Case No. 21-2665

United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

KOREAN CLAIMANTS,
Interested Parties – Appellants,

v.

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE; DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVE
Defendants – Appellees.

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

BRIEF OF APPELLEE FINANCE COMMITTEE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-2665 Case Name: In re: Settlement Facility Dow Corning r

Name of counsel: Karima G. Maloney and Sydney A. Scott

Pursuant to 6th Cir. R. 26.1, Finance Committee
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.

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:

No.

CERTIFICATE OF SERVICE

I certify that on October 12, 2021 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/ Karima G. Maloney
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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.

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STATEMENT REGARDING ORAL ARGUMENT

The Finance Committee believes that oral argument is not needed. This appeal presents straightforward issues, many of which the Court has already addressed in previous appeals, that are neither factually nor legally complex. Therefore, oral argument would not significantly aid the Court's decisional process.

INTRODUCTION[1]

This appeal presents an issue that the Court has addressed twice before: Whether adequate funding exists to distribute Second Priority Payments to eligible claimants under the Dow Corning[2] Amended Joint Plan of Reorganization (the "Plan"). The Plan contemplates distributing these payments to settling breast implant claimants so long as the Settlement Facility Dow Corning Trust's ("Settlement Facility") available funds are adequate to make all First Priority Payments. This follows the familiar and fair concept that no one should receive seconds unless there is enough for everyone to receive firsts.

The Plan sets out a specific and detailed process for determining whether adequate funds exist to make Second Priority Payments. It starts with the Finance Committee—the group responsible for the Settlement Facility's financial management—filing a motion that recommends and

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[1] Unless otherwise noted, all internal quotation marks and citations have been omitted from and all emphasis has been added to cited material.

[2] Dow Corning Corporation changed its name to Dow Silicones Corporation effective February 1, 2018. The Finance Committee will refer to these entities as Dow.

seeks court approval to distribute Second Priority Payments. That motion is supported by a report from the Independent Assessor, a third-party selected by the relevant stakeholders and approved by the district court to assist the Finance Committee with making funding projections. The Finance Committee must serve the motion and report to the Claimants' Advisory Committee ("CAC"), which represents claimants' interests, the Debtor's Representative, which represents Dow's interests, the Shareholders, and Non-Settling Personal Injury Claimants. These are the specific groups that the Plan grants the right and opportunity to be heard on the motion. After holding a hearing, the district court must then decide whether adequate funding exists in the trust to virtually guarantee that all First Priority Claims will receive payments.

The Finance Committee sought approval to make partial Second Priority Payments on two occasions prior to this appeal. The district court granted both requests. This Court reversed the district court's first decision authorizing payments, concluding that the lower court should have applied the "virtual guarantee" standard instead of one calling only for "adequate

assurance." The result was different for the second appeal. The Court upheld the district court's second authorization, holding that the court properly applied the "virtual guarantee" standard and that its decision was supported by the Independent Assessor's conservative and reliable funding projections.

The district court now has approved Second Priority Payments for a third time. Circumstances have changed this time around. The "virtual guarantee" standard is well-established and this Court has confirmed the district court's proper application of that standard; the claims filing deadline has come and gone, meaning that previous uncertainty about the amount of available funding for future claims has been eliminated; and none of the stakeholders with the Plan-provided right to be heard on this issue have contested the district court's decision to authorize Second Priority Payments on appeal. Under these circumstances, a virtual-guarantee finding is even more warranted now than in previous challenges to the district court's decisions.

Nevertheless, Korean Claimants, a group of claimants who have elected to participate in the Plan's settlement program, opposed the Finance Committee's recommendation and seek to overturn the district court's June 24, 2021 order authorizing distribution of Second Priority Payments (the "Order").[3] They claim in conclusory fashion that the Independent Assessor's projection, which has proved conservative and correct over time, is somehow unreliable. Korean Claimants also claim that the Finance Committee's majority vote to make the recommendation is invalid because the Committee was comprised of two members instead of three at the time it voted due to the death of one of its members.

The Korean Claimants lack any foundation for mounting this opposition. For one thing, the Plan does not grant them the right to

[3] The district court's order also addressed two of the Korean Claimants' motions: the Motion for Premium Payments (RE 1545) and the Motion for Order Vacating Decision of the Settlement Facility Regarding Address Update/Confirmation (RE 1569). The district court properly denied those motions for the reasons Dow states in its Appellee Brief. The Finance Committee joins Dow's Appellee Brief pursuant to Federal Rule of Appellate Procedure 28(i).

challenge the Finance Committee's recommendation. The Plan provides that right—the "opportunity to be heard"—to four specifically named parties. The Korean Claimants, as settling claimants, are excluded from that list. Even if the Korean Claimants could oppose the recommendation, their challenges are without merit.

The Korean Claimants' claim that the Independent Assessor's projection is unreliable is belied by the record and Korean Claimants' admission—based on the Independent Assessor's analysis—that the Settlement Facility has more than enough funds to distribute Second Priority Payments. Moreover, this Court has previously concluded that the Independent Assessor's projections were reliable at a time when the possibility existed for a surge of newly filed claims to consume any projected surplus. That conclusion should remain unchanged since all prior uncertainty concerning the potential number of filed claims was eliminated by the passage of the claims filing deadline over two years ago.

The Korean Claimants' challenge based on the Finance Committee's composition at the time of its recommendation vote also fails. The Finance

Committee's recommendation, based on a majority vote, was a valid act under the Plan's plain terms. And in any event, the district court's appointment of a third member to the Finance Committee mooted the Korean Claimants' composition complaint.

Finally, the Korean Claimants make unfounded claims of discrimination and bias, but nothing could be further from the truth. These baseless allegations—which have no bearing on whether the district court clearly erred by authorizing Second Priority Payments—are really complaints about the Settlement Facility fulfilling its core function to ensure that only eligible claimants receive payments under the Plan.

