

Case No. 22-1771

In the United States Court of Appeals for the Sixth Circuit

IN RE: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS

Interested Party – Appellant

v.

DOW SILICONES CORPORATION; DEBTOR’S REPRESENTATIVES;
CLAIMANTS’ ADVISORY COMMITTEE
Interested Parties – Appellees

FINANCE COMMITTEE

Movant – Appellee

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

**RESPONSE OF APPELLEES DOW SILICONES CORPORATION AND
THE DEBTOR’S REPRESENTATIVES TO APPELLANTS KOREAN
CLAIMANTS’ MOTION FOR ORDER ELIMINATING DOW CORNING
CORPORATION AND THE DEBTOR’S REPRESENTATIVES FROM
APPELLEE**

Deborah E. Greenspan
Blank Rome LLP
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 420-2200
Deborah.Greenspan@blankrome.com
*Counsel for Dow Silicones Corporation
and Debtor’s Representatives*

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Case: 22-1771 Document: 5 Filed: 08/31/2022 Page: 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 22-1771

Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, The Debtor's Representatives
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.
The Debtor's Representatives consist of one counsel for Corning Incorporated, one in house counsel for The Dow Chemical Company and Deborah E. Greenspan.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.
See separate Disclosure of Corporate Affiliations and Financial Interest filed by Dow Silicones Corporation.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Deborah E. Greenspan
Blank Rome LLP, 1825 Eye St. N.W.
Washington DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 22-1771

Case Name: In re Settlement Facility Dow Corning Trust

Name of counsel: Deborah E. Greenspan

Pursuant to 6th Cir. R. 26.1, Dow Silicones Corporation

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.

See answer to No. 2.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes.

Dow Silicones Corporation is owned by The Dow Chemical Company, a wholly-owned subsidiary of Dow, Inc.

CERTIFICATE OF SERVICE

I certify that on August 31, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Deborah E. Greenspan

Blank Rome LLP, 1825 Eye St. N.W.

Washington DC 20006

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

INTRODUCTION

Appellees Dow Silicones Corporation (“Dow Corning” or the “Reorganized Debtor”) ¹ and the Debtor’s Representatives (collectively, “Respondents”) respectfully submit this response to the Motion for Order Eliminating Dow Corning Corporation and the Debtor’s Representatives from Appellee, Doc. No. 29 (“Motion to Eliminate”) filed by Appellants the Korean Claimants. In this Motion to Eliminate, the Korean Claimants make an extraordinary and untenable argument: they assert that Dow Corning – the Reorganized Debtor and sole source of funding for claim payments – and its appointed representatives – should be prohibited from participating in an appeal involving the distribution of those very claim payments.

The Appellants – the Korean Claimants – are certain individuals who elected to settle their claims against Debtor Dow Corning Corporation through the settlement program established in the June 1, 2004 Amended Joint Plan of Reorganization (“Plan”).² This appeal involves an August 12, 2022 order of the district court, RE 1651 (“Order Denying Stay”), which denied the Korean Claimants’ Motion to Stay the Court’s Ruling Granting the Finance Committee’s

¹ On February 1, 2018, Dow Corning Corporation changed its name to Dow Silicones Corporation. For convenience, Respondents will refer to Dow Silicones as Dow Corning or the Reorganized Debtor.

² Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Plan and Plan Documents. *See* Plan, RE 1595-2.

Motion for Authorization to Make Second Priority Payments, RE 1610 (“Motion to Stay”). The Motion to Stay sought to the halt that portion of a June 24, 2021 district court order (RE 1607) (the “June 24, 2021 Order”) that authorized the distribution of “Second Priority Payments” or “SPPs” to those individual claimants who had complied with the requirements for eligibility for payment. Respondents filed an Appellee brief in this appeal. Brief of Appellees Dow Silicones Corporation and the Debtor’s Representatives, Doc. No. 27. The two other appellees in this appeal also filed an Appellee Brief. Brief of Appellees Claimants’ Advisory Committee and Finance Committee, Doc. No. 26. Appellants the Korean Claimants filed a reply. Reply of Appellant Korean Claimants, Doc. No. 30.

In their Motion to Eliminate, the Korean Claimants seek to exclude the Reorganized Debtor and the Debtor’s Representatives from the appeal and ask the Court “not to accept” Respondents’ Appellee brief. Motion to Eliminate, Doc. No. 29, at 5. The Reorganized Debtor is the sole source of funding for all payments to claimants and administrative expenses and the Debtor’s Representatives are appointed under the Plan to enforce its terms and provide input and assistance in its implementation. Dow Corning – as the Reorganized Debtor – and the Debtor’s Representatives have an unquestionable right to take action and participate in litigation regarding the operation of the Plan, including this appeal which seeks to

halt procedures necessary to finalize the Plan. Respondents respectfully request that the Motion to Eliminate be denied.

