No. 25-

IN THE

Supreme Court of the United States

KOREAN CLAIMANTS,

Petitioner,

v.

DOW SILICONES CORPORATION; DEBTOR'S REPRESENTATIVES; CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a question that the Closing Orders for Dow Corning breast implant Settlement Facility and its Program, issued by the District Court and affirmed by the Sixth Circuit, and the Respondent's Motion to terminate funding and to terminate the Settlement Facility without a proper notice to the foreign claimants including the Korean claimants is such constitutional that those were not a violation of due process. The foreign claimants including the Korean claimants have not received any notice of the Closing Orders when each Order was issued and further did not receive a notice of status of their claims when the Order granting the Motion to Terminate was issued. Whether the District Court can approve the bankruptcy chapter 11 debtor, Dow Corning Corporation's Motion to terminate funding and to terminate the Settlement Facility without paying to the Korean claimants without proper notice is a question.

This case presents a question that when the foreign claimants participated in a United States class action, the class action was developed into a chapter 11 bankruptcy, and the foreign claimants decided to participate into the settlement program under the Reorganization Plan, the foreign claimants must follow the address update and confirmation requirement which was never provisioned in the Plan documents but established by the District Court' Orders regarding their address update and confirmation requirement pursuant to the debtor's mere request. The Korean claimants rather followed the address update and confirmation requirement and submitted their address updates but the Settlement Facility denied them in accordance with its internal rules. The postal service of

Korea is different from the postal service of the United States. Nevertheless, the Settlement Facility denied the submissions of the Korean claimants' addresses update entirely and finally denied payments for the claims approved from review. In addition, the Settlement Facility applied the address update and confirmation requirement discriminatorily and unfairly by a violation of Bankruptcy Code. Whether the District Court overseeing mass tort settlement may summarily deny payments for claims to the Korean claimants for administrative noncompliance such as the addresses update, absent willful default, under the federal equity principles is a question.

This case presents a question that the interpretation of the terms regarding Section 2.01(c) of the Funding Payment Agreement by the District Court and the Sixth Circuit to terminate funding to terminate the Settlement Facility may comply with the contract principles and match cross border equity principles. The Korean claimants did not receive payments in amount of over six million dollars approved from review of the claims by the Settlement Facility. Whether Dow Corning Corporation, the debtor, may terminate funding and the settlement facility without payments approved to the Korean claimants may match cross board equity is a question.

PARTIES TO THE PROCEEDINGS

Petitioner is the Korean claimants who participated in Dow Corning bankruptcy settlement program, received the settlement identification from the settlement facility, and are 2,616 Koreans.

Respondents are Dow Corning Corporation, the Debtor's Representative, the Claimants' Advisory Committee, and the Finance Committee.

RELATED PROCEEDINGS

In Re: Settlement Facility-Dow Corning Trust, Settlement Facility Matters, No.00-00005, United States District Court Eastern District of Michigan. Order Regarding Motions Filed by the Korean Claimants (ECF NOS.1752, 1757, 1758, 1767, 1776) entered on July 31, 2024.

In Re: Settlement Facility Dow Corning Trust, Korean Claimants v. Dow Silicones Corp., et al., No. 24-1653, U.S. Court of Appeals for the Sixth Circuit. Per Curiam Opinion entered on February 13, 2025.

In Re: Settlement Facility Dow Corning Trust, Korean Claimants v. Dow Silicones Corp., et al., No. 24-1653, U.S. Court of Appeals for the Sixth Circuit. Order entered on February 27, 2025.

In Re: Settlement Facility-Dow Corning Trust, Settlement Facility Matters, No.00-00005, United States District Court Eastern District of Michigan. Order Granting Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement (ECF NO.1796), Order entered on December 30, 2024.

In Re: Settlement Facility Dow Corning Trust, Korean Claimants v. Dow Silicones Corp., et al., No. 25-1004, U.S. Court of Appeals for the Sixth Circuit. Opinion and Judgment entered on April 10, 2025.

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The District Court's Order Granting Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement (ECF NO.1796) (Pet. App. 8a-32a) is available at 2024 WESTLAW 5249436.

JURISDICTION

The Sixth Circuit entered its Opinion on April 10, 2025. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS AT ISSUE

Section 1 of the Fourteenth Amendment of the Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION AT ISSUE

11 U.S. Code § 1123(a)(4) states:

> Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall provide the same treatment or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.

STATEMENT OF THE CASE

The Settlement Facility ("the SF-DCT") denied the attorney ("the AOR")'s request for payments regarding the approved Korean claimants' claim by saying that the Korean claimants held "bad address". The SF-DCT's denial began from 2019. The SF-DCT explained the AOR that Closing Orders 2, 3 and 5 required the claimants including the Korean claimants to submit the address update to the SF-DCT and the address of the Korean claimants must be confirmed by the SF-DCT.

The District Court issued Closing Order 2 on March 19, 2019, requiring the claimants to update their addresses and receive confirmation from the Settlement Facility. The District Court issued Closing Order 3 on March 25, 2021. The Korean claims that were filed their claims on time but have not been reviewed will be permanently barred and denied payment unless the address was confirmed before June 30, 2021. Closing Order 5 was issued on June 13, 2022. The SF-DCT posted all of the 2600 Korean claimants on the SF-DCT's website (www.sfdct.com) as the claimants with "bad address."

The 676 Korean claimants submitted the form of address update to the Settlement Facility. However, the Settlement Facility rejected the address update of 676 Korean claimants by saying that 600 out of eligible 1,382 claimants who had correspondence sent directly to the claimants have been returned as undeliverable, 39.2% of mailings of 2,476 claimants were returned as undeliverable, and 50% of the mailings to updated addresses provided by the Korean claimants in January 2018 were returned as undeliverable. The Settlement Facility further determined that *all* of Korean claimants' addresses should be "bad address". In addition, the Settlement Facility determined that each Korean claimant must *directly* update the address and the attorney representing the Korean claimants was not allowed to update the claimants' addresses from March 3, 2020.

However, the Settlement Facility failed to request the address update and confirmation from the other country's claimants including the US claimants. The SF-DCT revealed in the process of briefings for the Finance Committee's Motion to Show Cause against attorney/law firms that the SF-DCT discriminated the Korean claimants. The SF-DCT did not request other claimants to update their address or to be confirmed by the SF-DCT. The SF-DCT sent the premium payments without confirmation of the address update. The SF-DCT did not send the premium payments to the Korean claimants.

The Settlement Facility failed to track the claimant addresses for several years. It was revealed that the Settlement Facility did not track the attorney's addresses either. The Settlement Facility admitted through a declaration that (a) the Dow Corning team researched

email addresses for 2,424 attorneys, (b) the Settlement Facility emailed the Audit Survey form on September 7, 2021 via Survey Monkey to 1,660 attorneys who were issued and had cashed on behalf of the claimant, (c) the Settlement Facility received the following results from emailing the Audit Survey: (i) 219 completed Audit Survey forms (13% response rate) (ii) 32 opted-out the survey (iii) 259 email bounce back and (iv) 1,150 no response, (d) the Settlement Facility mailed via U.S. Mail, an envelope containing the court-mandated Audit Survey form, to each of 4,230 attorneys who had cashed payment on behalf of claimants, and who had not previously responded to the email Audit Survey, (e) the Settlement Facility received the following results mailing from the Audit Survey: (i) 1,655 responses (39% response rate) and (ii) 833 pieces of returned mail, (f) the Settlement Facility conducted second mailing to 1,899 attorneys and received the following results from the second mailing: (i) 905 responses (48% response rate) and (ii) 22 pieces of returned mail with no forwarding address.

If the Settlement Facility did not track the attorney's addresses as such rates as above, the Settlement Facility failed to track the claimant addresses as well. However, the debtor alleged that the Settlement Facility tracked the claimants' addresses for many years.