The district court did not err in authorizing the Finance Committee to make Second Priority Payments; therefore, its Order should be affirmed.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the Korean Claimants have standing under the Plan to bring this appeal when the Plan does not provide Settling Personal Injury Claimants, like Korean Claimants, with the right to challenge the Finance Committee's recommendation to make Second Priority Payments.

2. Whether the district court clearly erred in relying on the Independent Assessor's overinclusive and conservative analysis concluding that a $172.6 million surplus would remain if both First and Second Priority Payments were made.

3. Whether the Finance Committee's two-person majority vote to recommend distributing Second Priority Payments was valid when the Plan expressly authorizes the Finance Committee to act by majority vote.

4. Whether the Settlement Facility's evaluation and processing of the Korean Claims in accordance with the Plan's exclusive eligibility criteria and the district court's orders constituted discrimination.

STATEMENT OF THE CASE

A. Background

This Court has discussed the history of Dow's bankruptcy proceedings and Plan on multiple occasions. *See, e.g., In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 475–76 (6th Cir. 2015); *Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 628 F.3d 769, 771 (6th Cir. 2010); *In re Dow Corning Corp.*, 456 F.3d 668, 671–73 (6th Cir. 2006); *In re Dow Corning Corp.*, 86 F.3d 482, 485–87 (6th Cir. 1996). It

has also twice addressed the Settlement Facility's extensive history resolving claims pursued by Korean Claimants' counsel, Mr. Yeon Ho-Kim. *In re Settlement Facility Dow Corning Trust*, 760 F. App'x 406 (6th Cir. 2019); *Korean Claimants v. Claimants' Advisory Committee et al.*, 813 F. App'x 211 (6th Cir. 2020). Thus, the Finance Committee describes only the facts relevant to the instant appeal.

B. Dow's Amended Joint Plan of Reorganization

This appeal involves the settlement trust that Dow set up in connection with its bankruptcy plan to resolve silicone breast implant claims. On May 15, 1995, Dow filed a petition for reorganization under Chapter 11, and the Plan became effective on June 1, 2004. The Settlement Facility and Fund Distribution Agreement ("SFA"), Annex A (together with the SFA, the "Claims Resolution Procedures"), and other Plan documents also became effective on that date.[4]

[4] All citations to the Plan, SFA, and Annex A to the SFA (collectively referred to herein as the "Plan") refer to Exhibits A–B to *Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments*, RE 1566, Page ID # 25958–26233. Citations to the Plan Documents will include only a citation to the relevant section and Page ID number. All

Under the Plan, holders of breast implant claims may either litigate their claims with the $400 million Litigation Facility or settle their claims with the $1.95 billion Settlement Facility. The Settlement Facility is responsible for resolving the claims of those, like the Korean Claimants, who elect the Plan's settlement option. SFA § 2.01, Page ID # 25964. The Settlement Facility is obligated to resolve all claims according to the Plan's detailed and exclusive criteria for determining and paying eligible claims. SFA § 5.01(a), Page ID # 25978.

The Finance Committee is responsible for the Settlement Facility's financial management. Plan § 1.67, Page ID # 26145. It has three members—the Claims Administrator, the Special Master, and the Appeals Judge—who are authorized to take actions consistent with the Plan by a two-member majority vote. SFA § 4.08, Page ID # 25973–75. Relevant here, the Finance Committee is charged with making recommendations to the district court

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capitalized terms, unless otherwise defined herein, maintain the meanings assigned in the Plan.

concerning the release of funds to pay claims that the Settlement Facility resolves, including the Second Priority Payments at issue in this appeal. *Id.*

C. Plan Provisions Related to First and Second Priority Payments

Claimants who elect settlement may seek and receive compensation for up to three payment options, referred to as First Priority Payments, or base payments: (i) an explant payment to offset costs incurred to remove a breast implant; (ii) a rupture payment to compensate claimants whose implant ruptured while implanted; and (iii) either a disease payment to compensate claimants who suffer from a qualifying disease or an expedited release payment to compensate claimants who choose to forego a disease payment and release any qualifying disease claim. SFA § 6.01(a), Page ID # 25982.

Second Priority Payments are also broken out into three categories: (i) Premium Payments for certain breast implant and rupture claims; (ii) payments for increased severity of disease or disability for claimants whose conditions worsen after receiving a base payment; and (iii) Class 16

payments reimbursed to Dow Chemical for settlement amounts paid prior to the Plan going into effect. SFA § 7.01(a)(iii), Page ID # 25985.

The SFA sets the priority of payment for claims. First Priority Payments (higher priority payments) must be distributed as soon as "reasonably practicable" following the approval of a claim. SFA § 7.01(c)(ii), Page ID # 25986. Second Priority Payments (lower priority payments), cannot be made unless the Court determines that "all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility Agreement, have either been paid or adequate provision has been made to assure such payment." SFA § 7.01(c)(iv), Page ID # 25986.

The Finance Committee is not precluded from seeking approval to make Second Priority Payments prior to completing all First Priority Payments if the ability to make First Priority Payments is reasonably assured. SFA § 7.01(c)(v), Page ID # 25986. As discussed below, this Court has interpreted the SFA to authorize early payment of Second Priority Payments so long as all First Priority Payments are "virtually guaranteed."

See In re Settlement Facility Dow Corning Tr., 592 F. App'x 473, 478–80 (6th Cir. 2015).

