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

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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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STATEMENT OF CORPORATE
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Pursuant to 6th Cir. R. 26.1, Finance Committee makes the following disclosure:

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

   No.

4. 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 and Finance Committee do not believe that oral argument is necessary to resolve this appeal, but do not object to the Korean Claimants' request for argument.

INTRODUCTION

This appeal is but the latest in a seemingly unending stream of baseless filings by counsel for Korean Claimants in the Dow Corning[1] settlement aimed at disrupting or delaying the final stages of the settlement process. The separate appeal of the District Court's underlying order approving final Premium Payments for thousands of settling breast implant claimants (*including Korean Claimants*) is fully briefed and awaiting argument or decision. That appeal is moot because the challenged payments have all been made. *A fortiori*, this appeal, challenging the District Court's refusal to stay its Premiums order pending appeal, is moot as well. It is also meritless and, frankly, an unfortunate waste of this Court's time and the parties' resources.

The briefing in the related merits appeal (Case No. 21-2665) sets forth in detail why the District Court did not abuse its discretion in authorizing the long-delayed final Premium Payments due on previously approved breast implant disease and rupture claims. That pending appeal is the third time this Court has been asked to review the District Court's decision that sufficient funds were available in the Settlement Facility – Dow Corning Trust ("SF-DCT") to issue Premium Payments. The difference this time is that, when the District Court ruled

[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.

last year, the settlement program was already over and all uncertainty over funding adequacy had been eliminated. Even Dow, which has continually opposed approval of Premiums, eventually dropped its initial objection to issuing the remaining 50% installment on Premium Payments. These appeals are thus prosecuted only by claimants represented by Mr. Yeon-Ho Kim (the "Korean Claimants"), who harbor a host of alleged beefs with the SF-DCT having nothing to do with the only issue that ever *was* relevant to approval of Premiums: funding adequacy.

The Dow Corning reorganization plan (the "Plan") promised breast implant claimants more than 20 years ago that, if sufficient funding existed, the SF-DCT would issue Premium Payments (or "Premiums") to all settling claimants with approved and paid disease and rupture claims. Sections 7.01 and 7.03 of the Settlement Facility Agreement ("SFA") charge the Finance Committee ("FC") to assist the District Court in determining sufficiency of funding by making recommendations based on projections prepared by the Independent Assessor ("IA") derived from its analysis of past claim approval and payment history. These provisions have been implemented conservatively over the years:

- In 2013, upon concluding that adequate funding existed to cover all future First Priority Payments as well as at least 50% of accrued and

future Premium Payments, the District Court authorized 50% Premiums, and the majority of those claims were paid.

- This Court reversed in 2015, clarifying a higher "virtual guarantee" standard of funding certainty to be applied on remand. *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473 (6th Cir 2015).
- In 2018, the District Court determined that the heightened standard had been met and authorized completion of 50% Premiums and 50% of other Second Priority Payments ("SPPs"); this Court affirmed; and as a result, 50% Premiums were then paid on an ongoing basis.

The sixteen-year settlement program ended in June 2019, and the SF-DCT stopped taking new claims – eliminating the only uncertainty that had provided a colorable basis to question funding adequacy: the possibility of an unexpected crush of valid claims at the filing deadline. After analyzing 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.

The Korean Claimants timely appealed the June 24 Order (RE 1608, Page ID # 28633) and moved for a stay pending appeal (RE 1610, Page ID # 28637). The District Court did not immediately rule on the stay motion, and the Korean Claimants took no further action to seek a stay in this Court even as payments of full Premiums commenced. The District Court denied the stay motion on August 12, 2022 (RE 1651, Page ID # 29348), by which time, as the Korean Claimants correctly observe, the SF-DCT had finished processing and issuing substantially all Premium Payments (Brief of Appellant Korean Claimants ("App. Br.") at 5 n.2).