The Claimants' Advisory Committee and the Finance Committee even admitted that just as the Settlement Facility has experienced a high volume of claimants who have moved and did not provided a forwarding address, the Settlement Facility should update and verify the current address of non-responding law firms, and the Settlement facility did not have current contact

information for lawyers and law firms. If the attorneys did not update their addresses as admitted above, the claimants represented by those attorneys inevitably did not update their addresses since the check sent to the attorneys would not be delivered to the claimants. If the claimants, who should have received payment checks, had updated the addresses, the claimants must have contacted the Settlement Facility.

While the Settlement Facility failed to confirm the addresses of both the attorneys and the claimants, the Settlement Facility obliged the Korean claimants to update their addresses *directly* (meaning forfeiting the power of attorney by the AOR) and to receive confirmation from the Settlement Facility individually. In addition, the Settlement Facility denied the addresses update of June 3, 2019 for the 676 Korean claimants who had received the address update letter from the Settlement Facility and finally treated all of the Korean claimants' addresses as "bad address".

Accordingly, the Settlement Facility pinpointed the Korean claimants and sanctioned by willful intent to discriminate the Korean claimants with the condition of address update and confirmation requirement under Closing Orders 2, 3 and 5. The Korean claimants requested the debtor to give treatment equal to other country's claimants but the debtor smilingly explained that the Settlement Facility required the other country's claimants to update their addresses. It was not obviously true as stipulated above.

The Korean claimants filed the Motion to Lift-Off the Address Update and Confirmation Requirement unfairly

executed with the District Court. The District Court ruled that the Korean claimants previously appealed issues related to Closing Order 2.

The Sixth Circuit affirmed the Court's decision, finding that the appeal failed on the merits because the District Court correctly interpreted Closing Order 2 to require the Korean claimants to confirm their addresses as a condition of receiving payments and permissibly considered the SF-DCT bound by Closing Order 2.

On the other hand, on November 15, 2024, Dow Corning Corporation, the Debtor's Representatives and the Finance Committee filed the Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement with United States District Court Eastern District of Michigan on November 15, 2024. Their purpose for this filing was to terminate Funding to the Settlement Facility Dow Corning Trust ("the SF-DCT") and to terminate the SF-DCT by March 31, 2025.

The District Court had consulted with the Movants secretly to fix the date, agreed to it with the Movants, and thus urged the Movants to file this Motion on time, which was determined November 15, 2024.

In this Motion, the Movants asserted that the FPA provides that Dow Corning's obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of (i) the date when all Allowed Claims in each of Classes 5 through 19 and

all other obligations of the Settlement Facility and the Litigation Facility have been paid, all Claims filed have been liquidated and paid or otherwise finally resolved, and no new timely Claims have been made against the Settlement Facility or the Litigation Facility for two consecutive Funding Periods; or (ii) the payment of all amounts required by this Agreement." (FPA at Section 2.01(c))

The Movants alleged that the Claims Administrator, the FC, the DRs, the CAC, the Financial Adviser, and the Independent Assessor have all conducted extensive due diligence and their findings demonstrate conclusively that these conditions have been satisfied. The Movants further alleged that the Settlement Facility has processed all timely-filed claims and issued final payments for all Allowed claims and the Financial Adviser has confirmed that all funding payments required of the Reorganized Debtor under the Plan and pursuant to the funding procedures adopted by the Finance Committee have been made timely and that there are no outstanding requests or need for funding payments if the wind down period is completed by the end of March 2025.

The Movants alleged that (A) all Allowed Claims in Classes 5 through 10 have been paid or otherwise resolved, and no new timely claims have been made, (B) all Allowed Claims in Classes 11 through 19 have been paid, all claims have been liquidated and paid or otherwise resolved, and (C) all other obligations of the Settlement Facility and Litigation Facility have been paid. The Appellees further alleged that the Settlement Facility should be terminated pursuant to Section 10.03 of the SFA since the SFA provides that the Settlement Facility

and Trust shall terminate as soon as practicable after the Reorganized Dow Corning's obligation to fund under the FPA is terminated in accordance with Section 2.01(c) of FPA.(SFA Section 10.03(a))

Against the Motion, the Korean claimants filed Cross Motion to Deny Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility Fund Distribution Agreement and for Order to Make Payments in Default of over six million dollars to Korean Claimants on November 27, 2024. The Payments in Default include the Premium Payments, Claims Approved but not paid without any notice by the Settlement Facility, and Claims Filed but not processed without reasonable basis by the Settlement Facility. Despite the Movants alleged that all Allowed Claims in Classes 5 through 10 have been paid or otherwise resolved and no new timely claims have been made, neither were the Korean claims (Class 6.2 and Class 6.1) paid nor were otherwise finally resolved. The Settlement Facility is in default of US 6,064,350 dollars on the record, whose claims were approved by the Settlement Facility. The Korean claimants filed Cross Motion for the Payments in Default.

Along with the Korean claimants, the Claimants' Advisory Committee filed Response to the Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility Fund Distribution Agreement on December 6, 2024. The Claimants' Advisory Committee asserted that the Korean appeal has not been finally

resolved so that the Korean claims have not been "finally resolved" as required by Section 2.01(c) of FPA.

The Korean claimants asserted that the Korean claims have not been otherwise finally resolved. The Korean claimants through the attorney sent emails/letters (meaning "the Demand of Payments") to both the Claims Administrator and the Settlement Facility before the filing of the Motion to Terminate in October 2024. The Korean claimants further asserted that the phrase, "No new timely claims have been made against the Settlement Facility for two consecutive funding periods", has not been satisfied because many timely-claims were filed with the Settlement Facility in the year of 2022.

However, the District Court Granted the Motion quickly. There was no doubt that District Court acted quickly because the District Court had already consulted for the Motion with the Movants.

On December 31, 2024, The District Court ruled that the conditions under Section 2.01(c)(i) of the Funding Payment Agreement and Section 10.03 of the Settlement Facility and Fund Distribution Agreement were met. The District Court Granted the Motion on the basis that although the Korean Claims were not paid or liquidated, the Korean claimants were "otherwise finally resolved" because the Claims Administrator denied the certain Korean Claims and the Sixth Circuit ruled that the Korean claimants' challenge to such denial was beyond the scope of the Plan and further the Korean claimants did not appeal the Sixth Circuit's ruling to the Supreme Court.

The Sixth Circuit issued the Opinion that "Allowed Claim" has met all criteria needed to be "approved for

payment pursuant to the settlement agreement", and "Otherwise finally resolved" is also unambiguous, and claims against Dow qualify as "finally resolved" through several routes, and By equating "resolved" with "paid", the Korean claimants overlook the plain meaning of "otherwise", and the Korean claimants' demands for payment do not qualify as claims, and the Korean claimants' accusations such as "discriminated against the Korean claimants" lack any record support, and there is nothing left to fight to the Korean claimants, and thus affirmed the District Court's Order plus denied the Korean claimants' Cross Motion for Payments in Default.

This petition follows.

REASONS FOR GRANDING THE WRIT

I. The District Court Violated Due Process in Issuing the Closing Orders and Granting the Motion to Terminate Funding and the Settlement Facility

Closing Orders 2,3 and 5 issued by the District Court Lack notice to the affected claimants. Those Orders were stipulated by Dow Corning Corporation, the Debtor's Representatives, the Claimants' Advisory Committee and the Finance Committee.

As the result of those Closing Orders, the SF-DCT prohibited the Korean Claimants from receiving the payment for approved claims. The SF-DCT determined that the Korean claimants' addresses were "bad address" so shall not be confirmed.

The address update and confirmation requirement was not in the Plan documents. However, it was enacted by

the Closing Orders. Therefore, the notice must be provided to the claimants before and after the Closing Orders were enacted. The Korean Claimants were not notified before the Closing Orders were entered. In addition, The Notice to the AOR by the ETF was done only after the District Court issued the Closing Orders. There was no prior notice for Closing Orders.

