UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
	§	**(Settlement Facility Matters)**
SETTLEMENT FACILITY DOW CORNING TRUST	§	
	§	**Hon. Denise Page Hood**

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

For the reasons set forth in the attached memorandum, Dow Silicones Corporation ("Dow Silicones")[1] and the Debtor's Representatives (the "DRs") oppose the revised Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments, ECF No. 1566 ("Motion") and respectfully submit that the Motion should be denied at this time, without prejudice to making a further motion.

[1] As Dow Silicones Corporation previously advised the Court, Dow Corning Corporation changed its name to Dow Silicones Corporation on February 1, 2018.

Dated: January 27, 2021

Respectfully submitted,

/s/ Deborah E. Greenspan

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
	§	**(Settlement Facility Matters)**
SETTLEMENT FACILITY DOW CORNING TRUST,	§	
	§	**Hon. Denise Page Hood**

PROPOSED ORDER OF DOW SILICONES CORPORATION AND THE DEBTOR'S REPRESENTATIVES DENYING THE REVISED FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

The Court has considered the response of Dow Silicones Corporation and the Debtor's Representatives to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments (ECF No. 1566) ("Motion"), and the Court finds and concludes that the Motion is premature and therefore should be denied without prejudice.

ACCORDINGLY, it is hereby ORDERED that the Motion is DENIED without prejudice.

DATED: _____

_____
DENISE PAGE HOOD
CHIEF JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
	§	**(Settlement Facility Matters)**
SETTLEMENT FACILITY DOW CORNING TRUST	§	
	§	**Hon. Denise Page Hood**

MEMORANDUM IN SUPPORT OF THE 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

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court authorize the distribution of Second Priority Payments where the Plan requires a guaranty of payment in full of First Priority Payments before such authorization and where the parties and the Settlement Facility have not completed due diligence and verification to confirm that all claims that still may generate First Priority Payments have been identified and properly evaluated?

   Respondents Answer: No.

2. Should the Court authorize the distribution of Second Priority Payments at a time with the Finance Committee that is responsible for making the recommendation is not fully constituted and where one of the two remaining members was not in a fully active status when the Motion was filed?

   Respondents answer: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- *In re Settlement Facility Dow Corning Trust*, 592 F. App'x. 473 (6th Cir. 2015)
- *In re Settlement Facility Dow Corning Trust*., 754 F. App'x 409 (6th Cir. 2018)
- Dow Corning Amended Joint Plan of Reorganization
- The Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A

INTRODUCTION

Dow Silicones Corporation ("Dow Silicones") and the Debtor's Representatives (the "DRs") respectfully request that the Court deny the revised Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments, ECF No. 1566 ("Motion").[1]

The Motion once again raises an issue that has been hotly contested for nearly a decade. The Motion seeks, for a third time, to obtain authorization to distribute over $200 million as second, third, or fourth distributions to claimants – at a time when thousands of claimants *still* have not yet had their First Priority claims processed or paid and, importantly, while the Settlement Facility-Dow Corning Trust ("SF-DCT")[2] is engaged in a due diligence process to assure that each timely claim

[1] The original Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments Motion was filed on December 23, 2020 (ECF No. 1560). On January 14, 2021, that original motion was withdrawn (ECF No. 1564) and later that same day a revised Motion was filed (ECF No. 1566). Because the original motion was withdrawn "to correct a factual error" and then a new motion filed, counsel for Dow Silicones requested, but did not obtain agreement from the Finance Committee member to, an extension of time to respond. The revised Motion does not contain any changed statement of fact; it differs from the original filing in that it removes an argument asserting that absent approval of the Motion, claimants would receive unequal treatment.

[2] Unless otherwise defined, capitalized terms used herein shall have the meaning provided in the Dow Corning Amended Joint Plan of Reorganization ("Plan") (Exhibit B to the Motion) or the Settlement Facility and Fund Distribution Agreement ("SFA") or the Dow Corning Settlement Program and Claims Resolution Procedures, ("Annex A") (the SFA and Annex A are attached as Exhibit A to the Motion).

has been identified and properly treated. At this stage in the operation of the SF-DCT, Dow Silicones hopes and anticipates that additional Second Priority Payments will be payable and that such payments will not affect the ability to pay First Priority Payments in full within the Settlement Fund cap. But multiple factors – the evaluation process, the status of due diligence, procedural issues, the uncertainty generated by the claims data system itself, and the need to research the status and treatment of various groups of claims – counsel against a finding that First Priority Payments are sufficiently "guaranteed" at this time to allow distribution of Second Priority Payments. Second Priority Payments should not be distributed until such time as appropriate due diligence is concluded and the parties can say, and the Court can determine with the requisite certainty, that all claims have been identified and properly addressed and that there are no groups of claims that require investigation to determine whether they are payable, or retain the right to further review. In fact, as claims are identified for processing, they must be viewed as claims that can generate both First and Second Priority Payments.