The SFA also outlines the procedure for seeking authorization to make Second Priority Payments. *See* SFA § 7.03, Page ID # 25990. The Finance Committee initiates the process by filing a recommendation and motion with the Court. *Id.* The recommendation and motion must be accompanied by "a detailed accounting of the status of Claims payments and distributions under the terms of the Settlement and Litigation Facilities, including a detailed accounting of pending Claims and projections and analysis of the cost of resolution of such pending Claims as described in Section 7.01(d)." *Id.*

The Finance Committee is required to work with the Independent Assessor to make funding projections in connection with the motion and recommendation. SFA § 4.08(b)(ii), Page ID # 25973. The Independent Assessor is a third party that the Finance Committee, Dow, and the CAC select, subject to the district court's approval, "to oversee and make recommendations concerning the development of projected funding

requirements," including recommendations to make Second Priority Payments. SFA, § 4.05, Page ID # 25972. The Independent Assessor's projections must account for pending and projected future claims for First Priority Payments to determine the amount of funds required to pay such claims in full. *Id.* at § 7.01(d)(i), Page ID # 25986-87. Estimating the potential number of future claims used to complicate the Independent Assessor's analysis, but this complication was removed by the expiration of the claims filing deadline on June 3, 2019.

The Debtor's Representatives, which represents Dow's interests, the CAC, which represents claimants' interests, Stakeholders, and Non-Settling Personal Injury Claimants with pending claims must be served with a copy of the recommendation and motion and given the "opportunity to be heard." SFA, § 7.03(a), Page ID # 25990. The district court may authorize Second Priority Payments if, after a hearing, it "rules that all Allowed and allowable First Priority Claims 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.* at § 7.03, Page ID # 25990.

D. Prior Litigation Involving Authorization to Make Second Priority Payments

This is the third time that the Finance Committee has sought authorization to make Second Priority Payments. The Finance Committee first moved for authorization to make partial 50% payments on October 7, 2011. RE 814. At that time, the parties disputed what level of confidence was needed to adequately ensure that all First Priority Claims would receive payment. The Finance Committee and CAC interpreted the Plan to require "adequate assurance" of payment, while Dow argued that the Plan imposed a higher "virtual guarantee" standard. The district court rejected Dow's interpretation and held, based on the Independent Assessor's analysis, that there was more than "adequate assurance" for payment of First Priority Payments and partial Second Priority Payments. *In re Settlement Facility Dow Corning Tr.*, 2013 WL 6884990, at *10 (E.D. Mich. Dec. 31, 2013).

This Court reversed disagreeing with the district court's interpretation and holding that the Plan required a "virtual guarantee" that First Priority

Payments would be made before Second Priority Payments could be authorized. *See Dow Corning Tr.*, 592 F. App'x at 478–80. The Court explained that "this standard does not require absolute certainty, [but] it is nonetheless stricter than the strong likelihood or more probable than not levels of confidence that describe adequate assurance." *Id.* at 480.

On December 30, 2016, the Finance Committee filed a new recommendation and motion to make partial 50% Second Priority Payments. RE 1279. By this time, there were over 70,000 claimants who could have filed claims eligible for First Priority Payments. *In re Settlement Facility Dow Corning Tr.*, 2017 WL 7520575, at *10 (E.D. Mich. Dec. 27, 2017). The Independent Assessor therefore had to estimate future liability for unfiled claims based on extrapolations from historical claims data. *Id.* at *9. Dow challenged the Independent Assessor's estimates on multiple fronts, including that they were "fraught with uncertainty" given the sizeable number of unfiled claims. *Id*. at *7.

After a careful analysis, the district court again granted the Finance Committee's motion, but this time under the "virtual guarantee" standard.

Id. at *9. The court relied heavily on the Independent Assessor's conservative analysis, which concluded that there would be a surplus of $100.4 million (in net present value) even if First and Second Priority Payments were made. *Id.* The district court concluded that despite some degree of uncertainty in the projections:

> The Independent Assessor has utilized conventional statistical and actuarial techniques to estimate the number, dollar amount and timing of these liabilities in assessing the overall solvency of the Trust. It relies heavily on the Trust's historical experience to determine many of the components of this analysis . . . and has scrutinized the supporting data to ensure that the information critical to this analysis is consistent and reliable.

Id. The district court further observed that the "Independent Assessor's methodology has been proven to be correct and more conservative throughout the years." *Id.*

This Court affirmed on appeal. *In re Settlement Facility Dow Corning Tr.*, 754 F. App'x 409, 417 (6th Cir. 2018). In so doing, the Court emphasized the heightened deference afforded the district court's findings of fact,

including the reliability of the Independent Assessor's analysis supporting payment of Second Priority Payments. *Id.* at 415.

E. The Finance Committee's Motion for Authorization

On January 14, 2021, the Finance Committee filed its Recommendation and Motion for Authorization to Make Second Priority Payments ("Motion for Authorization"), requesting that the district court authorize distribution of Second Priority Payments to eligible claimants consisting of: (1) premium payments to Classes 5, 6.1, 6.2 for Breast Implant Disease and Rupture Payment Option Claims; (2) increased severity of disease or disability to Classes 5, 6.1, 6.2 under the Breast Implant Disease Payment Option; and (3) the remaining 50% payment to Class 16 Claimants. RE 1566.

The motion was again supported by the Independent Assessor's Report.[5] This time, virtually all uncertainty was eliminated because the last

[5] Analysis Research Planning Corporation was the Independent Assessor in prior rounds of litigation. Upon ARPC's retirement, the Court, based on the parties recommendation, appointed the Claro Group as the Independent Assessor. RE 1553. The Claro Group prepared the Report supporting the present Motion for Authorization. Prior to its appointment, the Claro Group provided consulting services to the Settlement Facility for over eight years and served on the Closing Committee for two years. This prior experience

remaining filing deadline passed on June 3, 2019.[6] Therefore the Independent Assessor's analysis was not based on projections of future claims that had not been submitted, but rather on a fixed universe of claims in hand at the Settlement Facility. RE 1567, Exhibit C at 4, filed under seal.

Further bolstering the reliability of the Independent Assessor's analysis was the fact that it, along with the Finance Committee, Settlement Facility, CAC, Dow, and others, spent the better part of two years analyzing the Settlement Facility's claims data to provide a final and accurate accounting of all claims submitted for processing and payment. RE 1566, Exhibit C at 4, filed under seal. All members of the Finance Committee participated in this process until the Special Master, Mr. Francis McGovern, passed away in February 2020. RE 1590. The two remaining members continued to participate in the recommendation process.

