 29 of the Response) First of all, the Finance Committee declared that the Settlement Facility would close in 2023 or the early 2024. Once the Settlement Facility closed, the Korean Claimants would be irreparably harmed without a stay. Second, the Debtor, Dow Corning Corporation and the Debtor's Representatives, declared that if the 400 Korean Claimants' claims who filed after the deadline of June 3, 2019 were accepted and paid, the Debtor must fill up additional funding so that the Debtor indicated that there were not sufficient funds remaining, albeit the IA's report of the 100 million dollars' cushion. Without a stay, the Korean Claimants would face a reality that the Settlement Facility does not have money to pay the SPPs to the Korean Claimants because even the less available funds are depleting for the payments of the SPPs to *other* Claimants. In addition, specific facts and affidavits supporting assertions that these factors exist, required by the Korean Claimants, are not necessary since

the facts supporting the Korean Claimants' assertions had been presented to this Court in the cases of the substantial appeals.

**C. Whether the Claimants Would Have Suffered Irreparable Injury If the June 24 Order Had Been Stayed**

The Finance Committee and the Claimants' Advisory Committee assert, "In contrast to the speculative or nonexistent injuries to Appellants, claimants would have been immediately and irreparably harmed by the granting of a stay." The Finance Committee and the Claimants' Advisory Committee admitted that a substantial portion of the SPPs authorized by the District Court on June 24, 2021 has been paid. The Finance Committee and the Claimants' Advisory Committee also admitted that *all* of claims for *all* Claimants have been filed and processed and paid and counted in full. From their admissions, there would be no claimants immediately and irreparably harmed by the granting of the Korean Claimants' stay. The Finance Committee and the Claimants' Advisory Committee assert the remaining fund of 1.71 billion dollars base upon the IA's report so that there would be no claimants immediately and irreparably harmed by a lack of funds, who had been paid.

**D. Whether the Public Interest Disfavored a Stay**

The Finance Committee and the Claimants' Advisory Committee assert, "Meanwhile, there remained a compelling public interest in providing promised redress to *other* injured claimants and, indeed, preserving public confidence in the ability of the judicial system to implement and administer a settlement effectively and efficiently. Accordingly, the public interest favored permitting the SF-DCT to continue to process and pay as many of these long-delayed claims as possible while claimants were alive and able to benefit from the funds disbursed." (See page 33 of the Response) The public interest favors the effectiveness and efficiency of a settlement but favors the observance of the Plan and the Documents that the creditors agreed *greater*. The Finance Committee and the Claimants' Advisory Committee should have observed the clauses of the Plan and the Documents. The promises allegedly made to *other* claimants should apply also to the Korean Claimants in equal weight. The funds, variably changing in accordance with their allegations against the Korean Claimants, shall be disbursed to the Korean Claimants pursuant to the District Court's Order of 2018 where the Finance Committee is obliged to pay 50% of the SPPs promptly. The funds for the Finance Committee's recommendation of 50% of *other* SPPs were authorized by the District Court in 2021 but the Finance Committee does not allow the Settlement Facility to pay the SPPs to the Korean Claimants based upon the requirement of address update/confirmation not authorized under the Plan and the Documents. The

Motion for Stay was induced by the failure of the Finance Committee so that the Korean Claimants took a course of the public interest.

### III. CONCLUSION

For the forgoing reasons, the Korean Claimants request that this Court overturn the District Court's denial and grant the Motion for Stay.

Date: November 14, 2022

Respectfully submitted,



(signed by) Yeon-Ho Kim  
Yeon-Ho Kim Int'l Law Office  
Suite 4105, Trade Tower,  
511 Yeongdong-daero, Kangnam-ku  
Seoul 06164 South Korea  
Tel: +82-2-551-1256  
[yhkimlaw@naver.com](mailto:yhkimlaw@naver.com)  
For the Korean Claimants

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 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: November 14, 2022

Signed by Yeon-Ho Kim

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/s/ Yeon Ho Kim

Attorney for Korean Claimants

Dated: November 14, 2022