Other than the AORs registered with the SF-DCT, the District Court did not either notify the Closing Orders to individual claimants including the Korean claimants or disseminate the Closing Orders to the claimants.

There was no hearing either because the District Court just signed on them. The lack of notice and hearing before Closing Orders was a violation of due process.

The Closing Orders were a result of due process violation. ""The Supreme Court addressed the relationship between notice and the Fourteenth Amendment in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)… The Court went on to hold: An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance… Accordingly, the Court must conclude that the total absence of notice to the *Hahns* concerning the Hearing on Confirmation, and the various deadlines, renders the "Order Confirming Plan" violative

of the Fifth Amendment."" *In re Rideout*, 86 B.R. 523 (N.D. Ohio. 1988)

The Closing Orders were void because they have not been noticed to the Korean claimants and the other claimants before issuance.

The Claimants' Advisory Committee admitted in the Response to Motion to Establish Final Distribution Deadline Regarding Replacement Checks for Settlement Claims in the Dow Corning Settlement Program that an appropriate notice required by Closing Order 2 was not executed. The Claimants' Advisory Committee even asserted, "T[t] motion fails to provide any means of notice to affected claimants and their counsel. In all prior Closing Orders, the SF-DCT was directed to post SID numbers on its website and/or provide written notice to affected claimants. (*e.g.*, Closing Order 3 which directed the SF-DCT to send a letter to all 381 affected claimants informing them of the deadline). In addition, the CAC was directed to disseminate information about the Closing Orders on its website and through its electronic newsletter. The Motion provides no time and no procedure to give notice to the affected claimants. This would not constitute the 'appropriate notice' mandated by Closing Order 2."

Therefore, the Closing Orders shall be void for the lack of prior notice or at least the lack of appropriate notice as admitted by the Claimants' Advisory Committee.

However, the District Court ruled that the Korean claimants appealed issues related to Closing Order 2 to the Sixth Circuit of Appeals and the Sixth Circuit

affirmed the District Court's decision, finding that the appeal failed "on the merits because the District Court correctly interpreted Closing Order 2 to require the Korean claimants to confirm their addresses as a condition of receiving payments and permissibly considered the Settlement Facility bound by Closing Order 2." *In re Settlement Facility Dow Corning Trust*, Case Nos.21-2665/22-1750/1753/1771, 2023 WL 2155056 (6th Cir. Feb. 22, 2023), the Court will not revisit arguments related to Closing Order 2 in this new motion, the Korean claimants did not previously raise any issues with Closing Order 3, and the Korean claimants filed an appeal before the Sixth Circuit as to Closing Order 5 and the Sixth Circuit dismissed as untimely. The Sixth Circuit affirmed the District Court ruling.

Other than Closing Orders 2, 3, and 5, the District Court failed to serve a notice to the claimants regarding Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement ("Motion to Terminate"). The claimants do not know whether the Settlement Facility closed for lack of notice. The SF-DCT dropped the website secretly. The SF-DCT did not mail the Status of Claims to the claimants. The Claims Administrator simply declared that the SF-DCT mailed the Status of Claims to all claimants. All those irregularities in administrating the claims were just because the District Court lacked notices to the Closing Orders and the Motion to Terminate. The Motion to Terminate must be void and vacated for the lack of notice and a violation of due process clause of section 1 of the Fourteenth Amendment of the Consititution.

II. Address Update and Confirmation Requirement was Discriminatorily Applied to the Korean Claimants Resulting a Violation of the Bankruptcy Code and a Contravention to Equity to Cross Board Claimants

Equal treatment, that is, the same treatment for each claim of a particular class shall be provided in the Plan under Bankruptcy Code § 1123(a)(4). However, the Korean claimants were not provided with equal treatment by the District Court and the Settlement Facility.

The Address Confirmation Requirement under the Closing Orders was applied discriminatorily and unfairly against the Korean claimants. The SF-DCT applied the address update and confirmation requirement under the Closing Orders 2, 3 and 5 discriminatorily and thus unfairly against the Korean claimants in violation with § 7.01 Annex A to the SFA. The District Court failed to address the issue of the SF-DCT's discrimination against the Korean claimants. Rather, the District Court viewed Motions for correction as the Korean claimants' request for exemption from Closing Orders. The District Court ruled that the Korean claimants, in any event, cannot seek review of the decisions by the Claims Administrator and the Appeals Judge. The District Court ignored the clauses of the Plan documents and failed to address the discriminations by the Settlement Facility regarding the address update and confirmation requirement. Even though the Claims Administrator shall institute procedures to assure consistency of processing and of application of criteria in determining eligibility and to ensure fairness in processing of claims and appeals and to ensure an acceptable level of reliability and quality control of claims. § 7.01 Annex A to the SFA

The SF-DCT applied the address update and confirmation requirement discriminatorily and thus unfairly against the Korean claimants. *First of all*, the SF-DCT was discriminatory when the 676 Korean claimants submitted their address update form to the SF-DCT on June 1, 2019. The 676 Korean claimants received the SF-DCT's request for address update from 2015 to 2018 prior to Closing Order 2. They submitted the address update form via federal express on June 1, 2019. On March 3, 2020, the SF-DCT sent a letter by saying that the SF-DCT determined to reject the 676 claimants' address update and refused to confirm not only the 676 claimants but all of Korean claimants' (2600) address. Furthermore, the SF-DCT took away the AOR's power of attorney to submit the address update from the claimants by saying that the Korean claimants must update their address *directly* to the SF-DCT.

Technically, international mailings from the US to South Korea could not return back to the SF-DCT within a short period. Especially, a large volume of international mailings of the 676 Korean claimants was not able to return to the SF-DCT. The postal service of Korea is different from the postal service of the U.S.A.

The Claims Administrator declared in the District Court that according to the audit conducted by the SF-DCT, 600 out of eligible 1,382 claimants who had correspondence sent directly to the claimants that has been returned as undeliverable, 39.2% of mailings of 2,476 claimants were returned as undeliverable, and 50% of the mailings to updated addresses provided by the AOR in January 2018 were returned as undeliverable. However, the SF-DCT decided that the 676 Korean claimants'

address updates were not confirmed and all of Korean claimants' addresses were "bad address". In addition, other than 676 claimants among over 2600 claimants must not be treated as "bad address" because the SF-DCT did not request address update. The SF-DCT was discriminatory against the Korean claimants regarding the address update and confirmation requirement. The Claimants' Advisory Committee even confirmed that the claimants' address verification had not been required for the first round of the Premium Payments. The treatment of the SF-DCT with respect to the first-half Second Priority Payment was discriminatory against the Korean claimants since the SF-DCT failed to pay it on the basis of the claimants' address verification.

Second, the SF-DCT requested the submission of the Survey form on the basis of Closing Order 4 to all of the AORs registered with the SF-DCT. Over 4200 attorney/law firms were supposed to receive the Survey form. However, many attorney/law firms out of 4230 attorney/law firms (except 814 attorney/law firms which were subject to the Order to Show Cause) turned out as "bad address". Nevertheless, the SF-DCT sent the AORs the check for the last round Second Priority Payment to them in 2022. The claimants represented by the attorney/law firms with "bad address" must have been treated as the claimants with "bad address" by the SF-DCT. But the SF-DCT did not treat the Korean claimants likewise by failing to send checks for last round Second Priority Payment to the Korean claimants.

The SF-DCT's decisions regarding the address update and confirmation requirement were discriminatory against the Korean claimants. The SF-DCT exceeded its

administrative discretion and violated § 7.01 Annex A to the SFA. The District Court did not address whether the SF-DCT was discriminatory against the Korean claimants and violated the Clause of the Plan documents. The District Court ruled that the Korean claimants cannot seek review of the decisions by the Claims Administrator and has no authority to review the Korean claimants' request that were denied by the Claims Administrator and the Appeals Judge.

