

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: §
DOW CORNING CORPORATION, § CASE NO. 00-CV-00005-DPH
REORGANIZED DEBTOR § (Settlement Facility Matters)
§ Hon. Denise Page Hood

**RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO
FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR
AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS**

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The Claimants' Advisory Committee ("CAC") submits this Response to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments (the "Recommendation"), dated December 23, 2020, and respectfully states as follows:

Preliminary Statement

The CAC strongly supports the Finance Committee's Recommendation and urges the Court to approve it immediately so that all qualifying Breast Implant Claimants in the Settlement Facility – Dow Corning Trust ("SF-DCT" or the "Trust") may receive their full Premium Payments – finally fulfilling the promise made to them in 1999 and providing crucial assistance to an aging population still struggling through a pandemic and recession.¹

The Independent Assessor ("IA") concluded that adequate funding exists to "assure" payment of all First Priority Claims even with approval of all Second Priority Payments, with a vast cushion that readily satisfies the Sixth Circuit's "virtual guarantee" test. See Report of Independent Assessor, December 21, 2020 ("IA Report") at 16 (Exh. C to

¹ Abbreviated terms not defined herein have the meanings assigned to them in the Dow Corning Plan documents or the Recommendation.

Recommendation). The Finance Committee has endorsed that conclusion and requested approval of full Second Priority Payments. Recommendation at 9. The CAC strongly agrees and urges the Court to authorize the Settlement Facility to complete Premium Payments and issue all other Second Priority Payments as expeditiously as possible, both in fairness to Claimants and to facilitate winding down the SF-DCT most efficiently.

Factual Background²

As the Court knows, to encourage Breast Implant Claimants to vote for its reorganization plan (the “Plan”) in 1998 and compensate them for the delays of bankruptcy, Dow Corning promised them Premium Payments of \$5,000 for rupture claims and 20% above the base payment for disease claims, when and if sufficient funding was confirmed to cover all First Priority Payments in addition to the authorized Second Priority Payments. Claimants were induced to vote for the Plan based on the representation that Premiums would likely be issued a few years into the program, which began paying claims in 2004. *See* 2017 CAC Resp. at 3.

In practice, however, Premium Payments have been paid piecemeal and only after substantial delay, based on the Finance Committee’s conservative approach, augmented by the Sixth Circuit’s interpretation of the Plan as requiring a “virtual guarantee” of adequate funding. *See* 2017 CAC Resp. at 4-5; Recommendation at 3-4. Eighteen months after the SF-DCT’s final claim filing deadline, and more than 22 years after Claimants were asked to vote on the Plan, qualified Breast Implant Claimants still have received only 50% of their earned Premium Payments.

² For a summary of background facts, the Plan provisions governing approval of Second Priority Payments, and a more complete history of the treatment of Premium Payments during the administration of the Dow Corning settlement, *see* Response of Claimants’ Advisory Committee to Finance Committee’s Recommendation and Motion for Authorization to Make 50% Second Priority Payments, Doc # 1285, filed Feb. 10. 2017 (“CAC 2017 Resp.”) at 2-9.

The Independent Assessor's December 21, 2020 Final Report (the "IA Report") continues to apply an exceedingly conservative set of assumptions in evaluating the maximum possible exposure to the SF-DCT from the remaining universe of filed claims. As detailed in the IA Report and summarized in the Recommendation at 5-8, even applying extremely unrealistic conservative assumptions, including that every filed claim will be approved at the maximum amount sought, the IA concluded that all First and Second Priority Payments can be issued with a funding surplus in excess of \$170 million. Based on the IA Report, the Finance Committee agreed that the projected cushion assures adequate funding and requested that the Court approve all categories of Second Priority Payments. Recommendation at 10-12.

Argument

**THE COURT SHOULD AUTHORIZE PROMPT PROCESSING AND
ISSUANCE OF ALL REMAINING SECOND PRIORITY PAYMENTS**

The CAC strongly agrees that it is time to approve full Premium Payments and thereby finally fulfill the largest unmet promise to claimants injured by Dow Corning's breast implants—many of who have died while waiting for full payment of their claims. While the CAC believes it has been clear for many years that adequate funding exists to pay 100% Premiums under any standard, it is now, at the end of the settlement process, beyond any possibility of good faith dispute that the SF-DCT can comfortably pay *all* claims with an immense funding surplus. The passing of all claim filing deadlines means there is no longer any risk of a last-minute surge of meritorious claims, as Dow Silicones has long argued was possible. Projecting the amount necessary to pay the fixed universe of already-filed claims involves even less uncertainty than was involved in the IA's prior projections, permitting a high degree of confidence that the huge anticipated funding cushion will suffice.

Indeed, the cushion is even larger than the IA's projections indicate, because the approximately \$589 million available for qualified transfers to the Trust is calculated as of June 1, 2020. IA Report at 14. In reality, these funds will not be drawn until actually needed to pay claims in 2021 and 2022. Until paid, the available amounts continue to grow at 7% per year, adding millions of additional nominal dollars that will be available, if necessary, to pay claims. See IA Report, Exh. B, Note.

We do not expect Dow Silicones to dispute that adequate funding is now virtually guaranteed, thus satisfying the only requirement under the Plan to authorize Second Priority Payments. Absent the assertion of a plausible Plan-based argument against authorization of such payments, the CAC believes the Recommendation can and should be approved forthwith, without the delay of a formal hearing.

Moreover, as the Finance Committee explains, there is no logistical reason to delay processing and issuance of Second Priority Payments. Given that it took approximately a year and a half to complete processing of 50% Premiums, any delay in commencing payment of the second 50% "will extend the timeline for completing claims processing beyond December 2022, which would inevitably increase the cost of operating the SF-DCT." Recommendation at 11. The CAC agrees that approving Second Priority Payments *now* is the best way to "ensure the efficient and cost-effective resolution of all remaining claims and of winding up the SF-DCT and this litigation." *Id.* This should be a goal shared by all parties.

We add only that this step is also long overdue to make good on the parties' promise to Breast Implant Claimants, who have been waiting literally for decades for full payment and for closure on the Dow Corning saga, and who continue to die or lose touch with the Claims Facility as the years go by. As the COVID-19 pandemic continues unabated in many

parts of the country, with horrific health and economic impacts, payment of the final amounts owed to these Claimants should be expedited to the greatest extent possible.

Conclusion

For the reasons stated above, the CAC respectfully urges the Court to immediately grant the Recommendation; authorize the SF-DCT to issue all Second Priority Payments as and when they are approved for payment under the Plan; and grant such further relief as justice requires.

Dated: New York, New York
January 27, 2021

Respectfully submitted,

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