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allowed the Claro Group to enhance its knowledge about the Settlement Facilities operations, including its claims processing database, and the Plan documents. RE 1567, Exhibit C at 4, filed under seal.

[6] June 3, 2019 was the deadline for filing disease and expedited release claims. The deadlines for rupture and explant claims expired on June 1, 2006, and June 2, 2014, respectively.

After an extensive analysis of the closed universe of claims eligible for First Priority Payments, the Independent Assessor projected that there would be a $172,595,097 surplus of funds (in nominal dollars) after making First *and* Second Priority Payments and paying estimated administrative expenditures through 2024. RE 1566, Page ID # 25949.

As in the past, the Independent Assessor based its analysis on conservative assumptions that overestimated potential liability for First Priority Payments. For example, it took an expansive view of the claims that could potentially be eligible for First Priority Payments and included claims that had any conceivable chance of receiving payments, such as claims under appeal, claims with incorrect addresses, deficient claims that have not received a Final Determination Letter, and claims with returned or stale checks. RE 1607, Page ID # 28611. The Independent Assessor also assumed that each claim would receive the maximum payment allowed under the Plan. *Id.* at Page ID # 28612. Historical data from over 15 years of claims processing established that a much smaller pool of claims would actually be

eligible for a First Priority Payment or receive maximum payments. *Id.* at Page ID # 28611; *see also* RE 1567, Exhibit C at 16, filed under seal.

After reviewing the Independent Assessor's Report, a two-member majority of the Finance Committee voted to recommend Second Priority Payments. RE 1566. The Finance Committee concluded that the Independent Assessor's conservative projection that a significant $172.6 million surplus would exist after paying First and Second Priority Payments satisfied the Plan's "virtual guaranteed" standard. *Id.* On February 11, 2021, shortly after the Finance Committee filed its Motion for Authorization, the district court appointed Judge Nancy M. Blount to serve as the new Special Master. RE 1590. No member of the Finance Committee has objected to the recommendation. RE 1607, Page ID # 28627.

Dow Silicones and the Korean Claimants opposed the Motion for Authorization.[7] The Korean Claimants opposed the Finance Committee's

[7] Dow challenged the Motion for Authorization and initially appealed the district court's Order. RE 1611. Dow later moved to voluntarily dismiss its appeal, which this Court granted. RE 1618.

recommendation by making many of the same unsubstantiated and conclusory complaints urged on appeal and by recounting a number of disputes unrelated to the Motion for Authorization, many of which have been finally resolved by this Court.[8]

The Korean Claimants filed two other motions related to this appeal. One motion sought an award of the 50% Premium Payment authorized under the district court ("Motion for Premium Payments") (RE 1545), and the other motion sought an order vacating the Settlement Facility's

[8] Korean Claimants continue to raise these unrelated disputes on appeal. For instance, Korean Claimants continue to claim that they were harmed by the Finance Committee's decisions (i) to place an administrative hold on claims that was later lifted; (ii) to re-categorize their claims to receive a higher payment category albeit later than Korean Claimants would have liked; and (iii) not to pay Korean Claimants' counsel a $5 million settlement under a draft memorandum of understanding because a global settlement was barred by the Plan's terms. Korean Claimants have unsuccessfully litigated these issues and they are now resolved. *See In re Settlement Facility Dow Corning Trust*, 760 F. App'x 406, 413 (6th Cir. Jan. 14, 2019) (affirming district court's decision to deny the Korean Claimant's "hold" motion and motion for re-categorization as moot or on the merits); *Korean Claimants v. Claimants' Advisory Committee*, 813 F. App'x 211, 220 (6th Cir. June 1, 2020) (affirming district court's denial of the Korean Claimants' mediation motion as barred by the Plan).

requirement that the Korean Claimants (like all other claimants) verify their addresses before receiving payment ("Motion to Vacate"). (RE 1569). Dow and the CAC filed joint responses to these motions (RE 1546, 1595). which the Finance Committee joined and responded. (RE 1547, 1596). The Korean Claimants filed a reply supporting the Motion to Vacate. RE 1599.[9]

F. The District Court's Order Granting the Motion for Authorization

On February 25, 2021, the district court held a hearing on the Finance Committee's Motion for Authorization and the Korean Claimants' Motion for Premium Payments. RE 1597. The Korean Claimants' counsel appeared on their behalf. *Id.* at Page ID # 28233–28240; 28267–28274.

On June 24, 2021, the district court granted the Finance Committee's Motion for Authorization. RE 1607. The court began its analysis with a thorough review of the Independent Assessor's report. Page ID # 28621. It observed that the Independent Assessor's analysis was based on a closed universe of claims thereby eliminating the prior uncertainty involved in

[9] As stated earlier, the Finance Committee joins in Dow's Appellee Brief responding to these two motions pursuant to Federal Rule of Appellate Procedure 28(i).

estimating the number of potential unfiled claims. *Id.* The district court further observed that the Independent Assessor made conservative assumptions that overestimated the pool of claims eligible for a First Priority Payment and the compensation that this expansive pool of claims could receive. *Id.*

After its extensive review, the district court found (i) the Independent Assessor's conclusions properly supported the Finance Committee's Motion for Authorization (ii) a surplus of approximately $172.6 million would remain after making First Priority Payments; and (iii) there was a "virtual guarantee" that Allowed and allowable First Priority Claims would be paid based on the Settlement Facility's available assets. *Id.* at Page ID # 28628. In light of the foregoing, the court authorized the Settlement Facility to make Second Priority Payments. *Id.*

In addressing the Korean Claimants' opposition, the Court first observed that they did not challenge the Independent Assessor's conservative and overinclusive methodology as improper. *Id.* at Page ID # 28625–26. The Court also rejected the Korean Claimants' challenge to the

Finance Committee's composition, finding that "at all times, there were at least two members agreeing to the recommendation before the Court," and that in any event, the district court's appointment of a new Special Master mooted the Korean Claimants' challenge. *Id.* at Page ID # 28626–27.

