UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

REPLY OF CLAIMANTS' ADVISORY COMMITTEE TO RESPONSE OF DOW SILICONES CORPORATION AND THE DEBTOR'S REPRESENTATIVES TO THE REVISED FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The CAC submits this Reply to the Response of Dow Silicones Corporation and the Debtor's Representatives ("Dow Silicones") to Revised Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments ("Dow Resp."), dated January 27, 2021, and respectfully states as follows:

Preliminary Statement[1]

Dow Silicones fails to identify the faintest possibility that the nearly $600 million in nominal dollars remaining under the Settlement Facility funding cap could prove inadequate to pay the finite pool of already filed claims currently being processed – the only question potentially relevant to authorization of full Second Priority Payments ("SPPs"). This issue has been "hotly contested" (Dow Resp. at 1) only by Dow Silicones, which has just one motive: delay. The fiduciaries charged with balancing claimant interests – the Finance Committee and the CAC –

[1] Abbreviated terms not defined herein have the meanings assigned to them in the Dow Corning Plan documents, the Recommendation, the CAC's Response to the Recommendation ("CAC Resp."), or the Dow Resp.

agreed a decade ago that adequate funds remained to issue 50% Premiums, based on conservative and reliable projections. The Sixth Circuit, after requiring a heightened level of certainty, ultimately blessed that result. Now, with all claim filing uncertainty eliminated, those same fiduciaries agree that sufficient funding remains to assure payment of *all* remaining claims – including the balance of Premiums promised to claimants more than two decades ago.

Dow Silicones does not contest that there is plenty of money to pay all claims with a huge surplus. Instead, it tries to change the rules at the last minute, rewriting the Plan to require that every single base claim be identified, valued, and paid – and that all administrative hiccups and budgeting issues be resolved – before further Premiums may even be authorized. The Sixth Circuit has already rejected such arguments, confirming that Premiums may be paid based on *projections of future claim filings* so long as eventual payment of all claims is assured. *A fortiori*, Premiums may be paid when the claim filing deadline is eighteen months past and there is unquestionably enough money left to pay all filed claims. The Court should reject Dow Silicones' arguments for further delay and immediately authorize issuance of all SPPs.

Argument

1. All Requirements for Approval of Full Second Priority Payments Have Been Met

The Court is intimately familiar with the specific requirements set forth in SFA §§ 7.01 and 7.03 for approval of SPPs, which have all been met here: the Finance Committee has made the recommendation required by SFA § 7.03(a), accompanied by the detailed accounting of claim processing and payments, including projection of the amount "likely" necessary to pay remaining claims, described in SFA § 7.01(d) – concluding that, even employing a series of highly conservative assumptions, payment of *all* claims is assured, with a cushion of $172.6 million. Recommendation at 5-6.

The cushion is actually much larger, because the IA assumed that *all* pending claims would be paid in full at the maximum amount based on the disease listed on the claim form; a more realistic projection based on historical processing results would add approximately $129 million to the cushion. IA Report at 9-10. The IA also included many claims that will never be approved – *e.g.*, those on appeal; with incorrect addresses, uncured deficiencies, or returned or stale checks; or subject to funding caps. Recommendation at 7-8. Moreover, the amount available was valued as of June 1, 2020, but the undrawn payments from Dow Silicones will continue to grow at 7% per year until needed in 2021 or 2022. *See* IA Report, Exh. B, Note.

The record therefore overwhelmingly supports – and nothing contradicts – the consensus of the IA, the Finance Committee, and the CAC that payment of *all* valid claims is virtually guaranteed, satisfying the standard established by the Sixth Circuit.

In contrast to its oppositions to prior authorization motions, Dow Silicones does *not* challenge the IA's methodology, which it concedes is "conservative" (Dow Resp. at 11) and subject to significantly less uncertainty because there is now no need to project future claim filings (*id.* at 9). Indeed, the reliability of future claim filing projections was precisely what was "hotly contested" in the past – but that issue is now moot. Dow does not even suggest, much less attempt to prove, that liquidating the dwindling fixed pool of claims could conceivably threaten the funding cap. That eliminates the only possible basis to reject the Recommendation.

2. Dow Silicones Attempts to Rewrite the Plan and Block Payments Based on Issues That Have Nothing to Do With Funding Adequacy

In a Hail Mary attempt to force further delay, Dow Silicones opposes the Recommendation by making up new requirements not contained in the Plan documents and quibbling about administrative matters that are immaterial to the authorization process under § 7.03(a). None of these objections provides a ground for rejecting the Recommendation.

As the Court knows, the Plan provides for Premiums to be approved based on *projections*, which Claimants were told would probably happen a few years into the settlement process, when thousands of potential claims would still remain to be filed. Dow Silicones now tries to rewrite the settlement to require that *every single claim be identified and valued* before *any* Premiums are paid. *See, e.g.*, Dow Resp. at 6 (arguing that SPPs may not be authorized until all base claims "have been identified, accounted for, and valued"); *id.* at 19 (arguing that Plan requires "certainty that all claims have been accounted for" and SPPs cannot be approved until that process is "completed").