This appeal should be denied or dismissed, in the first instance, because the central underlying issue – the authorization of Premium Payments – is moot. The payments the Korean Claimants sought to stay have already been made, and there is no suggestion that those payments should or even could be clawed back. There is therefore nothing for this Court to address and no meaningful relief that could be fashioned.[2]

[2] The June 24 Order also disposed of certain motions brought by the Korean Claimants, raising issues that are either moot or have been addressed in other pending appeals. However, on this appeal, the Korean Claimants appear to argue only with the failure to stay the approval of Premiums. To the extent this appeal is viewed as addressing a stay pending appeal of the denial of the Korean Claimants' motions, the CAC and FC adopt the arguments regarding those motions contained in Dow's brief in this appeal.

In any event, the Korean Claimants failed to satisfy the familiar four-part test to justify a stay pending appeal.

First, the Korean Claimants did not establish even serious issues on the merits, much less a likelihood of success on the appeal in Case No. 21-2665. At the outset, the Korean Claimants lacked standing to oppose the approval of Premium Payments – both under the Plan documents and because they were not injured by that decision. And at the time of the June 24 Order, the adequacy of funding to pay all pending claims with a massive leftover cushion could 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 had been denied and were on appeal, as well as other categories of claims unlikely to be paid. This exercise still yielded a surplus – and thus, an *understated* margin of error – of more than $172 million. When the District Court ruled, it was not just unlikely but truly *impossible* for funding to fall short. And of course, we now know that it did not.

Against this backdrop, the Korean Claimants' conclusory assertion that the IA's projection was "not reliable" (App. Br. at 17) carries zero weight. The Korean Claimants argue that 400 of their own claims had 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 did 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 asserted below that all relevant claims *had* been counted and that plenty of funds existed to pay all claims.

The Korean Claimants' only other merits 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.

Second, the Korean Claimants failed to establish that they faced irreparable harm – or *any* harm – pending appeal. In the end, they were not injured by the payment of Premiums, and several of them in fact *received* such payments.

Third, the Korean Claimants failed to gainsay the obvious harm that would have been inflicted on other claimants, and to the SF-DCT's process of winding down the settlement, had a stay been issued.

And finally, the Korean Claimants failed to articulate how inflicting such harm on thousands of other claimants and delaying completion of the

settlement program – while bestowing no benefit on themselves – could possibly have been in the public interest.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the appeal of the denial of a stay of the order approving final Premium Payments is moot because the payments that the Korean Claimants sought to enjoin have all been made.

2. Whether the District Court abused its discretion in denying a stay pending appeal when the Korean Claimants failed to establish any of the relevant factors that could justify a stay.

STATEMENT OF THE CASE AND FACTS

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 votes for the Plan in 1998, tort claimants were promised 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.[3] Section 7.03(a) of the 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.

[3] 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.

The SFA requires that the recommendation and motion be served on the CAC; Dow, its then-shareholders, and the designed 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.

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 2019 final 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 Underlying Merits 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.

C. Proceedings on the Motion for a Stay Pending Appeal

The Korean Claimants moved on July 20, 2021 for a stay pending appeal of the June 24 Order. Motion to Stay, RE 1610, Page ID # 28637. The CAC and the FC filed responses opposing the stay motion. Response of Claimants' Advisory Committee, RE 1614, Page ID # 28699; Response of Finance Committee, RE 1613, Page ID # 28679. The District Court denied the motion on August 12, 2022. RE 1651, Page ID # 28348.

SUMMARY OF ARGUMENT

This appeal challenging denial of a stay pending appeal of the June 24 Order approving Premium Payments is moot, because substantially all of the challenged payments have been issued and no party has suggested that such payments can be clawed back. There is therefore no remaining controversy that this Court could address with meaningful relief. The Korean Claimants were aware that the claims were being paid – indeed, some of the Korean Claimants *received Premiums* – but took no action to seek a stay in this Court in the face of the District Court's inaction on the stay motion.

