

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

**FINANCE COMMITTEE’S REPLY IN SUPPORT OF THE
RECOMMENDATION AND MOTION FOR AUTHORIZATION
TO MAKE SECOND PRIORITY PAYMENTS**

The Finance Committee of the Settlement Facility Dow-Corning Trust (“SF-DCT”) files this Reply in Support of the Motion and Recommendation for Authorization to Make Second Priority Payments (the “Motion”), and would respectfully show as follows:

SUMMARY¹

Not once in its 25-page response did Dow Silicones contend that First Priority Payments are not virtually guaranteed. There is no credible basis for that contention. The Independent Assessor’s conservative and overinclusive analysis concluded that a \$172.6 million surplus would remain even if all First *and* Second Priority payments are made. Nor has Dow Silicones challenged the Independent Assessor’s conservative and

¹ The Korean Claimants also filed a response to the Motion. [Dkt. No. 1584]. The Korean Claimants, as Settling Personal Injury Claimants, lack standing under the Plan to challenge the Finance Committee’s recommendation. SFA § 7.03(a) (providing the CAC, Debtor’s Representatives, Shareholders, and Non-Settling Personal Injury Claimants with the opportunity to be heard on the recommendation). In any event, the Korean Claimants’ challenges to the motion fail (i) as an irrelevant rehashing of unrelated prior litigation or other dealings (Korean Cl. Response at 4–6, 8–9); (ii) for similar reasons as Dow Silicones’, *id.* at 6–8 (challenging the two-member composition of the Finance Committee); or (iii) for lack of proof. *Id.* at 9 (making the unsubstantiated and conclusory claim that the Independent Assessor’s analysis was “unreliable”).

overinclusive methodology that assumes full payment of all claims even though over 15 years of claims-processing history firmly establishes that a much smaller universe of claims will actually meet the Plan's eligibility criteria for payment. Dow Silicones concedes, as it must, that the Independent Assessor's analysis is conservative and immune to prior challenges related to estimating future filings given the closed universe of claims.

Unable to credibly challenge the inevitable conclusion that First and Second Priority Payments are virtually guaranteed, Dow Silicones attempts to rewrite the plan by arguing that all claims must be identified with 100% certainty—an “absolute certainty” standard rejected by this Court and the Sixth Circuit—and that such certainty can only be guaranteed after all Base claims have been fully and finally resolved. Otherwise, Dow Silicones speculates, there could be unidentified claims in the claims database that would require processing. Not only does Dow Silicones' argument find no support in the Plan, but also there is no reason to believe—and Dow Silicones has not argued—that the substantial \$172.6 million cash cushion would be unable to cover any such unidentified claims. Dow Silicones also attempts to erect several procedural barriers to distribution of Second Priority Payments, all of which lack any supportable basis.

Dow Silicones has failed to identify any reason that warrants further delay of making Second Priority Payments because none exists. The Court should therefore authorize the distribution of Second Priority Payments so that the SF-DCT can distribute these payments as it continues to wind up its operations.

ARGUMENT

A. Dow Silicones' reasons for delaying Second Priority Payments are untethered to the Plan.

Dow Silicones, in a last-ditch effort to delay distribution of Second Priority Payments, argues that they should be put off until a due diligence and verification process can confirm with 100% certainty that all pertinent claims have been identified. Response at 2–3, 12–18. But this invented requirement finds no support in the Plan. The Plan provides that a recommendation to make Second Priority Payments can be supported by projections based not on all claims data known with 100% certainty, but on all data *to the extent known or knowable*. SFA §§ 7.01(d); 7.03. The Plan therefore recognizes that there may be certain unknown unknowns but nevertheless authorizes Second Priority Payments so long as there is a virtual guarantee that such contingencies will not preclude payment of First Priority Payments. It is undisputed that First Priority Payments are virtually guaranteed.

Moreover, there is little, if any, chance that such unknowable claims will arise. Unlike previous rounds of litigation, the Independent Assessor's analysis is based on a fixed pool of claims, closing the door on the possibility that a surprise influx of claims will threaten to drain available funding. The Independent Assessor's iterative claims identification process with the SF-DCT to ensure that all pending claims within the claims database that had any conceivable chance of receiving payment were identified and its independent verification of these pending claims make it impossible that there will be a material discovery of newly identified claims. Report at 7–8.² And even if

² The Independent Assessor's review of the claims data actually began at least two years prior to issuing the Report. At this time, the Independent Assessor worked as the SF-

there are some claims that are later detected, Dow Silicones has failed to demonstrate that such claims would be more than a handful (even admitting that its cited example of newly identified claims “are small and unlikely to affect the total computation in a material way,” Response at 17), and notably failed to even suggest that the \$172.6 million cash cushion would be inadequate to cover any such claims.

Dow Silicones has not offered any justification rooted in the Plan or reality that warrants further delay of distributing Second Priority Payments, and thus, its baseless arguments should be rejected.