As to the question of the Korean Claimants' ability to challenge the Finance Committee's recommendation under the Plan, the district court did not rule on this issue but did observe that the Korean Claimants did not elect to litigate their claims, but instead to settle them as Settling Personal Injury Claimants. *Id.* at Page ID # 28627–28. Finally addressing the Korean Claimants' harm arguments, the district court found that the Settlement Facility was precluded from issuing the 50% Premium Payment to the Korean Claimants who had not verified their addresses, but that the Settlement Facility would make such payments upon address verification. *Id.* at Page ID # 28629. The district court also observed that this Court has resolved some of the Korean Claimants' grievances. *Id.* at Page ID # 28628.

On June 28, 2021, the Korean Claimants filed a notice of appeal to challenge the district court's Authorization Order. *Notice of Appeal*, RE 1608. Appellee the Finance Committee now timely files its response.

SUMMARY OF THE ARGUMENT

The district court did not commit clear error in authorizing the Finance Committee to distribute Second Priority Payments as contemplated by the Plan. After faithfully applying this Court's precedent to the evidence presented, including the Independent Assessor's conservative conclusion that $172.6 million cash cushion would remain after paying First and Second Priority Payments, the district court found that payment of First Priority Claims was virtually guaranteed. This virtual guarantee finding, the only relevant one to the Second Priority Payment analysis, is undisputed. Even the Korean Claimants admit the correctness of this finding, stating "[t]he funds held by the Settlement Facility exceed the funds necessary for distributing second premium payments." RE 1610, Page ID # 28639.

Despite this and other admissions, the Korean Claimants oppose the Finance Committee's recommendation to make Second Priority Payments.

Fatal to their appeal is the fact that the Plan's express terms foreclose their ability to contest the Finance Committee's recommendation in court. Even if the Plan did grant the Korean Claimants the right to challenge the recommendation—which it does not—the Korean Claimants' challenges fail on the merits.

For instance, the record easily exposes the weakness of Korean Claimants' threadbare challenge to the reliability of the Independent Assessor's Report. That record proves that Independent Assessor's uncontested methodology and conservative projections are even more reliable now than in previous years since the expiration of the claims filing deadline eliminated prior uncertainty about the number of claims potentially eligible for First Priority Payment. The Korean Claimants' challenge to the Finance Committee's majority vote to recommend Second Priority Payments also fails because it is foreclosed by the Plan's plain terms. And their claim that the Settlement Facility's compliance with its obligations under the Plan and the district court's orders somehow constitutes bias or discrimination is unsubstantiated, misguided, and does nothing to upset the

district court's decision to authorize distribution of Second Priority Payments. The district court's approval of Second Priority Payments should be affirmed.

STANDARD OF REVIEW

During its prior review, the Court concluded that the district court's decision on Second Priority Payments presents a mixed question of law and fact. *Settlement Facility*, 754 F. App'x at 415. Since the legal question has been settled by an earlier panel, the central focus of this Court's review is the district court's findings of fact. *Id.* at 415–16. This Court reviews those factual findings under a deferential clearly erroneous standard. *Id.* at 415.

The Court has also articulated the standard of review that applies to the district court's interpretation of Plan documents. *See In re Settlement Facility Dow Corning Trust,* 592 F. App'x at 477–78; *In re Settlement Facility Dow Corning Trust*, 517 F. App'x 368, 372 (6th Cir. 2013); *Settlement Facility Dow Corning Trust*, 628 F.3d at 771–72. Where, as here, the district court's interpretation is confined to the Plan documents, without reference to extrinsic evidence, this Court conducts a *de novo* review. *Settlement Facility*

Dow Corning Trust, 592 F. App'x at 478. New York state law applies to the Court's interpretation of the Plan. *See id.*; *see also* Plan § 6.13, Page ID # 26190; SFA § 10.07, Page ID # 25996.

ARGUMENT

A. The Korean Claimants are not authorized under the Plan to challenge the Finance Committee's recommendation.

The Plan grants the right to challenge the Finance Committee's recommendation to an exclusive list of parties. The Korean Claimants are not on the list. Indeed, the Plan's specific and detailed procedure for seeking authorization to distribute Second Priority Payments lists only the CAC, Debtor's Representative, Shareholders, and all Non-Settling Personal Injury Claimants with pending claims as the parties that "shall have the opportunity to be heard with respect to the motion [to distribute Second Priority Payments]." SFA § 7.03(a), Page ID # 25990. This Court has characterized the Plan's provision of an "opportunity to be heard" as a "contractual right," which includes the right to challenge the Independent Assessor's projections. *See Settlement Facility*, 592 F. App'x at 480–81.

Tellingly, none of the parties with this contractual right to challenge the recommendation continues to do so.[10]

The Plan's express terms foreclose the Korean Claimants' attempt to challenge the Finance Committee's recommendation and the reliability of the Independent Assessor's analysis. This result is dictated by well-established canons of contract construction. Where, as here, the contract specifically lists the persons or groups who have a right under the contract, the contracting parties intended to exclude all others from exercising that right. *See Nat'l Credit Union Admin. Bd. v. U.S. Bank Nat'l Assoc.*, 898 F.3d 243, 254 (2d Cir. 2018) (holding that the plaintiff lacked standing under the parties' agreement under *expression unius est exclusion alterius* because the "express grant of the right to institute proceedings to [one party] entails the denial of such rights to others, including [the plaintiff]"). And it is axiomatic that new terms (or names) cannot be read into the Plan. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 557 (6th Cir. 1998) (en banc) (observing "the basic

[10] As stated earlier, Dow has dropped its appeal challenging the Order. RE 1618.

principle of contract law that courts are not permitted to rewrite contracts by adding additional terms"). Because the Plan does not confer on Korean Claimants, as *Settling* Personal Injury Claimants, the right to challenge the Finance Committee's recommendation in court, their appeal must be dismissed.