BACKGROUND

The Settlement Facility, the entity created by the Plan to review, process, and pay Allowed claims submitted by individuals who elected the settlement process established in the Plan, has nearly concluded its operations after close to 20 years. In several motions and appeals, the Korean Claimants have challenged the actions and determinations of the Settlement Facility. In two of the motions at issue in the underlying appeal relevant here, the Korean Claimants sought orders compelling the Settlement Facility to pay their claims despite their failure to comply with the requirements for payment established by the Plan and the district court. *See* Motion for Premium Payments to Korean Claimants, RE 1545 (“Korean Claimants’ Motion for Premium Payments”); Motion for Vacating Decision of Settlement Facility Regarding Address Update Confirmation, RE 1569 (“Korean Claimants’ Motion for Vacating”).

In the third motion relevant here, the Korean Claimants opposed a motion filed by the Finance Committee – an entity established in the Plan to undertake certain supervisory and financial management tasks in implementing the Plan – for authorization to distribute certain Second Priority Payments. *See* Finance

Committee’s Recommendation and Motion For Authorization to Make Second Priority Payments, RE 1566, Page ID # 25948-25956 (“FC SPP Motion”).

In its June 24, 2021 Order, the district court denied the Korean Claimants’ two motions and granted the FC SPP Motion – thereby authorizing the distribution of Second Priority Payments. *See* June 24, 2021 Order, RE No. 1607.

On June 28, 2021, the Korean Claimants appealed June 24, 2021 Order. *See* Notice of Appeal, RE 1608; *Korean Claimants v. Claimants’ Advisory Committee, et al.*, Case No. 21-2665 (6th Cir.) (the “2021 Appeal”). That 2021 Appeal, which involves the same Appellees as in this appeal, is fully briefed and remains pending in this Court.

On July 21, 2021, the Korean Claimants filed the Motion to Stay in the district court. RE 1610. The Motion to Stay requested that the district court stay, under Fed. R. Civ. P. 62(c), its June 24, 2021 Order “regarding the Finance Committee’s Motion for authorization to make second priority payments.” *Id.*, RE 1610 at Page ID # 28637. The Claimants’ Advisory Committee and the Finance Committee filed responses opposing the Motion to Stay. *See* Response of Claimants’ Advisory Committee in Opposition to Korean Claimants’ Motion to Stay the Court’s Ruling Granting the Finance Committee’s Motion for Authorization to Make Second Priority Payments Pending Appeal, RE 1614, and The 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, RE 1613. The Reorganized Debtor and the Debtor’s Representatives took no position on the Motion to Stay.

On August 12, 2022, the district court denied the Motion to Stay, finding that the Korean Claimants had not met any of the standards required to issue a stay. *See* Order Denying Stay, RE 1651.

On August 30, 2022, the Korean Claimants filed a timely notice of appeal. RE 1659; Case No. 22-1771 (6th Cir.). On November 9, 2022, Respondents filed the Brief of Appellees Dow Silicones Corporation and the Debtor’s Representatives, Doc. No. 27. The Respondents’ brief did not address the merits of the original Motion to Stay, but set forth Respondents’ view that the matter is now moot because the vast majority of the Second Priority Payments that Appellants sought to halt have been paid. *Id.* at 10.

In their Motion to Eliminate, the Korean Claimants request that this Court (i) “[i]ssue an order to Eliminate Dow Corning Corporation and the Debtor’s Representatives from the Appellee’s List of the Caption of Case No. 22-1771,” and (ii) “further Order not to Accept the Appellee’s Brief that Dow Corning Corporation and the Debtor’s Representatives filed on November 9, 2022.” Motion to Eliminate, Doc. No. 29, at 5.

ARGUMENT

A. Dow Corning As The Reorganized Debtor And The Debtor's Representatives Have An Indisputable Interest In This Appeal And The Express Right To Be Heard On Any Matter That Affects The Plan Of Reorganization.

The Motion to Eliminate should be denied. Respondents have the absolute right to be heard on any matter involving the Plan, or Plan Documents, or their application and implementation.³

The Motion to Stay sought to prevent the distribution of Second Priority Payments to eligible claimants who had complied with all the requirements for receiving a Second Priority Payment. By the time this appeal was filed, the Second Priority Payments had been substantially distributed to those individuals, thereby mooting the appeal.