Even if the Court were to conclude that there is a sufficient amount of funds identified within the capped amount to account for some increase in the amount of First Priority payments (and corresponding increases in Second Priority Payments), it would be imprudent and contrary to the intent and plain language of the Plan to issue additional Second Priority Payments at this time. The First Priority claims

have paramount priority and given the current full time focus of the SF-DCT on first reviews and the essential due diligence process, it would be unfair and contrary to the prioritization scheme set forth in the Plan to institute a Second Priority Payment distribution now. Embarking on a process to verify and determine Second Priority Payments now risks delaying or deferring the processing and payment of First Priority Payments – which would violate the Plan.

As explained below, it is clear that neither the parties nor the Independent Assessor can guaranty that all claims have, in fact, been identified and that there are no groups of claims that require additional due diligence and examination. In addition, there is a procedural complication: as the Court is aware, there is no longer a three-person Finance Committee ("FC") as mandated by the Plan. While the parties had advised that the Finance Committee could perform its day to day functions so long as there were two members who agreed on a course of action, one of the two individuals who could comprise the Finance Committee has since advised of a change in status and was not engaged in normal full time duties when the Motion was prepared and filed. Any determination to make such a substantial irrevocable distribution of funds should be fully evaluated by a proper Finance Committee – one whose members will retain responsibility over such a major commitment of funds. Finally, the entire process of preparing and providing to the parties an Independent Assessor report was extremely compressed compared to prior years. The period of

time between the first draft report and the Motion was approximately one month. That did not provide sufficient time for the parties to analyze the claim data used by the Independent Assessor as in past years. The parties have the right to conduct independent due diligence as part of the evaluation of the Independent Assessor Report. It seems that a primary goal in submitting the Motion was speed – which is not one of the criteria in the Plan for authorization to distribute Second Priority Payments. Accordingly, Dow Silicones and the Debtor's Representatives request that this Court deny the Motion for Second Priority Payments without prejudice to be resubmitted once the verification is completed and a procedurally proper evaluation and motion can be submitted, assuming that after this verification is completed, the calculations guaranty that there are sufficient funds within the Settlement Fund to pay in full all First Priority Payments and also pay the requested Second Priority Payments.

BACKGROUND

A. Plan Requirements

The SFA governs the distribution of payments to claimants and prospective claimants in this bankruptcy proceeding. It establishes two types of payments: (1) First Priority Payments, which have the highest priority among creditors, are base payments – the amount of which depends on the nature of the claimant's injury – and are paid as soon as practicable following approval of a claim by the SF-DCT,

SFA § 7.01(c)(ii), and (2) Second Priority Payments, which are lower priority payments, comprised of three different types of payments – premium payments (additional payments that may be made to certain categories of claims), increased severity payments (additional payments that may be provided for certain claimants who demonstrate a more serious disease condition after being found eligible for a less serious condition), and Class 16 payments (payments that may be made for money owed to the Dow Chemical Company for settlement payments made before the Bankruptcy Plan took effect). Second Priority Payments may be paid *only* if First Priority Payments (and Litigation Payments) have been paid or if the First Priority Payments are "assured." SFA §§ 7.01(c)(iv), 7.03(a).

Sections 7.01(c) and 7.03(a) of the SFA operate in tandem to avoid any risk to First Priority Payments and dictate the timing of Second Priority Payments. Section 7.01(c)(iv) prohibits their distribution, "*unless and until* the District Court determines that all other Allowed and allowable Claims . . . have either been paid or adequate provision has been made *to assure* such payments." SFA §7.01(c)(iv) (emphasis added). Section 7.03(a) requires that, before the Court may authorize the distribution of Second Priority Payments, the FC must recommend the payments, provide an *accounting* of "Claims payments and distributions" and of "pending Claims," among other information. The Court must make a determination – which, of course, must be based on a sufficient record – that the standard is met – *i.e.*, that

all Allowed and allowable First Priority Payments and Allowed and allowable Litigation Payments have been paid or that such payments are guaranteed. In order to make such a determination, the Court must have a basis to conclude that all the claims that have been timely and correctly submitted have been identified, accounted for, and valued.

The Plan authorizes the simultaneous distribution of First and Second Priority Payments *only* if the SF-DCT can continue to make timely First Priority Payments. SFA §7.01(b)(c)(v). Thus, the payment of Second Priority Payments must not result in a delay or deferral of the higher priority First Priority Payments.