Section 7.03(a)'s prescribed procedure for seeking authorization to the district court is not the only Plan provision that restricts a claimant's ability to be heard in court. As one example, the Plan prevents a claimant from seeking an interpretation of the Plan from the district court. *See* SFA § 5.05, Page ID # 25982; *In re Settlement Facility Dow Corning Trust, Mary O'Neil*, 2008 WL 907433, at *3 (E.D. Mich. Mar. 31, 2008) ("The SFA and the Procedures authorize only the Debtor's Representatives and the CAC to file a motion to interpret a matter under the SFA. There is no provision under the SFA or the Procedures which allows a Claimant to submit an issue to be interpreted before the Court.").

The Plan also has an appeals process that provides an administrative appeals route but prohibits a claimant from appealing any claims decision

to the court. SFA § 8.05, Page ID # 26065 ("The decision of the Appeals Judge will be final and binding on the Claimant."). Indeed, this Court has previously rejected the Korean Claimants' attempt to challenge a claims decision outside of the Plan's administrative appeals process. *In re Settlement Facility Dow Corning Tr.*, 760 F. App'x 406, 411–12 (6th Cir. 2019) ("To the extent the Korean Claimants seek to challenge any substantive decisions of the Claims Administrator with respect to any particular claims, such review is beyond the scope of the plan. The Plan provides no right of appeal to the Court."); *see also In re Clark-James*, 2009 WL 9532581, at *2 (6th Cir. Aug. 6, 2009) ("The district court properly dismissed [claimant's] complaint [because claimant] essentially seeks a review of the SF–DCT's [eligibility] determination. . . . But the Plan provides no right to appeal to the district court.").

These provisions limiting a claimant's access to the courts makes sense within the context of this mass tort settlement program. Providing over

100,000 claimants[11] with the right to appeal or otherwise challenge decisions related to the Settlement Facility's administration or management in the federal court would have resulted in extensive litigation that would have been unduly burdensome on the federal court and inhibited the efficient administration of the settlement process. Moreover, these reasonable limitations were accepted by settling claimants in the Plan approved by the district court.

The Korean Claimants' attempts to establish standing under the Plan are unavailing. For starters, Korean Claimants argue that they have standing under the Court's holding in *In re the Gibson Group, Inc.*, 66 F.3d 1436 (6th Cir. 1995). Not true. The *Gibson* case—which concerned a creditors ability to bring an avoidance action when a debtor-in-possession declined to bring one—has no connection with the facts of this case. *Id*. at 1446.

[11] *Settlement Facility*, 754 F. App'x at 412 ("The settlement facility is open to any of the more than 100,000 people who submitted a bare-bones proof of claim during the bankruptcy proceedings, and allows claimants to submit claims over a sixteen-year period ending June 2019 (with interim claim-specific deadlines along the way)."

The Korean Claimants also apparently try to derive standing from the CAC by claiming that the CAC is their "agent in fact."[12] This argument not only lacks any legal support, but also tacitly concedes that the Korean Claimants lack the independent ability under the Plan to challenge the Finance Committee's recommendation. By design, the Plan authorizes the CAC—the party charged with representing the interests of all settling personal injury claimants (including the Korean Claimants')—to challenge the Finance Committee's recommendation on all settling claimants' behalf. The CAC determined here that distribution of Second Priority Payments to eligible claimants (including those in the Korean Claimants group) was in the best interest of all settling claimants.

The Plan has several provisions that bar claimants from seeking redress in court. Section 7.03 is one of them. It specifically spells out which parties can challenge the Finance Committee's recommendation in court and

[12] The CAC provides additional reasons for why the Korean Claimants' "agent in fact" and derivative standing arguments fail. The Finance Committee adopts by reference portions of the CAC's Appellee Brief that respond to these arguments. *See* Fed. R. App. P. 28(i).

the Korean Claimants do not make the cut. Accordingly, Korean Claimants' appeal should be dismissed.

B. The district court did not err in authorizing the Finance Committee to distribute Second Priority Payments.

The Korean Claimants make two claims in their quest to overturn the district court's order: (1) the Independent Assessor's conservative and overinclusive analysis was unreliable; and (2) the Finance Committee's majority vote was invalid. Both claims lack merit.

1. The Independent Assessor's conservative and overinclusive analysis is reliable.

The district court properly relied on the Independent Assessor's analysis. For starters, it was required to rely on the Independent Assessor's analysis under this Court's precedent. *Settlement Facility*, 592 F. App'x at 480 (the district court "must make its decision to authorize Second Priority Payments *based on* the Independent Assessor's analysis and projections."(emphasis in original)).

Moreover, the Independent Assessor's past projections have withstood the test of time, proving to be both conservative and accurate even though prior projections had some degree of uncertainty. *Settlement Facility*

Dow Corning Tr., 2017 WL 7520575 at *9 (concluding that "built-in uncertainties . . . [did] not change the fact that the Independent Assessor's projections have proven accurate"). Despite this uncertainty, the district court previously relied heavily on the Independent Assessor's analysis when authorizing distribution of Second Priority Payments, a decision that this Court affirmed on appeal. *Dow Corning Tr.*, 754 F. App'x at 417.

This time, however, the passing of the claims filing deadline has eliminated past uncertainty. Removal of these unknown contingencies simplified the Independent Assessor's analysis thereby making it even more reliable. For this analysis, the Independent Assessor just had to review claims data to identify all claims in a now fixed universe and then apply conservative assumptions to make sure that each and every base claim with any chance of payment could receive a settlement award.