Even if the merits of this appeal were to be reached, the Korean Claimants fail to establish that the District Court abused its discretion in denying a stay. The Korean Claimants did not establish a likelihood of success on the merits, because (1) they lacked standing to challenge the Premiums decision; (2) the record before the District Court overwhelmingly established the adequacy of funding; and (3) the District Court correctly rejected the argument that the FC was not authorized to act through a majority of two members as flatly contradicted by the Plan documents and in any event moot. The Korean Claimants did not establish that they would suffer any prejudice from the issuance of Premiums pending appeal; had no answer for the obvious injury that a stay would have inflicted on other claimants and the SF-DCT itself; and did not establish that a stay

of thousands of long-delayed payments for which there was indisputably plenty of funding available could conceivably have been in the public interest.

STANDARD OF REVIEW

The District Court's denial of a stay pending appeal is evaluated under an abuse of discretion standard. *See Welch v. Brown*, 551 F. App'x 804, 808 (6th Cir. 2014); *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) ("[The] decision is generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.").

ARGUMENT

I. THE KOREAN CLAIMANTS' APPEAL OF THE DENIAL OF A STAY PENDING APPEAL OF THE APPROVAL OF FINAL PREMIUM PAYMENTS IS MOOT BECAUSE THE CHALLENGED PAYMENTS HAVE ALREADY BEEN MADE

The Korean Claimants' appeal of the denial of a stay pending appeal is moot because the action they sought to prevent – the issuance of SPPs, including Premiums – has already occurred. The Settlement Facility has processed and paid substantially all claims, and the Korean Claimants do not suggest that such payments should or, in practicality, even *could* be clawed back. There is therefore nothing meaningful left for the Court to do here – no stay or other relief that could

be fashioned that could provide a meaningful remedy, even assuming the Korean Claimants could establish that the stay was improperly denied.

This Court has recognized in analogous circumstances that the appeal of the denial of a motion to stay execution of a judgment pending appeal is moot when the judgment has already been executed and paid: "Just as we cannot enjoin a levy that already has been satisfied . . . we cannot stay the execution of a judgment that already has been executed." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 376 (6th Cir. 2007). A key factor in *GenCorp* was the absence of any showing that granting the stay would "dislodge" the funds already paid out, rendering the potential reversal of the denial of the stay "a futile exercise of [the Court's] equitable powers." *Id.* at 376; *see also M & C Corp. v. Erwin Behr GmbH & Co., KG*, 935 F. Supp. 910, 912 (E.D. Mich. 1996) (denying, as moot, part of motion to stay pending appeal of partial judgment that was already satisfied by party seeking stay). Here, similarly, there would be no point to reversing the denial of the stay, even if such a result were warranted, because the claims have been paid and it is impossible to undo those payments.

The Korean Claimants' invocation of equity in their favor is not enhanced by their inaction over the last year as the Settlement Facility paid out thousands of claims with no stay in place. While the Korean Claimants properly first sought a stay from the District Court, once it became clear that the court was

permitting claims to be paid without granting a stay, the Korean Claimants could have – and, if they still cared about obtaining a stay, *should* have – sought a stay in this Court. *See* Fed. R. App. P. 8(a) (2) (motion for stay may be made to court of appeals when district court has "denied the motion or *failed to afford the relief requested*") (emphasis added); *see also Tiger Lily, LLC v. U.S. Dep't of Housing and Urban Dev.*, 992 F.3d 518, 521 n.2 (6th Cir. 2021) (construing district court's decision not to order more expedited response to motion to stay, and not ruling on motion, as denial of requested relief). Instead, the Korean Claimants waited for more than a year, while thousands of claims were paid, and took no further action until the District Court formally denied a motion that it had already obviously chosen not to grant – by which point it was too late to fashion any meaningful relief. Having taken no steps to prevent mootness, the Korean Claimants provide no good reason for this Court to engage in a "futile exercise of [its] equitable powers." *See GenCorp, Inc.*, 477 F.3d at 376.