B. Prior Litigation

The FC first sought authorization to distribute a component of Second Priority Payments in 2011. On October 7, 2011 the FC filed an amended motion seeking distribution of 50% of *Premium Payments*. The amended motion did not seek authorization to pay other Second Priority Payments. Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments, *In re Settlement Facility Dow Corning Trust*, No. 2:00-mc-00005-DPH (E.D. Mich. Oct. 7, 2011), ECF No. 814. Among the parties' disputes was the definition of Section 7.03(a)'s "assure" standard.

This Court adopted the FC and Claimant's Advisory Committee ("CAC")'s[3] proposed standard and directed distribution of 50% Premium Payments. *See In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990 (E.D. Mich. 2013), *rev'd in part*, 592 Fed. App'x. 473 (6th Cir. 2015). The Sixth Circuit found that the standard proposed by the CAC and the Finance Committee and adopted by the Court was contrary to the plain language of the SFA. The Sixth Circuit explained that the phrase "to assure" in the context of future payments means to "guarantee" that those payments will be made. *In re Settlement Facility Dow Corning Trust*, 592 Fed. App'x. 473 (6th Cir. 2015). Thus, the Sixth Circuit found that Second Priority Payments could not be distributed absent a "virtual guarantee" that all First Priority Payments would be made. *Id*. at 479-80.

On December 30, 2016, the FC filed another Recommendation and Motion for Authorization to Make Second Priority Payments, recommending distribution of 50% Second Priority Payments. ECF No. 1279 ("2016 FC Motion"). This Court granted the 2016 FC Motion and the Sixth Circuit affirmed.[4] *In re Settlement*

[3] *See id*. at 6-7; Reply of the Claimants' Advisory Committee in Further Support of Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments, *In re Settlement Facility Dow Corning Trust*, Dec. 23, 2011, ECF No. 848, ("CAC 2011 Reply") at 5.

[4] The issue before the Sixth Circuit on that appeal was, simply stated, whether an estimate of future claims could constitute the "virtual guaranty" required by the SFA.

Facility Dow Corning Tr., 2017 WL 7520575 (E.D. Mich. Dec. 27, 2017), aff'd 754 F. App'x 409 (6th Cir. 2018).

As a result of the Sixth Circuit's decision, this Court ordered and the SF-DCT paid 50% of Premium Payments to all eligible disease and rupture claims that had not previously been paid any Premium Payment; 50% of the Class 16 claim; and 50% of the Disease Option II Increased Severity claims. The SF-DCT did not pay any Increased Severity payments to Disease Option I claimants. These 50% payments have continued so that as claims are reviewed and processed and found eligible for payment, an eligible claimant receives the applicable 50% payment.[5]

ARGUMENT

A. The Current Motion

The Finance Committee first filed the Recommendation and Motion for Authorization to Make Second Priority Payments Motion on December 23, 2020 (ECF No. 1560). Thereafter, on December 29, 2020, the Court entered a Scheduling Order setting a briefing schedule in response to the Motion. ECF No. 1563. On January 14, 2021, counsel withdrew the original Motion. ECF No. 1564. On that same day, counsel filed a new revised Motion. ECF No. 1566. The revised Motion, albeit vaguely worded, seeks authorization to distribute $232,812,360 in Second

[5] *See, e.g.*, Exhibit A, January 27, 2021 Declaration of Deborah E. Greenspan ("Greenspan Dec.") (to be filed under seal) at Exhibit 6.

Priority Payments to pay an additional 50% of Second Priority Payments to those who already received a 50% payment, including the 50% Class 16 payment, and 100% Second Priority Payments to those who have not already received any portion of a Second Priority Payment. [6]

B. The Independent Assessor Report

Like the prior motions seeking authorization to pay Second Priority Payments, the current Motion is based on calculations provided by the Independent Assessor. *See* Report of Independent Assessor, Exhibit C to Motion ("IA Report"). The IA Report purports to project the future payments that the SF-DCT will be required to make for First Priority Payments that have not yet been made (including for claims that have not yet been reviewed) plus the future payments that would be made for Second Priority Payments, assuming that a full additional 50% of Second Priority Payments is authorized. The IA Report also assumes that Disease Option 1 Increased Severity Claims would be paid in full. As the IA Report notes, there was no need to estimate future filings because the deadline for filing has already occurred. The challenge that the Independent Assessor faces here, however, is to identify the claims – already submitted – that could generate future payments. This inquiry is not limited to claims that were filed near the claims filing deadline and have not yet been

[6] This includes $184.7M in Premium Payments for past and future disease and rupture claims, plus $13.8 million for a second 50% Class 16 payment, plus $34.3 million in Increased Severity Payments for Disease Option I and II claims.

processed. For a multitude of reasons, claims that were pending before the newest filings were submitted can and will generate additional First Priority Payments, 50% Second Priority Payments, and, of course, additional Second Priority Payments to the extent authorized.