B. The Independent Assessor’s Report contains sufficient support for its projected administrative costs and calculation of available funding.

Dow also argues that the projections for administrative costs and calculation of available funding lacks support. Response at 19–21. This is wrong. The Independent Assessor’s Report contains detailed calculations performed by the Financial Advisor who was selected by Dow Silicones and the CAC and approved by the Court. SFA § 4.04. Under the Plan, the Financial Advisor’s responsibilities include determining the available funds in the Settlement and Litigation Funds and for matching these funds to claim payment needs as determined by the Independent Assessor. *Id.* The Financial

DCT’s auditor and was involved in the SF-DCT’s work with the Closing Committee. As part of this work with the Closing Committee, the Independent Assessor collected and verified all claims data with the goal of providing a final accounting of all claims submitted to the SF-DCT. Report at 4. The Independent Assessor, therefore, gained an intimate familiarity with the claims data prior to its work on the Report. *Id.* (explaining that its work with the Closing Committee was “invaluable in enhancing [its] knowledge of the SF-DCT operations, computer systems (primarily SAM), and the relevant Plan Documents”).

Advisor's determinations of administrative costs and available funding to make First and Second Priority Payments fall squarely within its Plan-prescribed responsibilities.

Tellingly, Dow Silicones does not dispute the Independent Assessor's reliance on or the reliability of the Financial Advisor's calculations. Rather, Dow Silicones claims that the Independent Assessor should have included an explanation of the Financial Advisor's methodology and provided the source data for its calculations. But here again, Dow Silicones is attempting to read requirements into the Plan that do not exist. The Plan requires a "detailed accounting," which the Financial Advisor has provided. *See* Report Exhibits B–C. Dow Silicone's challenge to the determinations of administrative costs or available funding find no support in the Plan.

C. The SF-DCT's distribution of Second Priority Payments will not risk the timely payment of First Priority Payments.

Dow Silicones argues that the SF-DCT's distribution of Second Priority Payments while it is "singularly focused" on evaluating and resolving First Priority claims could jeopardize the timely payments of these First Priority claims. Response at 23. This argument ignores the Plan's authorization to make Second Priority Payments at the same time as First Priority Payments as long as the ability to make First Priority Payments is virtually guaranteed, SFA § 7.01(c)(v), and the fact that the SF-DCT has already distributed partial Second Priority Payments while also focusing on First Priority Payments (and a whole host of other issues) without any delays attributable to such distributions. Dow Silicone's unfounded contention also ignores that the SF-DCT has administered the complex claims resolution process consistent with the Plan's extensive eligibility criteria and managed the day-to-day operation of the Facility for over 15 years. The SF-DCT's demonstrated ability to carry out its many functions over

the Settlement Facility's extensive 15-year history eliminates any risk that Second Priority Payments will delay First Priority Payments, especially as the SF-DCT transitions from active claims resolution to winding down the Facility.

D. Dow Silicones' unsubstantiated procedural arguments do not warrant further delay of Second Priority Payments.

Lacking any valid substantive attacks to the Report, Dow Silicones resorts to attacking the process. Despite acknowledging that the majority decision of the two-member Finance Committee is valid, Response at 22, Dow Silicones suggests, without any basis, that both members of the Finance Committee were not fully engaged in the recommendation process. This vague assertion should be rejected out of hand.

Dow Silicones also suggests that it did not have an opportunity to be heard because the recommendation process was compressed as compared to other years. Response at 22–23. But the issues in prior years were more complex, involving competing expert reports, and various projections of a potential influx of tens of thousands of new claims ahead of the claims filing deadline. That complexity was all but eliminated here because the claims filing deadline passed almost two years ago, leaving the Independent Assessor and the parties to evaluate a closed universe of claims. In any event, Dow Silicones' detailed, 25-page response with supporting exhibits severely undercuts any contention that its ability to participate meaningfully in this process was somehow compromised. Dow Silicones' is also a member of the Closing Committee that has spent the better part of two years working with the Independent Assessor to identify and categorize every claim that was ever filed with the Facility. Finally, an expeditious decision on the Finance Committee's recommendation—which, contrary to Dow Silicones' assertion is permitted by the Plan, § 7.03(a)—is warranted here as the SF-

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2021, the foregoing pleading has been electronically filed with the Clerk of Court using the ECF system which will send notice and copies of the document to all registered counsel in this case.

/s/ Karima G. Maloney
SMYSER KAPLAN & VESELKA LLP
Karima G. Maloney
Texas Bar No. 24041383
(E.D. Mich. admitted)
717 Texas Ave, Suite 2800
Houston, Texas 77002
(713) 221-2382 (telephone)
kmaloney@skv.com

**COUNSEL FOR THE FINANCE
COMMITTEE, SETTLEMENT FACILITY-
DOW CORNING TRUST**