The Reorganized Debtor is the sole source of funding for the Plan's settlement program (*see* SFA § 3.01; RE 1595-3, Page ID # 27993; FPA § 2.01, RE 1592-12, Page ID # 27755), and therefore has the incontrovertible right to participate in any proceeding that could affect the amount or timing of payments. A stay at this juncture would not only fail to achieve the relief sought, but it would also delay the

³ The Plan Documents include the Settlement Facility and Fund Distribution Agreement, RE 1595-3 ("SFA"), the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to the SFA, RE 1595-4 ("Annex A"), and the Funding Payment Agreement, RE 1592-12 ("FPA"). *See* Plan at § 1.131, RE 1595-2, Page ID # 27906.

Settlement Facility's and district court's efforts to finalize the settlement program and issue final payments to claimants who have been able to cure deficiencies in their claims. This necessarily would result in excess costs to the Reorganized Debtor. The Reorganized Debtor clearly has an appropriate and strong interest in this proceeding.

The Debtor's Representatives similarly have the right and obligation to participate in this appeal. The Plan established the Debtor's Representatives to assist in the implementation of the Plan's settlement program. *See* SFA § 4.09, RE 1595-3, Page ID # 28004-28005. This Court has previously recognized the important Plan-defined role of the Debtor's Representatives: *See In re Settlement Facility Dow Corning Trust*, 592 F. App'x. 473, 476 (6th Cir. 2015) ("the Debtor's Representatives represent Dow Corning's interests") (citing SFA § 4.09); *In re Settlement Facility Dow Corning Trust*, 670 F. App'x. 887, 888 (6th Cir. 2016) (describing the "[v]arious entities created for the purposes of Dow Corning's bankruptcy—specifically, the Claimants' Advisory Committee, the Debtor's Representatives and Dow Corning itself (together, the 'Dow Corning Parties')").

Section 4.09 of the SFA expressly provides that the Debtor's Representatives "may file a motion or take any other appropriate actions to enforce or be heard in respect of the obligations in the Plan and in any Plan Document." SFA § 4.09(c)(v); RE 1595-3, Page ID # 28005. *See also* August 8, 2022 Memorandum Opinion and

Order, RE 1652 at Page ID # 29360 (denying Korean Claimants’ motion for “exclusion” of Dow Corning from responding to a motion because Dow Corning has “the authority to be heard in any matter relating to the Plan and the SFA”) (citing SFA § 4.09).

The Reorganized Debtor and the Debtor’s Representatives also have a specifically defined role with respect to the distribution of Second Priority Payments – which is the subject of the Motion to Stay. *See* SFA § 7.03(a); RE 1595-3, Page ID # 28018; *see also In re Settlement Facility Dow Corning Trust*, 592 F. App’x. 473, 480 (6th Cir. 2015) (appellants Dow Corning and the Debtor’s Representatives “are guaranteed an ‘opportunity to be heard with respect to the motion [to authorize the distribution of Second Priority Payments]’ under SFA § 7.03(a)”); *In re Settlement Facility Dow Corning Trust*, 754 F. App’x. 409, 412 (6th Cir. 2018) (in addressing another motion for Second Priority Payments, explaining that Finance Committee must make motion and that “[a]ll parties, including Dow, are provided an ‘opportunity to be heard’ on the motion”).

The Korean Claimants do not and cannot provide a compelling reason to exclude the Respondents’ Appellee brief, nor do they cite any pertinent rule or case law. The Korean Claimants make two arguments: first, they contend that Dow Corning and the Debtor’s Representatives should not be allowed to submit a brief because they had opposed the original motion to distribute the Second Priority

Payments and second, they contend that Dow Corning and the Debtor's Representatives should not be allowed to file an Appellee brief because they did not take a position on the Motion to Stay in the district court. Motion to Eliminate, Doc. No. 29, at 4. These arguments misapprehend the important roles of Dow Corning and the Debtor's Representatives and they do not and cannot provide a basis to exclude them from this appeal. While Dow Corning and the Debtor's Representatives initially opposed the Finance Committee's recommendation to issue Second Priority Payments, they ultimately did not pursue an appeal of the district court's decision and withdrew any opposition. Dow Corning and the Debtor's Representatives' initial opposition to the Finance Committee's motion is not relevant here – particularly since the broad relief sought in the Motion to Stay (halting all Second Priority Payments to eligible claimants) cannot be provided. The fact that Dow Corning and the Debtor's Representatives did not take a position on the Motion to Stay in the district court is similarly irrelevant to their unequivocal right to be heard on matters involving the Plan. In this appeal, Dow Corning and the Debtor's Representatives address the *current* circumstances: as the brief makes clear, the matter is moot because the vast majority of the Second Priority Payments have already been paid. Brief of Appellees Dow Silicones Corporation and the Debtor's Representatives, Doc. No. 27, at 10.