The IA Report describes the approach that was used in an effort to identify claims that have the potential to generate a future payment. The IA attempts to identify claims in a series of categories – each mutually exclusive – and thereby winnow out the claims that are not eligible for any future payment and those that could result in a future payment. The IA Report then summarizes the categories of claims that the IA has concluded could generate a future payment (both First and Second Priority). The IA Report then applies assumptions about the value of certain claims to project the amount that could be paid in the aggregate.

The IA Report relies on data extracted from the SF-DCT database as of August 31, 2020. IA Report at 3. The IA Report explains that future base payments for disease claims are projected based on the Plan class (*i.e.*, Class 5, 6.1 or 6.2) and on the disease option selected by the claimant or on the disease option reviewed. *Id.* at 9-11. The IA Report further explains that future base payments for rupture claims are based on the Plan class in which the claim falls. *Id.* The calculations also apply – for previously unprocessed or unpaid disease and rupture claims – a 100% Premium Payment (*i.e.*, both the 50% payment previously authorized and an

additional 50% which is the maximum additional amount that could be paid.) *Id.* at 11. The calculations then include dollar amounts for a second 50% Premium Payment for claims that have previously received a 50% Premium Payment. The calculations further include payment amounts estimated for Expedited Release claims that have not yet been processed or paid. *Id*. at 12.

The calculations are all presented at the "claim level" and not the "claimant" level. The IA Report includes in the calculations categories of claims that might or might not in the future be eligible for payment – such as, for example, some claims that are currently listed as having a "bad address"[7] and claims that are on appeal. The IA Report indicates that this is a conservative approach that may well over-estimate the number of claims that will actually become eligible for payment in the future. *Id.* at 16.

After computing an aggregate amount for its projected First and Second Priority Payments using the above methodology the IA then adds in a projected

[7] *Id.* at 5 n. 2. Closing Order 2 prohibits the SF-DCT from issuing a payment where the SF-DCT has not been able to verify an address for or engage in contact with the particular claimant. ECF No. 1482 at ¶ 11. The purpose of this limitation is to avoid issuing checks to claimants who have moved or perhaps passed away – and who likely cannot be found. When a check is mailed to a claimant and the claimant cannot be located, the SF-DCT must wait at least six months to void the check and then will incur costs for accounting and stopping payment on the check. Claimants retain the ability to update and verify the address at any time so a claim that is designated as a "bad address" claim today might become a claim with a verified address tomorrow.

amount of future administrative costs and compares that total amount to a projection of the amount of available funds. The IA has not actually computed the amount of available funds but cites to an Exhibit (Exhibit B of the IA Report) that apparently was prepared by the Financial Advisor, showing a calculation of the estimated remaining funds. The comparison of the amount of future payments calculated by the IA to the remaining cash balance of the Settlement Fund assets plus a computation of funds that could remain under the Settlement Fund cap (from Exhibit B) is set forth in the IA Report and indicates that the amount of funds available exceeds the projected amount of future payments.[8]

On this basis, the Motion asserts that there are sufficient funds under the funding cap to permit the distribution of Second Priority Payments.

B. The Requisite "Accounting" of Pending Claims Cannot be Deemed Valid or Accurate Absent Completion of Due Diligence.

In both of the prior disputes, this Court and the Sixth Circuit addressed the interpretation of the Plan requirements for distributing Second Priority Payments in the context of the estimation of future claims filings. Neither of these prior disputes focused on the proper accounting of existing claims or the due diligence necessary

[8] The calculations in Exhibit B show a computation in net present value terms and then a conversion to "today's dollars." There are two different computations and they differ only in that one includes as a "pre effective date payment" the amount of funds paid for the Australian settlement option and the other does not. The Exhibit acknowledges that the calculations have not been approved by the parties or by the Finance Committee. IA report, Exhibit B.

to assure proper disposition of all claims. These factors are pertinent to the determination of whether to issue Second Priority Payments because a failure to account for all claims or a failure to identify any claims that require further processing can affect the total dollar amount of funds that must be reserved for First Priority Payments. The SFA expressly provides that any submission seeking authorization to distribute Second Priority Payments must include an accounting of prior distributions and *pending* claims. SFA §7.03 ("Such recommendation and motion shall be accompanied by a detailed accounting of the status of Claims payments and distributions under the terms of the Settlement and Litigation Facilities, including a detailed accounting of pending Claims and projections and analysis of the cost of resolution of such pending Claims as described in Section 7.01(d).").