II. THE KOREAN CLAIMANTS FAILED TO ESTABLISH ANY OF THE FACTORS SUPPORTING A STAY PENDING APPEAL OF THE ORDER APPROVING FINAL PREMIUM PAYMENTS

Even if this appeal were not moot, it would fail on the merits. To obtain a stay pending appeal under Fed. R. App. P. 8(a),[4] movants must carry the

[4] The factors regulating the issuance of a stay by a court of appeals under Fed. R. App. P. 8(a) are the same as those that apply in the District Court pursuant to Fed. R. Civ. P. 62(c). *See generally Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

burden of demonstrating that four "interrelated considerations" balance in their favor: (1) their likelihood of success on appeal; (2) the likelihood that they will suffer irreparable harm absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest. *See Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (citing *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). The decision whether to grant a stay is entrusted to the District Court's sound discretion. *See Green Party of Tenn. v. Hargett*, 493 F. App'x 686, 689 (6th Cir. 2012) ("The issuance of a stay pending appeal 'is not a matter of right,' but 'an exercise of judicial discretion.'") (quoting *Nken v. Holder*, 556 U.S. 418, 433 (2009)).

Though the factors governing a stay pending appeal are the same as those considered on an application for a preliminary injunction, *see Griepentrog*, 945 F.2d at 153, those seeking a stay must meet a "higher burden" because their motion has been made "after significant factual development and after the court has fully considered the merits." *United States v. Omega Solutions, LLC,* 889 F. Supp. 2d 945, 948 (E.D. Mich. 2012); *see also Bailey v. Callaghan*, No. 12-CV-11504, 2012 WL 3134338, at *1 (E.D. Mich. Aug. 1, 2012) (Hood, J.). Accordingly, this Court has instructed that a party seeking a stay pending appeal must demonstrate "a likelihood of reversal." *Bailey*, 2012 WL 3134338, at *1

(quoting *Griepentrog*, 945 F.2d at 153). The Korean Claimants established none of the requisite factors.

A. The Korean Claimants Did Not Establish a Likelihood of Success

Most fundamentally, the Korean Claimants did not and still cannot make any serious attempt to show a likelihood of success in establishing 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 party then still seeking to delay payment of 100% Premiums two years after the end of the Dow Corning settlement program, the Korean Claimants lacked standing and offered 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 was "unreliable" (App. Br. at 17) 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 15).

1. The Korean Claimants Lacked Standing to Oppose the Recommendation to Approve Premium Payments

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. For this reason alone, the Korean Claimants failed to establish a likelihood of success on appeal.

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. *See* above at 9. 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 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).

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. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (describing elements of Article III standing). 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, but the Korean Claimants failed to present any evidence that this was possible, and the record before the District Court overwhelmingly foreclosed that possibility. This injury was thus too ephemeral to convey standing. *See Lujan*, 504 U.S. at 560 (harm must be "actual or imminent, not 'conjectural' or 'hypothetical'") (citation omitted).

In short, the Korean Claimants had no standing to oppose the FC's motion below, and as a result have no basis to contest the granting of the motion on appeal and thus no likelihood of success. *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.").

2. The Korean Claimants Failed 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 was and is wholly unsubstantiated.

As discussed above (at 11-12), 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 – was eliminated when that deadline passed. It was thus no longer necessary for the IA to project the rate of future claim filing; all claims that could possibly be paid were already 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 each claim in 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 highly 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 the fixed Class 16 Payments to Dow Chemical, this would have left a funding surplus of more than $172 million. FC Recommendation, RE 1566, Page ID # 25949. In fact, the cushion was 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 continued to increase 7% per year until drawn in subsequent years. *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 did not seriously challenge this conclusion. Indeed, in seeking the stay, 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 have tried to walk back this admission and raise questions about the IA's analysis by arguing that its report "did not include full potential claims pending [in] the Settlement Facility" because the IA did not include 400 claims that are subject to the Korean Claimants' motion to extend the June 2019 deadline. App. Br. at 17. 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