The Claims Administrator must institute procedures to assure *consistency* of processing and of application of criteria in determining eligibility and to ensure *fairness* in processing of claims and appeals. § 7.01(c) Annex A to the SFA. The SF-DCT as well as the Claims Administrator violated § 7.01(c) Annex A to the SFA and violated Bankruptcy Code § 1123(a)(4) providing the same treatment of claims. Conclusively, the discriminations to the Korean claimants regarding the address update and confirmation requirement are not only a violation of Bankruptcy code but a contravention to equity to the cross border claimants who have postal services different from the US postal services. Bankruptcy Code § 1123(a)(4)

III. To Terminate Funding and To Terminate the Settlement Facility without Paying for Claims Approved on the Basis of the Address Update and Confirmation Do Not Match Cross Border Equity

The District Court granted Motion to terminate funding pursuant to Section 2.03(c) of the Funding Payment Agreement and to terminate the settlement facility pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement. The District Court

interpreted that the terms Section 2.03(c) of the Funding Payment Agreement, "Allowed Claims" and "Otherwise Finally Resolved", are unambiguous so Dow Corning Corporation can terminate funding, and in accordance with Section 10.03 of the Settlement Facility and Fund Distribution Agreement, Dow Corning Corporation can terminate the Settlement Facility.

The District Court did not interpret the terms correctly by assuming that the terms are unambiguous and additionally, the Korean claimants cannot appeal to the Court from the decisions of the Claims Administrator and thus the Korean Claims were finally resolved although the claims of the Korean claimants were not paid or liquidated.

Even if the District Court interpreted the terms of Section 2.03(c) the FPA well, the Korean claimants were not paid on the basis of the address update and confirmation requirement.

The address update and confirmation requirement was enacted and executed by Closing Orders 2, 3 and 5. Closing Orders 2, 3 and 5 are issued by the District Court without notice to the claimants including the Korean claimants. The District Court ruled that the Korean claimants received notice from the ETF system to the AOR but the other claimants, domestic and foreign, who did not hire an attorney, did not receive notice. The District Court failed to adopt a way to disseminate the Closing Orders either. The District Court simply issued by way of stipulation of Dow Corning Corporation, the Debtor's Representatives, the Claimants' Advisory Committee and the Finance Committee. Those Committee members were under the influence of Dow Corning Corporation.

The address update and confirmation requirement is void because the Closing Orders were issued without notice to the claimants including the Korean claimants. The Closing Orders were issued by a violation of due process.

In addition, the Settlement Facility applied the address update and confirmation requirement discriminatorily and unfairly, which were supported by the evidences presented through other Motions filed with the District Court. The District Court simply ignored them to grant the Motion to Terminate. The District Court violated the same treatment of claims under Section 1123(a)(4) of the Bankruptcy Code.

Over 6 million dollars for over 2600 Korean claimants were not paid because of either the Closing Orders or the discriminatory treatment by the Settlement Facility. The District Court just ruled that the Korean claimants cannot appeal the decisions of the Claims Administrator on the Korean claimants regarding the address update and confirmation requirement under the Plan documents and cannot request an opinion from the District Court. The District Court ruled that all claims of the Korean claimants were paid or "otherwise finally resolved" and the Korean claimants' Cross Motion must be denied too.

Even assumed that the District Court's interpretation regarding Section 2.01(c) of the FPA and Section 10.03 of the SFA correct with no possibility contested, the foreign claimants were discounted in the Plan documents. The foreign claimants were divided by the country. While the US claimants received the compensation full, the foreign claimants only received either 60% or 35% of the US claimants in accordance with the GDP per capita.

Under these circumstances, each country has respective individual postal services which are quite different from the postal service of the United States. In addition, the Settlement Facility applied the address update and confirmation requirement to the Korean claimants discriminatorily and unfairly. The postal service of Korea is quite different from the postal service of the US so the Settlement Facility had to consider the difference and should not decide the return rates of mailings from the view of the postal service of the United States.

The claims of the Korean claimants were not "otherwise finally resolved". The claims of the Korean claimants which were unfairly denied on the basis of the Closing Orders and discriminatory application of the address update and confirmation requirement cannot be "otherwise finally resolved". Furthermore, when the Fund Payment Agreement became in force in 2004, there was no address update and confirmation requirement in the Plan documents.

The claims of the Korean claimants are foreign claimants' claims which have been already discounted by the Plan documents. If the claims approved are not paid actually on the basis of the address update and confirmation requirement and the District Court could terminate funding and terminate the Settlement Facility, it does not match cross border equity.

CONCLUSION

For the foregoing reasons, the Korean claimants request a writ of certiorari to Overturn the District Court's Orders and the Sixth Circuit's Opinion and to Grant the Korean claimants' Cross Motion the Settlement Facility to Make Payments in Default.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 10, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 25-1004

IN RE: SETTLEMENT FACILITY
DOW CORNING TRUST.

KOREAN CLAIMANTS,

Interested Parties-Appellants,

v.

DOW SILICONES CORP., *et al.*,

Interested Parties-Appellees.

Filed April 10, 2025

OPINION

NOT RECOMMENDED FOR PUBLICATION

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

Before: SUTTON, Chief Judge; READLER and BLOOMEKATZ, Circuit Judges.

Appendix A

READLER, Circuit Judge. The saga of Dow Corning Corporation's bankruptcy continues. Once the longtime leader of silicone-gel breast-implant manufacturing in the United States, the company's success abruptly ended in 1992 when the Food and Drug Administration ordered sharp restrictions on using such implants, given their connection to various auto-immune diseases. Hundreds of thousands of possibly affected implant recipients sued shortly thereafter, driving Dow to file for reorganization under Chapter 11 of the Bankruptcy Code in 1995.

In this latest installment, the self-described Korean Claimants, a group of South Korean residents who opted to settle their claims and now seek over $6 million, challenged a motion to terminate Dow's funding obligations under the bankruptcy plan. The district court granted the motion over their objections. We affirm.

I.

In general, a confirmed bankruptcy plan, such as the one here, "bind[s]" the debtor and any creditor. 11 U.S.C. § 1141(a). Because "the plan is effectively a new contract between the debtor and its creditors," we interpret it using "contract principles." *In re Dow Corning Corp.*, 456 F.3d 668, 676 (6th Cir. 2006). The parties agree that, consistent with the plan's choice-of-law clause, New York law controls. *See Wesco Ins. v. Roderick Linton Belfance, LLP*, 39 F.4th 326, 335 (6th Cir. 2022).

In the Empire State, contract terms "must be enforced according to the[ir] plain meaning" when the contract "is

complete, clear and unambiguous on its face." *Greenfield v. Philles Recs., Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002). Turn, then, to the bankruptcy plan's funding agreement. Dow's financial obligations, the agreement states, end "when all Allowed Claims [for enumerated classes that include the Korean Claimants] and all other obligations . . . have been paid, all Claims filed have been liquidated and paid or otherwise finally resolved, and no new timely Claims have been made." R. 1796-2, PageID#42362-63.

Each of these conditions has been met. The Claims Administrator, an individual assigned to "oversee the processing and payment of Claims by the Settlement Facility," R. 1796-1, PageID#42258, performed "due diligence" for many claims—including those pursued by the Korean Claimants—and "confirm[ed] that all eligible claimants who complied with the deadlines . . . and procedures required" had received their checks, R. 1796-7, PageID#42626. Likewise, the Independent Assessor, a third party assigned to oversee and assist "the development of projected funding requirements," R. 1796-3, PageID#42426, explained that "[b]ased on the claim and financial data, . . . all timely claims that are eligible for payment and that have met the requirements established by the [district court] for payment have been sent a payment," R. 1796-8, PageID#42633. The Independent Assessor therefore concluded that "no pending outstanding claims remain[] to be paid." *Id.* Lastly, no new claims can be made because the final deadlines have passed for filing claims and distributing payments. *See In re Settlement Facility Dow Corning Tr.*, No. 23-1936, 2024 WL 4710155, at *2 (6th Cir. Nov. 7, 2024).