That is exactly what the Independent Assessor did when performing its analysis. As the district court found, the Independent Assessor made several conservative assumptions that used an expansive class of claims and awarded maximum payments for those claims. It did this despite the fact

that a historical lookback of over 15 years of claims data proved that only a small fraction of these claims would actually be eligible for payment.

Based on this conservative analysis, the Independent Assessor concluded that a significant $172.6 million cushion would remain even after making First and Second Priority Payments. The Independent Assessor's track record of overestimating liability for all First and Second Priority Payments coupled with the interest-rate derived growth means that the remaining surplus will be even larger. This massive $172.6 million margin of error further supports the reliability of the Independent Assessor's projections. *See Settlement Facility*, 754 F. App'x at 416.

There is no credible basis on which to challenge the reliability of the Independent Assessor's analysis and funding projections. Indeed, the Korean Claimants did not challenge the Independent Assessor's methodology, RE 1607, Page ID # 28625–26, and they have essentially admitted that the Independent Assessor's conclusion that adequate funds exist to distribute Second Priority Payments is correct. RE 1610, Page ID # 28639. Korean Claimants nevertheless make the conclusory and

unsubstantiated claim that the Independent Assessor's analysis is unreliable. That claim is plainly contradicted by the record recited above.

Left with nothing else, the Korean Claimants' attempt to insert uncertainty into the Independent Assessor's analysis by raising, for the first time on appeal, that the Independent Assessor failed to account for 500 claims that the Korean Claimants failed to submit by the filing deadline. Appellant Br. at 25. This belated attempt should be rejected for several reasons.

As an initial matter, the Korean Claimants failed to raise this argument before the district court so it is waived. *See Korean Claimants v. Claimants' Advisory Committee*, 813 Fed. App'x 211, 219 (6th Cir. 2020) (holding that the Korean Claimants waived arguments by failing to raise them below). Moreover, the Korean Claimants admitted that: "All of claims for all of Claimants have been filed and counted *in full*. There is no claim which has not been taken into account by the Finance Committee." RE 1610, Page ID # 28639. Even if this argument overcomes this first waiver hurdle (and their own admission), the second two hurdles are insurmountable.

For one thing, unfiled claims are not eligible for payment under the Plan's terms. SFA, Annex A § 7.09, Page ID # 26063–64 (setting filing deadlines for submitting various claims). And for another, the Korean Claimants have made no showing that these 500 claims—if allowed—would come remotely close to exhausting the substantial $172.6 million surplus. Thus, even if the Court considers the Korean Claimants waived argument, it fails on the merits.

At bottom, no clear error exists. The district court's decision to authorize Second Priority Payments was well supported by the Independent Assessor's conservative, reliable, and time-tested analysis. The Korean Claimants' challenge to the Independent Assessor's reliability, assuming they have standing to make such a challenge, should be rejected.

2. The Finance Committee's majority vote to recommend making Second Priority Payments complied with the Plan.

Korean Claimants claim that a temporary vacancy on the Finance Committee invalidated the Committee's decision to distribute Second Priority Payments. This is wrong. The Plan authorizes the Finance

Committee to act by a majority vote. SFA § 4.08(e), Page ID # 25975. The Finance Committee's two-member majority vote to recommend distributing Second Priority Payments complied with this provision. As the district court found, "*at all times* there were at least two members agreeing to the recommendation before the Court." RE 1607, Page ID # 28627. This finding is not clearly erroneous.

The district court also correctly found that its appointment of a new Special Master while the Motion for Authorization remained pending mooted the Korean Claimants' challenge to the Finance Committee's composition. *Id.* No member of the Finance Committee objected to the recommendation and nothing precluded the Finance Committee from amending or withdrawing the Motion for Authorization if any member did object.[13] *Id.*

[13] In fact, the Finance Committee did withdraw its initial motion for authorization to correct an inadvertent factual inaccuracy, but not to change its recommendation. RE 1564.

Korean Claimants rely on two cases to argue that the three-person composition is a threshold requirement for valid action under the Plan: *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 688 (2010); *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3rd Cir. 2013). Their reliance is misplaced. Both cases involved the scope of authority for an NLRB delegee group under the NLRB's enabling statute. *See New Vista Nursing*, 719 F.3d at 210 ("Under § 153(b) and *New Process Steel*, delegee groups of the Board do not have statutory authority to act if they have fewer than three members.").

These cases provide no guidance to this Court as to how to interpret the Plan's majority vote requirement. As the Korean Claimants observe, the Finance Committee is a creature of contract, not one of statute. Appellant Br. at 24. And under contract principals, the majority-vote requirement means what it says: A majority—*i.e.*, two out of three members—is all that is required for the Finance Committee to take a valid action. *See Majority*, Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/majority ("[A] number or percentage equaling more than half of a total; the greater quantity or share"). Notably, the other

stakeholders agree with this interpretation, including Dow who despite challenging the Finance Committee's recommendation, conceded that the two-member vote "was no less valid than if those same two members agreed and a third dissented." RE 1581, Page ID # 26554.

Moreover, the Korean Claimants' nonsensical claim that the district court's appointment did not moot its challenge because creditors should receive more consideration than employees does nothing to cure the fact that the district court's appointment of a Special Master did in fact moot the Korean Claimants' challenge to the Finance Committee's composition.

The district court correctly found that the Finance Committee's two-member majority agreed to the make the recommendation, which is all that the Plan requires to take a valid action. The district court also properly found that the Korean Claimants' challenge to the Finance Committee's composition, assuming it had standing to make it, was moot. Accordingly, the Korean Claimants' objection to the Finance Committee's composition should be rejected.

C. The Settlement Facility has not discriminated against the Korean Claimants, but rather reviewed and processed their claims consistent with the Plan's terms and the district court's orders.