400 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 the assertions that the FC is biased against the Korean Claimants and has acted to frustrate payment of their settlements (in part seeking to relitigate issues already rejected by this Court, *see Korean Claimants,* 813 Fed. App'x at 217-19), and that the CAC breached its fiduciary duty as "agent in fact" for the Korean Claimants in declining to oppose the approval of Premiums. App. Br. at 17-19.[5] None of these issues establishes any reason to question the District Court's recognition of the obvious fact that sufficient funds existed to approve full SPPs. The Korean

[5] The latter 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. *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). 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.

Claimants thus failed in seeking a stay, and still fail even considering all of their arguments on appeal, to demonstrate that the District Court clearly erred in finding that adequate funding was virtually guaranteed.

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

The Korean Claimants further argue that they demonstrated a likelihood of 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, was in any event moot when the June 24 Order was issued.

The FC, which oversees the financial operation of the SF-DCT, is composed 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 15. 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.3d 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 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. 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 recognized 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.[6] No other party has advanced the extreme suggestion that the mechanisms 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

[6] Dow suggested that the FC Recommendation was procedurally flawed because one of the remaining members was supposedly less than fully engaged, but failed to submit any evidence to substantiate this vague assertion. Dow Objection, RE 1581, Page ID # 26554. As noted above, Dow is no longer appealing from the June 24 Order's approval of SPPs.

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.

B. The Korean Claimants Did Not Establish That They Would Have Been Irreparably Harmed Pending Appeal Absent a Stay

To evaluate whether a party will suffer irreparable harm in the absence of a stay, this Court has pointed to three factors: "1) the substantiality of the injury alleged; 2) the likelihood of its occurrence; and 3) the adequacy of the proof provided." *Griepentrog*, 945 F.2d at 154 (citation omitted). The Korean Claimants failed to meet the requisite standard as to any of those factors.[7]

The Korean Claimants articulated no harm that could flow to them from the denial of a stay. Instead, they complained about the treatment of their individual claims by the SF-DCT and FC, which they suggested, without elaboration or substantiation, "have been working for the Class 5 [domestic]

[7] Appellants failed at the outset to offer "specific facts and affidavits supporting assertions that these factors exist." *Griepentrog*, 945 F.2d at 154. Rather, their factual showing below in support of a stay was utterly conclusory. The complete lack of detail and substantiation itself required denial of the stay motion.

Claimants" – such that the Korean Claimants are "likely to be ignored and disregarded" if Premiums are paid pending appeal. Motion to Stay, RE 1610, Page ID # 28638. The Korean Claimants' allegation that the SF-DCT "cut off any possibility" of Premiums for them (*id.*) was incorrect; in fact, many Korean Claimants at that point *had* been approved for their first 50 percent payments and were ready to be paid, but their counsel refused to provide the Settlement Facility with confirmation of his clients' current addresses, which was required of *all* claimants, not just the Korean Claimants. In any event, the Korean Claimants did not explain how paying valid Class 5 claims affected them or made it less likely that their own claims would be approved. They thus did not coherently allege *any* harm, much less irreparable harm.

On appeal, the Korean Claimants repeat the baseless assertion that the District Court's denial, also in the June 24 Order, of the Korean Claimant Motions "cut off any possibility" that the Korean Claimants could receive even First Priority Payments. *Id.* As explained more fully in Dow's brief, the District Court did no such thing – it simply ruled that the Korean Claimants had to satisfy the same procedural requirements as all other claimants, including to provide the SF-DCT with updated address information. Korean Claimants who followed these procedures and otherwise qualified for payments in fact received *both* First *and* Second Priority Payments.