As the Court is aware, the CAC, the DRs and the FC formed a "Closing Committee"[9] for the purpose of facilitating the termination of operations, identifying tasks, protocols and rules that are necessary in order to complete the processing of claims and assure an orderly termination of the settlement program, verifying that

[9] The Motion indicates that the IA is a member of the Closing Committee. Motion at 4 n.6. That is not correct. Both the IA and another consultant working with the IA are invited to most – but not all – Closing Committee meetings. Their specific function is to provide data and reports at the request of the Closing Committee and where no such information is needed, they do not participate in the meeting. The IA has no decision-making role or authority.

all requirements of the Plan have been satisfied, and confirming that all claims have been addressed and properly resolved.[10] The Closing Committee meets nearly every week to discuss issues and questions and to identify areas that require additional investigation and research. The parties have reported to the Court on the activities of the Closing Committee periodically at status conferences.

As the Court is also aware, the Closing Committee has spent a significant amount of time undertaking a due diligence process and, in particular, seeking to obtain reliable information about the number of claims in process and the number of claims that have not yet been processed. While it might seem that this is a straightforward exercise it is not: the nature of the data and the data management system makes this a very complicated exercise – and one that requires due diligence and examination of anomalous data in order to be assured that all claims have been identified and properly categorized.

Throughout most of 2020, the SF-DCT and the consultant engaged to assist in claim data review have sought to identify the claims that still require a first review and claims that are still "in process." During this period of time, both the SF-DCT and the consultant have presented computations to the Closing Committee. Despite the fact that the claims filing deadline occurred in June of 2019, over a year later the

[10] The Closing Committee's review includes a review of the Litigation Facility's accounting of filed and resolved claims.

SF-DCT and the consultant still could not define the universe of claims requiring first review. The two groups produced different computations to the Closing Committee at various times during the summer and Fall of 2020. As late as September, the SF-DCT provided to the Closing Committee "revised" protocols for identifying claims that had not yet been reviewed. *See* Greenspan Dec. Exhibits 2-4.[11] This means that even shortly before the IA report was submitted, the SF-DCT was still revising the protocols for identifying claims needing review. In short, this lengthy process that involved multiple meetings, inquiries and directives from the Closing Committee demonstrates the great difficulty in identifying claims with certainty. It does not matter whether the differences are small or large: the fact that there are differences means that there are inconsistencies and anomalies in the data or differences in the data fields used to identify claims[12] that, in turn, create uncertainty about the numbers and types of claims that remain to be finalized.[13]

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[11] Some differences between reports provided in different months could be attributed to the use of a different data set, but again, the different groups analyzing the data arrived at different numbers.

[12] The determination of the fields that are relevant for the purpose of identifying claims that are not final and could generate payments is a significant factor. If there is variation in the fields used, or if the fields selected are not fully populated or were not populated with the appropriate data, then the resulting numbers will be incorrect.

[13] Although this discussion describes the efforts to determine the claims that were in process or that had not yet been reviewed at all, there are other claims that must be taken into account in assessing the value of First Priority Payments. For example, claims that are under appeal can generate a payment, claims that can cure certain deficiencies – such as an address issue – can generate a payment. The IA Report

Although the IA did not agree to provide a declaration explaining these uncertainties, if asked to testify the IA likely would and could only state that there cannot be at this time a 100% guaranty that all pertinent claims have been identified – because there are so many anomalies in the data.

Perhaps more importantly, in the process of verifying the protocols applied to identify claims that may be closed (meaning no further evaluation is required) the SF-DCT and the Closing Committee have identified groups of claims that require further investigation to determine whether processing is complete, whether the claims have been processed in accordance with the applicable rules, and whether there are claims that may require further communication. In the course of this due diligence process the Closing Committee has learned that different data sources that purport to be providing the same information yield different information. One simple example illustrates this issue: The IA Report states that all Class 7 claims have been closed. IA Report at 4. The SF-DCT reports that there is one Class 7 claim remaining. Greenspan Dec., Exhibit 5. The claims data (relied on by the Financial Advisor to track outstanding checks and obligations) indicates that there are more than 25 Class 7 claims that remain to be finalized. Greenspan Dec., ¶ 10.

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does attempt to account for such claims, but all such numbers are dependent on the underlying data and are subject to the same anomalies and uncertainties discussed herein. In addition, IA is not familiar with many of the legal determinations regarding the viability of certain claims and thus the data compilation reports have required and continue to require review and correction by the parties.