II.

Resisting this conclusion, the Korean Claimants argue that the phrases "Allowed Claims" and "otherwise finally resolved" are ambiguous. We disagree. These contested provisions of the bankruptcy plan are "reasonably susceptible of only one meaning." *White v. Cont'l Cas. Co.*, 878 N.E.2d 1019, 1021 (N.Y. 2007) (citation omitted).

Start with "Allowed Claims." The Korean Claimants believe this phrase lacks a contractual definition and that it can reasonably include an otherwise eligible claim deemed defective due to a procedural condition for payment, such as the failure to verify one's address. Yet the bankruptcy plan defines "Allowed Claims," in the context of the settled product liability claims here, as those that "ha[ve] been approved for payment pursuant to the [settlement agreement]." R. 1796-1, PageID#42253. The funding agreement "incorporated" this definition, R. 1796-2, PageID#42359, so it governs here, *see Mencher v. Weiss*, 114 N.E.2d 177, 180 (N.Y. 1953) ("Those who contract with each other may write their own glossary or dictionary."). Accordingly, an "Allowed Claim" has—by its definition—met *all* criteria needed to be "approved for payment pursuant to the [settlement agreement]." Such criteria cover substantive eligibility and procedural payment-processing rules alike, including rules from closing orders entered "in aid of" the bankruptcy plan and settlement agreement. R. 1796-1, PageID#42325.

"[O]therwise finally resolved" is also unambiguous. By its plain meaning, "resolved" describes claims "decide[d], determine[d], [or] settle[d]." *Resolve*, 13 Oxford English Dictionary 724 (2d ed. 1989). "Finally," in turn, narrows these resolutions to those "ma[de] [in] a complete end" such that they are "not to be reversed or altered." *Finally*, 5 Oxford English Dictionary, *supra*, at 921; *see also R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002) (consulting same dictionary to glean plain meaning of contract). Consistent with this understanding, claims against Dow qualify as "finally resolved" through several routes. Many were irreversibly decided when the settlement facility approved claims and disbursed checks that the intended recipient cashed. Others, by contrast, were irreversibly decided when the Claims Administrator (and the Appeals Judge, the individual assigned to review the Claims Administrator's rulings) declined to disburse a check due to, say, inadequate medical records, an unverified address, or untimeliness—all of which are binding and unreviewable decisions. *In re Settlement Facility Dow Corning Tr.*, No. 24-1653, 2025 WL 488635, at *1-2 (6th Cir. Feb. 13, 2025) (per curiam). The Korean Claimants sit in this latter camp. *See, e.g.*, *id.* at *1, *3.

Even then, say the Korean Claimants, their claims were never finally resolved because they remain unpaid. But payment is just one of many means to resolve a claim. The funding agreement confirms as much. "Claims," it instructs, can be "paid or otherwise finally resolved." R. 1796-2, PageID#42363. By equating "resolved" with "paid," the Korean Claimants overlook the plain meaning of "otherwise." That term usually "follow[s] a noun,

adjective, adverb, or verb, to signify a corresponding word *of opposite or different meaning*." *Otherwise*, 10 Oxford English Dictionary, *supra*, at 984 (emphasis added). Their reading also renders superfluous the phrase "or otherwise finally resolved," a problematic outcome, given that reducing contractual language to mere surplusage is "a result to be avoided." *In re Viking Pump, Inc.*, 52 N.E.3d 1144, 1151 (N.Y. 2016) (citation omitted).

The Korean Claimants' remaining contentions merit little response. For example, they cite their recent demands for payment as evidence that timely claims continue to occur. Yet such demands do not qualify as claims, nor, it bears reminding, were they made within the applicable filing deadlines. *See, e.g.*, *In re Settlement Facility Dow Corning Tr.*, 2024 WL 4710155, at *2. They also allege that the Claims Administrator has habitually lied, discriminated against the Korean Claimants, and concealed key documents. Those accusations lack any record support. And, here too, we have already rejected the crux of their reasoning elsewhere. *Id.* at *3-4; *In re Settlement Facility Dow Corning Tr.*, 2025 WL 488635, at *3. At any rate, the Claims Administrator's correspondence cannot alter the unambiguous meaning of the bankruptcy plan's text. *See, e.g.*, *Tomhannock, LLC v. Roustabout Res., LLC*, 128 N.E.3d 674, 675 (N.Y. 2019). Lastly, the Korean Claimants argue their claims are not finally resolved because they intend to "continue fighting" until they secure payment. Appellant Br. 33. There is nothing left to fight. As explained, the Claims Administrator and Appeals Judge have reached final decisions for all the Korean Claimants, none of which

can be further appealed. *In re Settlement Facility Dow Corning Tr.*, 2025 WL 488635, at *1; *see also* Fed. R. App. P. 38.

* * * * *

We affirm.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED DECEMBER 30, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 00-00005

IN RE: SETTLEMENT FACILITY—
DOW CORNING TRUST,
SETTLEMENT FACILITY MATTERS.

Filed December 30, 2024

ORDER GRANTING MOTION TO TERMINATE FUNDING PURSUANT TO SECTION 2.01(C) OF THE FUNDING PAYMENT AGREEMENT AND TO TERMINATE THE SETTLEMENT FACILITY PURSUANT TO SECTION 10.03 OF THE SETTLEMENT FACILITY AND FUND DISTRIBUTION AGREEMENT (ECF NO. 1796)

Hon. Denise Page Hood

I. BACKGROUND/FINDINGS OF FACT

This matter is before the Court on a Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement filed by Dow Silicones Corporation (formerly known as

Dow Corning Corporation), the Debtor's Representatives and the Finance Committee ("Movants"). The Claimants' Advisory Committee ("CAC") supports the Motion but seeks to defer the termination until the appeals filed by the Korean Claimants' and the CAC's fee request are resolved. The Korean Claimants oppose the Motion and again seek payment for their claims. A hearing was held on the matter on December 11, 2024.

On June 1, 2004, the Amended Joint Plan of Reorganization ("Plan") became effective governing the Dow Corning bankruptcy matter. The Court retains jurisdiction over the Plan "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow, disallow, estimate, liquidate or determine any Claim, including Claims of a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, §§ 8.7.3, 8.7.4, 8.7.5)

The Settlement Facility-Dow Corning Trust ("SF-DCT") implements the claims of those claimants who elected to settle their claims under the Settlement Program of the Plan. (Plan, § 1.131) The SF-DCT was established to resolve Settling Personal Injury Claims in accordance with the Plan. (Plan, § 2.01) The Settlement Facility and Fund Distribution Agreement ("SFA") and Annex A to the SFA establish the exclusive criteria by which such claims are evaluated, liquidated, allowed, and paid. (SFA, § 5.01) The process for the resolution of claims is set forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01)

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The SF-DCT was funded under The Funding Payment Agreement ("FPA") which provided that the Debtor fund

> payments to the Settlement Facility up to a maximum aggregate amount of $3,172,000,000, subject to adjustment as described in this Agreement in order to achieve a net present value of $2,350,000,000 compounded annually as of the Effective Date after applying a discount rate of 7% per annum.

(FPA, § 2.01) There were 16 Funding Periods, with Annual Payment Ceilings, which commenced on the first anniversary of the June 1, 2004 Effective Date of the Plan. (FPA, § 2.01(b)) Section 2.01(c) provides that the Debtor's

> obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of (i) the date when all Allowed Claims in each of Classes 5 through 19 and all other obligations of the Settlement Facility and the Litigation Facility have been paid, all Claims filed have been liquidated and paid or otherwise finally resolved, and no new timely Claims have been made against the Settlement Facility or the Litigation Facility for two consecutive Funding Periods; or (ii) the payment of all amounts required by this Agreement.