Dow Corning, as the Reorganized Debtor, has an undeniable interest in assuring that the Plan is implemented according to its terms so that it can protect its expectations and financial interests. The assets used to pay claims, and the costs of administration, are paid by the Settlement Fund,⁴ which was created by the Plan and is funded on an ongoing basis solely by the Reorganized Debtor. Any action or dispute – such as the present appeal – that will result in prolonging the operations of the Settlement Facility or delaying its termination will impose additional expenses on the Reorganized Debtor. Dow Corning’s and the Debtor’s Representatives’ ability to protect their interests will be impaired if they are “eliminated” from this appeal.

B. The Korean Claimants’ Motion Amounts To A Motion To Strike Which Is Unwarranted And Should be Denied.

The Korean Claimant’s Motion to Eliminate effectively seeks to strike Respondents’ Appellee Brief from the docket. Such an action is unwarranted. There is no specific appellate rule addressing a motion to “strike” a pleading. Fed. R. Civ. P. 12(f), while not specifically applicable, provides helpful guidance indicating that motions to strike are permissible only where the pleading is inappropriate or

⁴ The Settlement Fund is a limited fund established under the terms of the Plan and Plan Documents. The assets of the Settlement Fund are sourced from Dow Corning under the terms of the Funding Payment Agreement, which is a Plan Document. *See* SFA § 3.01; RE 1595-3, Page ID # 27993; FPA, § 2.01, RE 1592-12, Page ID # 27755; Plan at § 1.131, RE 1595-2, Page ID # 27906.

irrelevant. There is nothing inappropriate or irrelevant in Respondents' Appellee brief. “[I]t is well established that the action of striking a pleading should be sparingly used by the courts” and “[t]hus a ‘motion to strike should be granted only when the pleading to be stricken [sic] has no possible relation to the controversy.’” *Parlak v. U.S. Immigr. & Customs Enft*, No. 05-2003, 2006 WL 3634385, at *1 (6th Cir. Apr. 27, 2006) (quoting *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir.1953)).

The Respondents' brief is pertinent and appropriate, and it sets forth the position of the entities that have the unequivocal right to be heard with respect to issues involving the interpretation of the Plan. There is no basis to consider removing the Respondents' Appellee brief under any standard.

CONCLUSION

The Respondents respectfully request that the Court deny the Motion to Eliminate.

Dated: November 21, 2022

Respectfully submitted,

/s/ Deborah E. Greenspan

Deborah E. Greenspan

BLANK ROME LLP

1825 Eye Street, N.W.

Washington, DC 20006

Telephone: (202) 420-2200

Facsimile: (202) 420-2201

Deborah.Greenspan@blankrome.com

Debtor's Representatives and

Attorneys for Dow Corning

Corporation

STATEMENT OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). According to the word processing program used to prepare this response (Microsoft Word) and excluding the parts of this brief exempted by Fed. R. App. P. 32(f), this response contains 2,457 words.

Dated: November 21, 2022

/s/ Deborah E. Greenspan

Deborah E. Greenspan

BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com

*Debtor's Representative and
Attorney for Dow Silicones Corporation*

CERTIFICATE OF SERVICE

I certify that on November 21, 2022, I electronically filed a copy of the foregoing Response of Appellees the Debtor's Representatives, Dow Silicones Corporation, Finance Committee and Claimants' Advisory Committee through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case, as follows:

Karima Maloney
Eugene Zilberman
Smyser, Kaplan & Veselka
717 Texas Avenue, Suite 2800
Houston, TX 77002
Counsel for the Finance Committee

Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of the Americas
New York, NY 10036

Ernest H. Hornsby
FarmerPrice
100 Adris Place
Dothan, AL 36302

Dianna Pendleton-Dominguez
401 N. Main Street
St. Marys, OH 45885
Counsel for the Claimants' Advisory Committee

Yeon-Ho Kim
Yeon-Ho Kim Int'l Law Office
159 Samsung-dong, Kangnam-ku
Suite 4105 World Trade Center Building
Seoul, 00125-0729, South Korea
Counsel for the Korean Claimants

Dated: November 21, 2022

/s/ Deborah E. Greenspan

Deborah E. Greenspan

BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
deborah.greenspan@blankrome.com

*Debtor's Representative and
Attorney for Dow Silicones Corporation*