While these specific numbers are small and unlikely to affect the total computation in a material way, this example illustrates the fundamental uncertainty in the claim information and the reason for the Closing Committee's due diligence process.

To put concerns about accuracy of the claim data and the need for complete verification into context, on several occasions throughout the history of the operations of the SF-DCT, the parties have learned of groups of eligible claims that had not been processed but that were eligible for processing. For example, the parties learned at one point that the SF-DCT had not processed over 20,000 rupture claims that had been filed without a claim form. *See* Greenspan Dec., Exhibit 1. Under the terms of the Plan, those claims are eligible for processing. The SF-DCT then undertook a focused project to identify and review those claims – as is required by the Plan. *See id.* On another occasion the parties learned that the SF-DCT had not taken any action to process 21,000 "MDL Disease Claims" as required by the Plan. *See* Annex A §4.02(a). The parties submitted an agreed order to this Court to facilitate the processing and finalization of those claims in accordance with the Plan. *See* Stipulation and Order Regarding Protocols for Processing MDL Disease Claims for Claimants Who Qualify for the Dow Corning Settlement Program, ECF No. 24444 (Sept. 25, 2019).

Thus, history demonstrates the necessity of completing proper due diligence to assure that all claims are fully and finally resolved in accordance with the Plan.

The parties and the SF-DCT are committed to this process and committed to providing the Court with assurance that all claims have been identified and appropriately resolved. The FC and CAC might argue that at this point, the parties have conducted enough diligence to be comfortable that they will not find any larger groups of unprocessed claims. And, of course, we hope that is the case. But we will not know until we complete the process. Just within the past two weeks, as an example, the parties learned that the SF-DCT could not confirm how certain timing requirements for approximately 5,000 Disease Option 2 claims were applied – raising questions about the validity of those claims. The SF-DCT has to undertake research to determine how the Plan rules were applied in evaluating those claims. Greenspan Dec., ¶ 9. Once the data is analyzed, the parties will be able to determine appropriate action, if any.

The SF-DCT and the Closing Committee continue to work diligently on these matters – but the conclusion that one must draw is that we cannot yet confirm that all relevant claims have been identified and either in line for processing or otherwise fully addressed and verified. Thus, we cannot confirm whether all potential future payments have been identified. There cannot be any disagreement about the need for verification and due diligence and the importance of this function cannot be

overstated.[14] Given the experience to date, no one can say with certainty that all claims have been accounted for until that process is completed. And certainty is required by the Plan.[15]

C. The Motion Does Not Contain Sufficient Support for Projected Administrative Costs and Does Not Contain a Basis for the Court to Accept the Calculation of Available Funding

In addition to the claim value calculations noted above, the IA Report also includes an estimated amount for future administrative costs. The IA Report does not explain the details of how that amount was calculated: it purports to be a projection based on the most recent budget submitted to the Court that then accounts for staff downsizing. IA Report Exhibit C. The IA Report does not explain when the "downsizing" is projected to occur or exactly how the numbers are affected. In

[14] *See, e.g.*, BDO, Independent Evaluation of the Gulf Coast Claims Facility, Report of Findings & Observations to the U.S. Dep't of Justice (June 5, 2012), available at https://www.justice.gov/iso/opa/resources/66520126611210351178.pdf, (excerpts are attached hereto as Exhibit B) at 57, 67 (describing process that, *inter alia*, involved "[r]oughly 80 SQL queries (averaging about 400 lines of coding syntax with the largest query approximating over 6,000 lines of coding syntax) . . . to identify claimants impacted by data input errors, coding errors and reviewer misapplication of GCCF policies," and that instances of identified errors resulted in finding both underpayments to claimants, in which GCCF agreed to pay more than $64 million to almost 7,300 claimants, as well as instances of overpayments, in which case claimants were not asked to return the overpayments).

[15] We expect that the response will be that the IA computation was overly conservative and leaves a sufficient "cushion" to account for any changes that are identified. But of course, that assertion "begs the question."

addition, it does not appear that the projected costs account for other events such as litigation that could arise both before this Court and in other courts.[16]

As noted, the IA Report aggregates its computation of the various categories of claims and payments plus the projected administrative expenses and then compares that amount to a dollar amount that the IA Report characterizes as the projected remaining funding available to the SF-DCT. IA Report at 14. This dollar amount purports to be the amount of money that can be required to be paid without breaching the Settlement Fund NPV cap. As noted, this funding calculation was apparently provided by the Financial Advisor. *See* IA Report at 14 and Exhibit B. The IA Report attaches only a summary of the calculations as Exhibit B.[17] That