(FPA, § 2.01(c))

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The SFA provides that the SF-DCT,

> shall terminate as soon as practicable after the Reorganized Dow Corning's obligation to fund under the Funding Payment Agreement is terminated in accordance with Section 2.01(c) of the Funding Payment Agreement. The Claims Administrator will use his or her best efforts to substantially complete and terminate the Settlement Facility and Trust within sixty (60) days after such termination of the Funding Payment Agreement. The Claims Administrator shall seek an order from the District Court confirming that it is appropriate to terminate the Settlement Facility.

(SFA, § 10.03(a)) After the termination of the SF-DCT,

> the Claims Administrator shall remain authorized to wind up the affairs of the Settlement Facility and the Trust, and thereafter, the Claimants' Advisory Committee shall be authorized to dispose of the balance, if any, of funds in the Settlement Facility after payment of or adequate provision for any remaining Settlement Facility or Trust expenses. Any such funds shall be distributed, if cost effective, pro rata to the holders of Allowed Claims previously paid to Claimants eligible under this Agreement by the Settlement Facility, or, if such distribution would not be cost effective, to a neutral medical research

> institute or university, selected by the Finance Committee after consulting with the Claimants' Advisory Committee.

(SFA, Art. 10.03(b))

The SF-DCT's Claims Administrator, Kimberly Smith-Mair, submitted a Declaration in support of the Motion. She states,

> 7. I have reviewed the Settlement Facility records and I can confirm, based on those records, that (1) all Allowed Claims in each of Classes 5 through 10 and all other obligations of the Settlement Facility have been paid, (2) all Claims filed have been liquidated and paid or otherwise finally resolved, (3) no new timely Claims have been made against the Settlement Facility since June 3, 2019 - which was the final deadline for submission of Disease Claims, and (4) on February 5, 2005 the Settlement Facility mailed notices to 4,926 Class 12 physicians and Class 13 Health Care Providers. For purposes of this Declaration, the phrase "all other obligations of the Settlement Facility" includes payment of all Fundable Expenditures, which are basically administrative expenses of operations as authorized by the budget approved by the Court.

> 8. I, along with various staff and consultants, and in conjunction with Independent Assessor, conducted a due diligence process for the purpose of assuring that all timely claims in Classes 5, 6, 6.1, 6.2, 7, 9, 10, 10.1 and 10.2 have been processed and have received a notification of status letter as required by the SF A. Based on that process, I confirm that all eligible claimants who complied with the deadlines imposed by the Plan and procedures required by Court Order were sent a payment check. I note that some claimants did not cash their payment checks but such claimants were provided opportunities to seek a reissued check up until the deadline for reissuance imposed by Court Order.

(ECF No. 1796, PageID. 42626) Smith-Mair further states that the staff at the SF-DCT has been reduced, with further reductions planned at the end of 2024. The office space lease was terminated at the end of June 2-24. *Id.* Smith-Mair anticipates that it will take fewer than 90 days following an Order terminating funding to complete and terminate the Settlement Facility. *Id.* If the Motion to Terminate is approved by the Court prior to the end of December 2024, Smith-Mair anticipates that the costs of completing and terminating the Trust within this 90-day period is within the amount remaining in the SF-DCT account. However, Smith-Mair states that if the wind-down activities extend beyond the end of March 2025, additional funding may be required. *Id.*

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The Declaration of the Financial Advisor, Brian Chmiel, was also submitted in support of the Motion. He confirms that the SF-DCT issued the final claim payment checks in August 2024, and that, except for one uncashed claim payment, all other claim checks have either been cashed or expired. (ECF No. 1796, PageID. 42459) Chmiel asserts that as to uncashed claim payment, there is sufficient available funds in the clam bank account if the claim payment was to be cashed. *Id.* He confirms that all payments due pursuant to the Quebec Breast Implant Settlement Agreement, the Ontario Breast Implant Settlement Agreement, the B.C. Class Action Settlement Agreement, and the Australia Breast Implant Settlement Option were made. *Id.* Chmiel further states:

> 7 As Financial Advisor, I confirm that all payments due for Class 14 under the Domestic Health Insurer Settlement Agreement have been made as part of the Effective Date payments.
>
> 8 As Financial Advisor, I confirm that all payments due for Class 15 Government Payor Claims have been made as part of the Effective Date payments.
>
> 9 As Financial Advisor, I confirm that a 50% Class 16 payment in the amount of $12,741,395 was remitted on June 7, 2019.
>
> 10 As Financial Advisor, I confirm that on December 31, 2021, in conjunction with

> the Court Order approving the 2nd 50% of Second Priority Payments, the Trust recorded $14,073,724 in Claims Payable for the 2nd 50% Class 16 payment to be remitted to the Dow Chemical Company, subject to the terms of the funding agreement.

Id.

Chmiel asserts that the Allowed administrative costs have been paid or that provision has been made to make such final payments as authorized by the Court. He states that the investment managers have completed their tasks and have been discharged. Chmiel further states that once the uncashed check is presented or expired, the claim bank account will be closed. He confirms that the bank account for the payment of administrative expenses will be closed upon completion of any wind-down activities authorized by the Court. A final audit and tax return for the SF-DCT will be completed at the conclusion of the wind-down process. *Id.* Chmiel asserts that the amounts remaining in the SF-DCT account and budget are sufficient to cover the costs to pay all amounts to complete and terminate the Trust if the Motion to Terminate is approved before the end of December 2024 and the wind-down is completed by March 2025. If the wind-down extends beyond the end of March 2025, additional funding may be required. *Id.* at PageID.42460.

John Wills, the Independent Assessor, also submitted a Declaration. He asserts:

5. In the course of my consulting work and my Independent Assessor work I obtained detailed knowledge of the claim data, the operations of the SF-DCT, the terms of the funding, and the likely required funding to complete the evaluation and payment of eligible claims.

6. In these capacities, I participated in and assisted with the development of comprehensive groupings of claims data to assure that each claim had been addressed as required by the Plan. I assisted in the preparation of data analysis and reports showing - at various stages - the universe of claims and their status as eligible, ineligible, paid, resolved, and closed.

7. I have analyzed the current claims data using the procedures that I have employed in the past. That data shows that all proofs of claims filed in the bankruptcy case were transmitted to the SF-DCT as required by the Plan, that the SF-DCT has evaluated each claim and has provided each claim with a determination of either eligible or deficient. A claim can be deficient if it does not have the supporting documentation to support a benefit payment, or if it is not timely, or if the claimant fails to correct a deficiency by the applicable deadline.

(ECF No. 1796, PageID. 42633)

Wills also asserts that he analyzed recent financial statements and claim data and that,

> [b]ased on the claim and financial data, I conclude as Independent Assessor that all timely claims that are eligible for payment and that have met the requirements established by the Court for payment have been sent a payment. I conclude that there are no pending outstanding claims remaining to be paid. Claims that did not receive payment were not eligible for payment under the terms of the Plan and/or the applicable Court orders governing the procedures for payment. There is no further need for claim review staff or claim payment staff.

Id. After analyzing the budget and current Fund balance, Wills concludes that "the remaining Fund balance is sufficient to complete the wind-down of operations over a reasonable period of time. I have been advised that the staff has already been reduced, and that the office space lease was terminated at the end of June 2024. Accordingly, I see no need for any further funding." *Id.* at PageID.42634.