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

In contrast to the speculative or nonexistent injuries to Appellants, claimants would have been immediately and irreparably harmed by the granting of a stay. As the Court is aware, claimants had already been waiting for years to receive Premium Payments. Many of these claimants depended on their settlement recoveries (including Premiums they had already earned) to meet basic living expenses or pay medical bills; others died waiting. The real-life consequences of delay that claimants would have endured from a stay far outweighed Appellants' imaginary harm discussed above.

Appellants argued that other claimants would not have been seriously harmed by the delay because there was plenty of money to pay all claims and the SF-DCT was scheduled to complete payments by 2022. Motion to Stay, RE 1610, Page ID #28639. But the adequacy of funding only underscored the *lack* of prejudice to the Korean Claimants, who would have and did receive whatever payments they were entitled to based on their individual claim documentation and the outcome of other motions and appeals having nothing to do with the decision on SPPs. But had a stay been granted pending resolution of the appeal, *all* claimants would still be waiting for their final payments.

Even a few months delay would have inflicted irreparable harm on many claimants. Those who had already verified their addresses with the SF-DCT

– a prerequisite to receiving Premiums – were poised to receive payments immediately, but if those payments were stayed, their verifications might have expired and needed to be renewed. Claimants would continue to die waiting for their full relief, while others might have moved, failed to re-verify their addresses, and never received payment. Even claimants who lived to receive their full settlements would have been harmed irrevocably by delay because the settlement provides claimants no interest or cost-of-living adjustments.

Courts in other mass tort cases have recognized this reality in stressing the importance of timely implementation of settlements. For example, in *Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001), the court denied defendant's stay request, noting the consequences of deferring benefits owed to injured plaintiffs. *See id.* at 441 ("What is certain is that delay where plaintiffs have mesothelioma, asbestosis, or pleural disease, or where decedents' survivors await compensation for support substantially harms those parties."); *see also W.R. Grace & Co. v. Libby Claimants (In re W.R. Grace & Co.)*, No. 01-1139, 2008 WL 5978951, at *8 (D. Del. Oct. 28, 2008) ("The fact that claimants have been dying for some time in no way undermines the very real harm they continue to suffer. In the case of [these] Claimants, justice deferred may well be justice denied."), *aff'd*, 591 F.3d 164 (3d Cir. 2009).

On appeal, the Korean Claimants strangely appear to argue that there was no harm to other claimants because, in the absence of a stay, they have all been paid during pendency of the appeal. App. Br. at 21-22. But that only occurred because the stay was *not granted* and hardly establishes that *staying* all of those payments would not have harmed claimants.

D. The Public Interest Disfavored a Stay

Finally, the public interest argued strongly to defeat a stay. The Korean Claimants advocated only for themselves and did not identify any way in which paying legitimate claims of other claimants out of the ample remaining funds would have prevented them from receiving whatever payments *they* might have been entitled to under the terms of the Dow Corning settlement. 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.

On appeal, the Korean Claimants merely repeat their conclusory assertion that they have not been treated fairly and equally under the Plan. App. Br. at 22-23. As explained in Dow's brief – and in the briefs responding to the

Korean Claimants' myriad other motions and appeals – that assertion is unsubstantiated and indeed false. The Korean Claimants' dissatisfaction with the outcome of their complaints does not create a public interest in delaying the payment of claims to others.

CONCLUSION

For the reasons stated above and in Dow's brief, the District Court's order denying a stay pending appeal of the June 24 Order should be affirmed.

Dated: November 9, 2022

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 8,037 words.

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CERTIFICATE OF SERVICE

I certify that on November 9, 2022, I electronically filed a copy of the foregoing Brief of Appellees Claimants' Advisory Committee and Finance 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
1613	08/03/2021	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	28679-28689

Record Entry	Filing Date	Description	Page ID
1614	08/03/2021	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	28699-28714
1651	08/12/2022	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	29345-29348