[16] There are currently several motions pending in this Court that have the potential to result in an appeal to the Sixth Circuit. Of course, the SF-DCT incurs costs to the extent it or the CAC participates in any appellate briefing and/or argument. And, of course, any ruling that is contrary to the manner in which the SF-DCT has processed those claims could result in additional payment obligations. (In some cases, it appears that the IA Report may include such potential claims but further confirmation is appropriate.) In addition, there can be other litigation that could generate costs or potentially other expenditures from the capped Settlement Fund: as the Court knows, currently there is a case pending in the United States District Court for the Southern District of Texas in which a claimant has sued the Claims Administrator and the CAC. *See* Notice by Dow Silicones Corp., the Debtor's Representatives, the Claimants' Advisory Committee and the Finance Committee of the Filing of a Case Styled *Hawkins v. Philip LNU, Claims Administrator, et al.*, Pending in the U.S. District Court for the Southern District of Texas, ECF 1559.

[17] The parties previously received a more detailed funding calculation from the Financial Advisor. We do not know whether that calculation formed the basis of the numbers in the IA Report, but based on a limited review, we identified some discrepancies in the chart. For example, the chart appears to identify net present value amounts that do not align with the corresponding nominal "deposit amounts"

Exhibit does not include the backup data for determining the Net Present Value of qualified funding transfers, the methodology for applying the 7% 'interest' rate each year, the roll-over of unused Payment Ceilings, or the precise calculation of the conversion of NPV funds to nominal funds. In addition, the funding computation applies a cash balance as of October 31, 2020 (added to the projected amount of funds available as of June 1, 2020) while the claims analysis is based on August 31, 2020 data. Without an explanation of the methodology and provision of source data, the Court does not have a proper foundation upon which to evaluate the asserted available funding.

D. Procedural Flaws Preclude Authorization of Second Priority Payments Based on the Motion.

Given the changes in the status of the Finance Committee, it seems unclear whether the Plan mandated procedures have been followed. The Plan provides for a three-person Finance Committee that operates by majority vote. SFA §4.08(e). This process institutionalizes a check and balance system: two members of the Finance Committee must agree on an action and the underlying premise is that all three

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stated for payments before September 2004 in the same rows. *See* Greenspan Dec. at ¶ 11. We note too that the Financial Advisor's analysis begins with the $2.35 NPV amount applicable to both the Settlement Fund and the Litigation Fund – rather than the $1.95 NPV Settlement Fund cap which was applied in prior IA reports. (The Financial Advisor does subtract an amount for the Litigation Fund on an NPV basis in Exhibit B to the IA Report, but does not provide the dates of disbursements in Exhibit B or Exhibit A that support the NPV amount of the Litigation Fund.)

members will fully evaluate a proposed course of action and discuss the propriety and legality of the action. If there are only two members of the FC, the process is somewhat diminished but presumably if two active, engaged, independent members agree on an action the decision is no less valid than if those same two members agreed and a third dissented. As of February 2020, the Finance Committee consisted only of two members. But at the time the IA Report was prepared and the Motion was filed, one of those two had was not actively working full time at the SF-DCT and had delegated most functions to others. The decision to recommend distribution of $232 million in assets in the form of Second Priority Payments is perhaps the most significant decision the Finance Committee can make. Such a decision should be made by a Finance Committee that is fully active and able to support the decision, oversee its proper implementation, and address its consequences.

Further, the entire process leading up to the Motion was extremely compressed, leaving insufficient time and resources to conduct an appropriate due diligence process. In the past, the parties have received claim data at the same time as the IA and have had sufficient time to conduct an analysis of data and review the IA analysis. Here the parties did not receive the data at the same time as the IA. (It was received by counsel for Dow Silicones on November 24, 2020 – after the draft IA Report was circulated to the parties.) The IA Report does not provide the queries used to identify claims – a process that the IA has advised is quite complex and time-

consuming to duplicate. The short time frame and the failure to receive the data before receiving the IA Report has hampered the ability of Dow Silicones and the DRs to test the analysis.

These procedural deficiencies undermine the process and actually affect the completeness of the record before the Court. The Plan expressly provides that the parties shall have the ability to be heard – this is a meaningless right if the parties do not have the tools to present an accurate response to the Court – whether it is a response that disputes or endorses the recommendation.

E. Distribution of Second Priority Payments Now Could Delay Payment for First Priority Payments In Violation of the Plan.