Korean Claimants make several claims of bias and wrongdoing against the Settlement Facility. For example, Korean Claimants claim that the Settlement Facility erected "administrative obstacles" and unfairly applied the district court's orders, including Closing Order 2, to deny Premium Payments and other compensation to the Korean Claimants. *See, e.g.*, Appellant Br. at 27, 34. These claims are unfounded, patently untrue, and irrelevant.

The Settlement Facility is responsible for ensuring that settlement payments are made only to claimants whose claims meet the Plan's exclusive eligibility requirements for payments. SFA § 5.01(a), Page ID # 25978. The Plan grants the Settlement Facility the discretion to implement additional procedures necessary to perform this and other core functions. *Id.*; *see also* § 5.01(b), Page ID # 25981 (granting the Claims Administrator "the plenary authority and obligation . . . to assure that payment is distributed only for Claims that satisfy the Claims Resolution Procedures" which includes

instituting necessary claims-tracking procedures). All actions that the Settlement Facility takes are subject to the district court's supervision, SFA § 4.01, Page ID # 25967, and must comply with the court's orders issued to effectuate the Plan.

Viewed through this lens, the Korean Claimants' so-called "administrative obstacles," like ensuring that claimants have valid addresses, are really the Settlement Facility satisfying its obligation to ensure that only eligible claimants receive settlement payments. *See* Beariicks Decl. at ¶ 12, RE 1595-6, Page ID # 28167 ("The procedures implemented by the [Settlement Facility] to track claimant addresses are intended to assure that eligible claimants receive their payments."). The district court's Closing Order 2 further insulates the Settlement Facility from charges of discrimination as the Settlement Facility is obligated to follow the court's orders. Those orders now include making Premium Payments to eligible

Korean Claimants upon verification of their addresses, which many of the Korean Claimants have so far refused to do.[14] RE 1607, Page ID# 28629.

Korean Claimants also claim that the Settlement Facility has singled them out by applying this address verification requirement only to them and not to other claimants. This is false. The Settlement Facility has applied this requirement, and all other eligibility criteria, to all claimants seeking a settlement award. *See* Bearicks Decl. at ¶¶ 12–31, Page ID # 28167-69. There is simply no evidence of discrimination. The Korean Claimants' unsubstantiated claims of discrimination are merely an irrelevant distraction untethered to the central issue on appeal, which is whether the district court clearly erred in authorizing Second Priority Payments.

Far from demonstrating bias or discrimination, Korean Claimants' complaints demonstrate that the Settlement Facility is merely "doing [its] job." *Settlement Facility*, 760 F. App'x at 412 n.2. Moreover, such complaints

[14] A handful of Korean Claimants have contacted the Settlement Facility to confirm their current address. The Settlement Facility sent most of the payments to their counsel, but few of those payments have been cashed. Bearicks Decl. at ¶ 35, Page ID # 28169

are unsubstantiated, untrue, and do nothing to overturn the district court's correct and well-reasoned findings in this case. The Korean Claimants' false claims of discrimination should be disregarded.

CONCLUSION

For the reasons stated herein and in Dow's brief, the Finance Committee respectfully requests that the Court affirm the district court's Order.

Dated: October 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face volume limitation of Rule 32(a)(7)(B) of the Federal Appellate Rules of Procedure. According to Microsoft Word, the word processing program used to prepare this brief, this brief contains 7,941 words.

/s/ Karima G. Maloney
Karima G. Maloney

CERTIFICATE OF SERVICE

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

/s/ Karima G. Maloney
Karima G. Maloney

ADDENDUM DESIGNATING RELEVANT DOCUMENTS
IN THE DISTRICT COURT DOCKET (00-00005)

RE#	DESCRIPTION	PAGE ID #
814	Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments	12350-12367
1279	Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	19674-19683
1545	Motion For Premium Payments to Korean Claimants	24488-24490
1546	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	Finance Committee's Response to Motion for Premium Payments to Korean Claimants	24912-24914
1553	Order Approving Selection of Successor Independent Assessor Pursuant to Settlement Facility and Fund Distribution Agreement	24921-24922
1564	Notice of Withdrawal for Docket Entry #1560	25940-25941
1566	Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	25944-25956
1566-1	Settlement Facility and Fund Distribution Agreement - Exhibit A to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	25957-26121
1566-2	Amended Joint Plan of Reorganization - Exhibit B to Finance Committee's Recommendation and	26122-26233

RE#	DESCRIPTION	PAGE ID #
	Motion for Authorization to Make Second Priority Payments	
1567	Report of the Independent Assessor - Exhibit C to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments	FILED UNDER SEAL
1569	Motion For Vacating Decision of Settlement Facility Regarding Address Update/Confirmation	26261-26274
1581	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
1590	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	Response to 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
1595-6	Declaration of Ellen Bearicks - Exhibit E to Response to 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	28164-28193
1596	Finance Committee's Joinder in Response of Dow Silicones Corporation, The Debtor's Representatives, and The Claimants' Advisory	28218-28219

RE#	DESCRIPTION	PAGE ID #
	Committee To The Motion For Vacating Decision Of Settlement Facility Regarding Address Update/Confirmation	
1597	TRANSCRIPT of Hearing on Motions ECF Numbers 1566 and 1545 held on 02/25/2021	28220-28283
1599	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
1607	Memorandum Opinion and Order Regarding the Finance Committee's Motion for Authorization to Make Second Priority Payments, the Korean Claimants' Motion for Premium Payments and the Korean Claimants' Motion for Order Vacating Decision of The Settlement Facility Regarding Address Update/Confirmation	28602-28632
1608	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	Korean Claimants' Motion to Stay The Court's Ruling Granting The Finance Committee's Motion for Authorization to Make Second Priority Payments	28637-28642

RE#	DESCRIPTION	PAGE ID #
1611	Dow Silicones Corporation's and Debtor's Representatives' Notice of Appeal to the Sixth Circuit	28643-28677
1618	United States Court of Appeals for the Sixth Circuit Order	28718-28719