II. ANALYSIS

A. Plan Interpretation

Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). In interpreting

a confirmed plan, courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors. *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); *see, Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir. 1993). State law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written, regardless of whether it is in line with parties' prior obligations. *In re Dow Corning*, 456 F.3d at 676. A term is deemed ambiguous when it is "capable of more than one reasonable interpretation." *Id.* The Court has no authority to modify this language. Although bankruptcy courts have broad equitable powers that extend to approving plans of reorganization, these equitable powers are limited by the role of the bankruptcy court, which is to "guide the division of a pie that is too small to allow each creditor to get the slice for which he originally contracted." *Id.* at 677-78 (quoting *In re Chicago*, 791 F.2d 524, 528 (7th Cir. 1986)). "A bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code." *Id.* at 678 (citing *In re Highland Superstores, Inc.*, 154 F.3d 573, 578-79 (6th Cir. 1998)).

New York law governs the interpretation of the Plan. (Plan, § 6.13) Under New York law, a court must first decide whether the contract is ambiguous. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 595 (6th Cir. 2001). If a court determines that language of a contract is ambiguous, external evidence of the parties' intent is admissible. *Id.* The court is to give effect to the intent of the contracting parties as revealed by the language they chose. *Id.* at 596.

The Court has reviewed the Plan documents and various applicable Orders it entered in this matter. Based on the arguments and supporting documents presented by the parties, the Court has interpreted the Plan and related documents, as more fully set forth below.

B. Korean Claimants' Arguments

The Korean Claimants argue that the conditions for termination have not been met since certain Korean Claimants have not received payment. The Movants replies that the Plan does not condition termination on receipt of payment by every claimant since under the Plan, not all claims are eligible for payment.

As this Court previously ruled and as affirmed by the Sixth Circuit Court of Appeals, this Court has no authority under the Plan documents to review the denial of Claims by the Claims Administrator. The Sixth Circuit has noted that "[t]o 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." *In re Settlement Dow Corning Trust*, Case No. 18-1040, 760 F. App'x 406, 411-12 (6th Cir. Jan. 14, 2019).

The FPA in Section 2.01(c) provides the Debtor's obligation to fund the SF-DCT terminates when "all Claims filed have been liquidated and paid *or otherwise finally resolved.*" The express language of the FPA does not support the Korean Claimants' position that because they have not been paid, the FPA cannot be terminated.

The Claims by certain Korean Claimants were "otherwise finally resolved" by the Claims Administrator's denial of those certain claims and the Sixth Circuit's ruling that the Korean Claimants' challenge to such denial was beyond the scope of the Plan. The Korean Claimants did not appeal the Sixth Circuit's ruling to the Supreme Court. Orders and judgments become final when "the availability of appeal has been exhausted and lapsed, and the time to petition for certiorari has passed." *Deja Vu v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee*, 421 F.3d 417, 421 (6th Cir. 2005). The Court finds that the FPA can be terminated even if certain Claims were not paid because they were denied by the Claims Administrator and thereby "otherwise finally resolved."

The Korean Claimants further argue that because they continue to make "demands of payments" on their unpaid claims which were denied, the FPA cannot be terminated. They also argue that as a result of the request for updated addresses by the SF-DCT, when the updated addresses were provided, these then became "new claims." The Movants reply that continued "demands of payments" do not "magically" resurrect claims that have been denied and closed.

Section 2.01(c) of the FPA also conditions termination if "no new timely Claims have been made against the Settlement Facility or the Litigation Facility for two consecutive Funding Periods." (FPA, § 2.01(c)) The Korean Claimants' Claims are not "new" because the Claims were previously denied. Any "demands of payments" submitted does not make the denied Claims "new" Claims since they

constitute the same Claims which were previously denied by the Claims Administrator. The request for updated addresses does not make the Korean Claimants' Claims "new" Claims since the requests for updated addresses was ordered by the Court in Closing Order 2 on March 19, 2019. Nothing in Closing Order 2 supports the Korean Claimants' argument that providing updated addresses turns a claim which was previously filed with the SF-DCT into a "new" Claim.

As to the Korean Claimants' position that the funding periods were extended, as the Movants argue, the FPA specifically set forth the Funding Periods.

The FPA provided for 16 Funding Periods, with Annual Payment Ceilings, which commenced on the first anniversary of the June 1, 2004 Effective Date of the Plan, ending on June 1, 2021. (FPA, § 2.01(b)) The Korean Claimants cannot point to any provision under the Plan documents, nor any order that extended the Funding Period. Pursuant to the plain language of the FPA, the 16 Funding Periods ended on June 1, 2021.

As to the Korean Claimants' renewed request for payment of Claims which were previously denied, the Court will again deny this request based on its previous Orders, and the Sixth Circuit's ruling on this issue, as set forth above.

C. The CAC's Arguments

1. Korean Claimants / Otherwise Finally Resolved

The CAC argues that the Korean Claimants' Appeal has not been resolved. However, as noted above and as ruled on by the Sixth Circuit, this Court lacks authority under the Plan documents to review the Claims Administrator's decision to deny a claim. The current appeal by the Korean Claimants involves Closing Order 5, which provided that the Claims Administrator close Claims where the claimants failed to update addresses. The Court noted the Sixth Circuit's Order that the Korean Claimants' appeal as to Closing Order 5 was untimely. See, ECF No. 1783, PageID.41110. The current appeal by the Korean Claimants does not change the Plan documents' language that there is no right to appeal a denial by the Claims Administrator, as this Court and the Sixth Circuit have previously ruled. Section 2.01(c) provides the Debtor's obligation to fund the SF-DCT terminates when "all Claims filed have been liquidated and paid *or otherwise finally resolved*." The Claims Administrator's denial of the Korean Claimants Claims meets the criteria under the FPA that Claims are "otherwise finally resolved" since the Korean Claimants' Claims currently before the Court were not liquidated or paid. The Korean Claimants' Claims were "otherwise finally resolved" by the denial because there is no right to appeal from the Claims Administrator's decision.

2. CAC's Request for Compensation

Regarding the CAC's request for compensation and the reasonable hourly rate issues before the Court raised in the CAC's response to the Movants' motion to terminate funding, the Movants argue in their reply that any such request should be made through the budget process and that an accounting of the CAC's request should be made available. The Movants assert that they were previously unaware the CAC had made a request for additional compensation to the Court. The CAC filed a sur-reply asserting that the Movants' reply raised "new claims" as to the request for accounting and that if the Movants appeared to be surprised by the CAC's compensation request, it is a surprise of their own making.

The Court finds an accounting is not required. The Movants are well aware of the amount of compensation the CAC has received throughout the years, through the budget process and based on the various financial reports the parties receive as required by the SFA. SFA, Art. VIII.

As to the CAC's compensation request in addition to what the CAC has received throughout the years, the Court finds that based on the Movants' response, they appeared surprised at the request for *additional* compensation. The Court agrees that the CAC's submissions as to their monthly request for compensation are reviewed by the Court ex parte. However, the request for additional fees to fully compensate the CAC based on past work, is a different and new request than the normal monthly

request for fees based on work the CAC already performed and on the approved hourly rates entered by the Court.

The SFA provides that the CAC members shall be compensated by the Settlement Facility at reasonable hourly rates established by the District Court. (SFA, § 4.09(d)) The Order Establishing Compensation for Claimants' Advisory Committee provides that the "CAC members have voluntarily agreed for purposes of conserving the assets of the Settlement Fund to reduce their normal hourly billing rate." (ECF No. 39, PageID.125) However, nothing in this Order, nor the SFA, provides for retroactive compensation for the CAC. As stated in the Order, the CAC "voluntarily agreed for purposes of conserving assets of the Settlement Fund to reduce their normal hourly billing rates." *Id.*

The Court finds this was a generous act on the part of CAC members. There is no doubt that the CAC's work through the years, especially at the beginning of the SF-DCT resulted in claimants receiving appropriate compensation and aided in preserving Trust assets. The CAC members' work shows that they placed the Claimants' interests first. The CAC could have requested an increase in their billing rates at any point, which the CAC eventually requested and was granted by the Court. Although the Court has discretion to determine hourly rates for the CAC members, the CAC has not cited any authority from the Plan documents that the Court has the discretion to *retroactively* review the hourly billing rates and direct the SF-DCT to pay the CAC a higher hourly rate which was not previously requested by the CAC, nor

approved by the Court. The CAC has not submitted any evidence to show that at the time the July 16, 2004 Order establishing the CAC's initial hourly rate, the Parties and the Finance Committee understood that at some future date, if there were sufficient funds available, the CAC would seek additional compensation based on a higher hourly rate and apply such to the previous work they performed so that the CAC members would then be fully compensated.