That was *not* the parties' deal – as the Sixth Circuit has confirmed by holding that Premiums were appropriately authorized and paid based on *projections* with years of future claim filings still pending. *In re Settlement Facility Dow Corning Tr.*, 754 F. App'x 409, 415-17 (6th Cir. 2018). If the SFA required identification and valuing of every single claim before payment of SPPs, the 50% payments twice authorized by this Court and ultimately affirmed by the Sixth Circuit would have violated the Plan. Dow Silicones offers no reason why approval of the second 50% installment should be governed by different rules.

In the same vein, Dow Silicones repeatedly states that funding adequacy must be "guaranteed" (Dow Resp. at 2, 3), although it ultimately acknowledges the actual standard of "virtual guarantee" (*id*. at 7). That distinction is crucial, because, as the Sixth Circuit recognized, the parties' intention that Premiums be paid *during* the settlement process based on *projections* meant that "absolute certainty" was neither possible nor required. *Id.* at 413 (citing *In re Settlement Facility Dow Corning Tr.*, 592 Fed. App'x 473, 480 (6th Cir. 2015)).

Beyond that, Dow Silicones raises a hodgepodge of procedural and administrative quibbles, some of which may warrant further discussion by the Closing Committee, but none of

which presents *any* possibility of the money running out – the only potential basis under the Plan for rejecting the Recommendation.

First, Dow Silicones argues that the required "accounting" accompanying the Recommendation cannot be considered "valid" because of minor discrepancies in claim totals that it suggests have not been fully ironed out in the Closing Committee process. Dow Resp. at 12. While it is a truism that variations in final claim totals "can affect the dollar amount of funds" needed to pay all claims (*id.* at 13), Dow Silicones does not suggest, much less attempt to prove, that any variations in claims accounting are more than de minimis – much less material to the question before the Court. Dow Silicones argues that "[i]t does not matter whether the differences are large or small" (*id.* at 15), but of course it does. Any accounting of tens of thousands of claims submitted and processed over 25 years will contain minor errors and anomalies. The Plan does not require perfection in the form of "a 100% guaranty that all pertinent claims have been identified" (*id.* at 16), only an assurance of funding adequacy, which the accounting before the Court amply provides.

Any minor variations in the calculation of pending claim totals are irrelevant in light of the IA's conservative approach of assuming that *all* claims will be paid – including hundreds that are on appeal, with bad addresses, or with stale or returned checks. Dow Silicones does not suggest that un-accounted-for claims exist in comparable numbers. Dow Silicones' discussion of corrections that have been made to data compilations (Dow Resp. at 15-16 n.12); prior claim anomalies that have been resolved (*id.* at 17); and questions raised about the timing requirements for certain claims (*id.* at 18) do not establish that any material number of *new* claims could suddenly materialize. All the claims discussed in these examples *are already included in the claim totals and projected to be paid at 100% of the amount claimed.*

Minor anomalies are further irrelevant in light of the vast $172.6 million cushion available *above* the amount needed to pay the over-inclusive total of remaining claims. Dow Silicones inexplicably asserts that invoking this huge cushion "begs the question" (*id.* at 19 n.15), but of course the size of the cushion as compared to any identified uncertainty *is* the question – as the Sixth Circuit recognized in affirming this Court's 2016 virtual guarantee finding: "The reliability of the projections is further backed up by the enormity of the margin of error provided by the projected $100.4 million cushion." 754 Fed. App'x at 416. Now, with claim filing uncertainty eliminated, Dow Silicones suggests no ground to question the adequacy of the remaining cushion to absorb, many times over, any variations in final claim processing.[2]

Second, Dow Silicones argues that the IA's projection of approximately $30 million in remaining administrative expenses is not adequate because it fails to explain the details of anticipated downsizing savings or to account for possible expenses associated with pending litigation. Dow Resp. at 19-20. Dow Silicones does not suggest that any variations in ultimate administrative costs could be material or threaten the funding cap, rendering the issue irrelevant to approval of the Recommendation.

Third, Dow Silicones complains that the IA Report does not contain sufficient back-up detail on the calculation of the nearly $600 million available to satisfy remaining claims. Dow Resp. at 20-21. But Dow Silicones is obviously quite familiar with the Plan's methodology of rolling forward undrawn funding with 7% interest and does not suggest any errors in the

[2] Even farther afield is Dow Silicones' unexplained citation to a report concerning the Gulf Coast Claims Facility, which processed more than a million lost earnings and profits claims arising out of the *Deepwater Horizon* oil spill. *See* Dow Resp. at 19 n.14 & Exh. B at p. 59 of 89. Dow Silicones does not explain why the payment adjustments made in that much larger settlement, which themselves would not threaten the cap even in this case, are relevant to the processes, accounting, or present posture of the Dow Corning settlement.

calculation provided to the IA by the Financial Advisor – much less any potential dispute that could conceivably be material to funding adequacy.

Fourth, Dow Silicones suggests in a point heading that "Procedural Flaws Preclude Authorization" of SPPs (Dow Resp. 21), but fails to identify any. Instead, Dow Silicones acknowledges that the two remaining members of the Finance Committee were empowered to issue the Recommendation, but vaguely suggests that one of the members was no longer "fully active." *Id.* at 22. This type of general statement cannot be sufficient to rebut the presumption that both long-serving members of the Finance Committee made a fully informed, well-considered decision to support moving forward with the necessary final steps in processing pending claims and winding down the SF-DCT.

Dow Silicones' further complaint that the process leading up to the Recommendation was "extremely compressed" compared to prior SPP authorizations (Dow Resp. at 22-23) does not identify a "flaw" in the process, much less one barring approval of the Recommendation. Prior proceedings involved far more complex issues, including hundreds of pages of dueling expert reports evaluating the risk that thousands of unanticipated claims might still be filed at or before the June 2019 deadline. The issue before the Court now is far simpler: valuing the finite claims actually filed. Dow Silicones fails to explain how it was "hampered" in its ability evaluate the IA's treatment of this limited issue, much less to an extent rendering its right to be heard "meaningless." Dow Resp. 23. Dow Silicones' suggestion that "speed" is "not one of the criteria in the Plan" for approval of SPPs (Dow Resp. at 4) ignores SFA § 7.03(a), which provides: "The parties agree to cooperate in expedited procedures for review and resolution of issues under this subsection and consent to an expedited hearing."

Finally, while the Plan expressly contemplates issuing lower and higher priority payments simultaneously so long as this does not interfere with the ability to make "timely" First Priority Payments, SFA § 7.01(b)(c)(v), Dow Silicones argues that every single base claim must be paid before SPPs are even authorized because devoting *any* resources to simultaneous processing would render base claim payments "untimely." Dow Resp. at 23-24. Of course, such a rule would have barred the already approved partial SPPs, since some base claims are always in the processing pipeline. Dow Silicones recognized in prior briefing that this provision addresses something else: timeliness concerns presented "because funding payments are capped on an annual basis." Brief of Appellants, *In re Settlement Facility Dow Corning Tr.*, No. 14-1090 (filed Apr. 23, 2014), at 34 (excerpt attached hereto as Exh. A). Thus, if cash flow in a particular funding period during the settlement had been insufficient to pay all approved claims, this provision required that higher priority claims be paid first. *See id.* at 34-35 & n.17 (provision protects against First Priority Payments being delayed "until a later funding period"). In any event, this provision concerns processing order and "has nothing to do with the threshold standard governing the authorization to pay Second Priority Payments." *Id.* at 34-35.

Dow Silicones has already succeeded in delaying Premiums years past when claimants were told to expect payments, even though funding certainty has consistently exceeded what was projected at confirmation. We are now nearly two years *past* the end of the settlement, and no meaningful uncertainty remains. Dow Silicones has not identified *any* risk that paying all pending claims will threaten the funding cap or any other reason relevant under the SFA to delay further approval of full SPPs. The Recommendation should be approved.[3]

[3] We also respond briefly to the Response of Korean Claimants to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments, dated January 27, 2021 ("Korean Cl. Resp."), which mostly recycles concerns unrelated to the SPP issue. The

Conclusion

For the reasons stated above and in prior submissions, 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
February 10, 2021

Respectfully submitted,

KRAMER LEVIN NAFTALIS & FRANKEL LLP
/s/ Jeffrey S. Trachtman
By: Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (telecopy)

Dianna Pendleton-Dominguez, Esq.
Law Office of Dianna Pendleton
401 North Main Street
St. Marys, OH 45885
(419) 394-0717 (telephone)
(419) 394-1748 (telecopy)

Ernest Hornsby
FarmerPrice, LLP
100 Adris Place
Dothan, AL 36303
(334) 793-2424

Attorneys for the Claimants' Advisory Committee

Korean Claimants lack standing to object to the Recommendation, because SFA § 7.03(a) does not include Settling Personal Injury Claimants among the parties given notice and an opportunity to be heard on such motions. On the merits, the Korean Claimants' objection to the Finance Committee's composition is irrelevant given Dow Silicones' recognition that the Committee may act through a two-member majority, as well as the practical realities of managing this negotiated settlement. The Korean Claimants fail to substantiate their assertions either that approving SPPs would consume funds needed to pay their claims or that the $172.6 million cushion is "unreliable." Korean Cl. Resp. at 9.

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021 a true and correct copy of the following document was electronically filed with the Clerk of the Court using the ECF system, which will send notice and copies to all registered counsel in this case:

REPLY OF CLAIMANTS' ADVISORY COMMITTEE TO RESPONSE OF DOW SILICONES CORPORATION AND THE DEBTOR'S REPRESENTATIVES TO THE REVISED FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

KRAMER LEVIN NAFTALIS & FRANKEL LLP

/s/ Jeffrey S. Trachtman
By: Jeffrey S. Trachtman
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100 (telephone)
(212) 715-8000 (telecopy)

Attorneys for the Claimants' Advisory Committee