Based on the Declaration submitted by the CAC, the Finance Committee was provided on November 18, 2021, a copy of a memo requesting the CAC's proposed compensation at the conclusion of the Settlement Trust. (ECF No. 1824, PageID. 43009) At the earliest, it appears that the Finance Committee had knowledge of the CAC's request for additional compensation in November 2021. However, the CAC was excluded from all discussions on funding requests from 2021 to 2024. *Id.* at PageID.43010. As this Court noted in its September 29, 2023 Order, the Plan language provided that the CAC must be included in all discussions with the Finance Committee, in addition to the Debtor's Representatives. Based on the declaration submitted by the CAC, the CAC had not been included, in a recent analysis of the funds required for the proposed wind-down operations. The Financial Advisor provided the funding analysis for the wind-down process, which included a line item for the CAC's compensation. The CAC does not know how these numbers were generated since the CAC had no input into the document. It is noted that there was no proposed 2025 Budget submitted to the Court, in light of the anticipated termination of funding of the SF-DCT.

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The Court is concerned that the CAC has not been part of the discussions regarding the funding of the SF-DCT and the wind-down operations, despite the language of the Plan and the Court's September 29, 2023 Order. The Court cannot understand the exclusion of the CAC from these discussions, in light of the fact that the CAC is a party to all the agreements at issue. The CAC *must* be included in all future discussions and *must* be given any reports and analysis since 2021 as to the funding of the SF-DCT.

Even though the Finance Committee had knowledge of the CAC's request to retroactively seek compensation based on hourly rates not previously approved by the Court, as noted above, the CAC's request has not been shown to be supported by any Plan language, nor any agreement or understanding between the Parties and the Finance Committee at the time the initial hourly rate order was entered by the Court. The Court agrees it has discretion to determine the reasonable hourly rate and hours worked by the CAC. However, such discretion is guided by statutory and case law regarding the award of attorney fees.

The Bankruptcy Code provides that a bankruptcy court may award (A) reasonable compensation for actual, necessary services rendered by the . . . attorney and by any paraprofessional person employed by any such person; and (B) reimbursement for actual, necessary expenses. 11 U.S.C.A. § 330(a)(1). Section 330(a)(3) provides that, "[i]n determining the amount of reasonable compensation to be awarded" to a "professional person, the court shall

consider the nature, the extent, and the value of such services." 11 U.S.C. § 330(a)(3). And it instructs the courts to "tak[e] into account all relevant factors, including" the time spent, rates charged, "whether the services were necessary . . . or beneficial *at the time at which the service was rendered*," as well as other factors. *Id.* (italics added). "[T]he court shall not allow compensation for . . . 'unnecessary duplication of services; or services that were not – (i) reasonably likely to benefit the debtor's estate; or (ii) necessary to the administration of the case.' " *Id.* § 330(a)(4)(A). A reasonable attorney fee award is determined by the "lodestar" method-the reasonable hourly rate multiplied by the number of hours expended. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *Isabel v. City of Memphis*, 404 F.3d 404, 415 (6th Cir. 2005).

The Court has done so in approving the CAC's monthly request for fees. The Court has not found any support, by way of the Plan language, the Parties' agreement, statutory law, or case law, that the Court has discretion to retroactively award a "more reasonable hourly rate" than the Court previously approved and apply such to the hours of work the CAC previously performed. The Court denies the CAC's request for additional fees, beyond the fees the Court has already approved.

D. Summary

Based on the above analysis and findings, the Court finds that the conditions for the termination of funding required by the Plan and the Funding Payment

Agreement have been met. Dow Silicones complied and met its funding obligations to the Settlement Facility and the Litigation Facility under the Plan and the Funding Payment Agreement. The Movants properly supported their Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement. Pursuant to the terms of the Funding Payment Agreement and the Settlement Facility and Fund Distribution Agreement, the SF-DCT shall proceed to wind-down its operations. The declarations of the Claims Administrator, the Financial Advisor and the Independent Assessor indicate that the wind-down period, if commenced by January 1, 2025, shall conclude no later than March 31, 2025.

III. CONCLUSION/ORDER

For the reasons set forth above,

IT IS ORDERED that the Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement filed by Dow Silicones Corporation, the Debtor's Representatives, and the Finance Committee (**ECF No. 1796**) is GRANTED. The Funding pursuant to Section 2.01(c) of the Funding Payment Agreement and the Settlement Facility pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement are terminated effective December 31, 2024.

IT IS FURTHER ORDERED that all Parties to the Plan and the various Agreements related to the Plan, the Reorganized Debtor, the Debtor's Representatives, the Claimants' Advisory Committee, and the Finance Committee, *must* confer as to the remaining matters in this case, including the wind-down activities and projections.

IT IS FURTHER ORDERED that the following general activities with respect to wind-down are as follows:

1. The Claims Administrator and Financial Advisor are instructed to complete all necessary tasks to achieve final termination including closure of bank accounts, payment of all funds due to remaining staff, any other fees and expenses for vendors and contractors, and termination of storage of data and contracts for the storage of claims data by the end of the first quarter of 2025.

2. The Claims Administrator is instructed to arrange for the long-term storage of the claims database on a suitable hard drive or drives. Such data shall be maintained for a period of time to be set by the Court and shall be held and maintained as further instructed by the Court.

3. The Claims Administrator shall transfer to the Reorganized Debtor the files of

cancelled checks (which serve as evidence of releases) as provided in the Plan.

4. The Finance Committee shall provide to the Court the summary of the resolution of claims.

5. The Finance Committee and the Parties shall submit a final report.

6. The Financial Advisor is instructed to prepare and submit the final audit of the SF-DCT and the final tax returns for the Trust. The Financial Advisor shall endeavor to complete the preparation and submission of these documents as promptly as feasible. The Financial Advisor shall submit the audit and confirmation of tax filing to the Court.

7. Any funds remaining in the Trust account at the conclusion of the wind-down activities are to be distributed to a neutral medical research institute or university, selected by the Finance Committee after consulting with the Claimants' Advisory Committee.

8. Once wind-down activities are complete, the parties shall provide a Trustee Direction to the Trustee instructing the Trustee to conclude its operations as provided in the Depository Trust Agreement and the parties shall assist the Trustee with the dissolution of the Depository Trust in

accordance with the terms of the Depository Trust Agreement.

9. At or near the conclusion of the wind-down activities, the parties shall provide a notification to the Court and request an order from the Court that will terminate and dissolve all positions appointed by the Court under the Plan - including the Claimants' Advisory Committee, Debtor's Representatives, Finance Committee, Trust, Trustee, Independent Assessor, Claims Administrator, Appeals Judge and Lien Judge, the Special Master for Closing and the Financial Advisor (once the final audit and tax filings are complete). The parties will provide to the Court a proposed form of order.

10. At the conclusion of wind-down activities, the parties shall also provide a proposed order directing the destruction of any claim materials in the possession of any persons appointed by the Court or who were not subject to the Stipulation of the Finance Committee, Debtor's Representatives, and Claimants' Advisory Committee to Require All Vendors, Contractors, and Various Appointees to Return or Destroy All Data, Information and Materials Related to the Settlement Facility (ECF No. 1781) entered by the Court on July 24, 2024.

11. Once wind-down activities are complete, Dow Silicones will dissolve the DCC Litigation Facility, Inc.

/s/_____
Denise Page Hood
United States District Judge

Dated: December 30, 2024