The Motion states that the authorization to make these payments should occur now because waiting could delay closure of the Settlement Program to 2022. Motion at 11. There is no explanation as to why distributing Second Priority Payments after the completion of due diligence would delay the closure; nor is there any explanation as to why making such a distribution now while the SF-DCT is fully occupied processing First Priority claims would be more efficient or more correct. The Plan authorizes the simultaneous distribution of First and Second Priority Payments *only* if the SF-DCT can continue to make timely First Priority Payments. SFA §7.01(b)(c)(v). Because the SF-DCT is singularly focused now on the evaluation and payment of First Priority claims that have not yet been reviewed, any additional

tasks aimed at distributing additional Second Priority Payments would affect the First Priority distributions and therefore would violate the Plan.

F. Summary.

The Motion seeks authorization now to distribute over $200 million from the capped Settlement Fund assets to pay Second Priority Payments while the parties and the SF-DCT are *still* undertaking extensive due diligence procedures to confirm the status of all claims. Moreover, this request comes at a time when the staff of the SF-DCT is fully consumed (as they should be and as the Plan requires) with processing First Priority Claims that have not yet been reviewed, evaluating timely appeals, and reviewing submissions in support of First Priority claims made in response to notification of status letters. Under no circumstances should the processing of First Priority claims that still remain pending be deferred or slowed in order to start issuing the lower priority Second Priority Payments: The SFA forbids action that would delay the First Priority Payments.

It is essential at this point – now that we are at the ending stage of the operation of the SF-DCT – to assure accuracy, completeness, and full compliance with the Plan. The only way to achieve these essential goals is to complete the full due diligence and verification process. No one can dispute that the SF-DCT will identify additional claims – beyond those set forth in the IA Report. And no one can provide a guaranty that all claims requiring further action have been identified at this time.

And no one can dispute that there have been many instances during the operation of the SF-DCT where large groups of claims have been identified that had not been processed in accordance with the Plan requirements.

CONCLUSION

Dow Silicones certainly hopes and expects that there will be sufficient assets in the Settlement Fund to pay all First Priority Payments in full and to permit at least some additional Second Priority Payment to eligible claimants. For the foregoing reasons, Dow Silicones and the Debtor's Representatives respectfully request that the Court deny the Motion without prejudice to resubmitted if after the completion of due diligence the analysis provides assurance that the First Priority Payments will not be jeopardized in any way by the payment of Second Priority Payments.

Dated: January 27, 2021

Respectfully submitted,

/s/ Deborah E. Greenspan

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Debtor's Representative and Attorney for Dow Corning Corporation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
SETTLEMENT FACILITY DOW CORNING TRUST	§	**Hon. Denise Page Hood**

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to all registered counsel in this case.

Dated: January 27, 2021

/s/ Deborah E. Greenspan

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
	§	**(Settlement Facility Matters)**
SETTLEMENT FACILITY DOW CORNING TRUST	§	
	§	**Hon. Denise Page Hood**

INDEX OF EXHIBITS

Exhibit A	Declaration of Deborah Greenspan, dated January 27, 2021
Exhibit B	Excerpts from "Independent Evaluation of the Gulf Coast Claims Facility, Report of Findings & Observations to the U.S. Dep't of Justice"

EXHIBIT

A

Declaration of Deborah Greenspan

Filed Under Seal

EXHIBIT B

BDO Consulting, a Division of BDO USA, LLP

INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS TO THE U.S. DEPARTMENT OF JUSTICE

June 5, 2012

BDO

INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS

Table of Contents

INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF FINDINGS & OBSERVATIONS

I. INTRODUCTION

At the request of the U.S. Department of Justice (the "DOJ"), BDO Consulting, a division of BDO USA, LLP ("BDO"), conducted an independent evaluation of the Gulf Coast Claims Facility (the "GCCF"). The GCCF was established to receive and process claims by individuals and businesses for costs and damages as a result of the oil discharges from the April 20, 2010 *Deepwater Horizon* incident ("the Spill"). On December 21, 2011, the DOJ publicly announced the selection of BDO to perform the independent evaluation and mandated that our work be fully independent,[1] be overseen and directed by the DOJ, and meet the highest professional standards. (See Exhibit A.)

In conducting our independent evaluation, we were at all times mindful of the unprecedented nature of the 2010 *Deepwater Horizon* explosion and the resulting Spill, and the acute financial distress endured by individuals and businesses in the region. We conducted our independent evaluation of the GCCF with the professional care commensurate with this task. At no point did we experience any pressure from any source to do anything other than conduct an objective review of the facts and make a presentation of our unbiased findings and observations.

Our approach included, among other things, the interview of over 40 professionals from the GCCF and subcontractors engaged to provide services to the GCCF, the testing of tens of thousands of claims that had been processed by the GCCF, the extensive use of data analytics to identify broader populations of claims affected by issues uncovered by our claims testing, the further review of the potentially affected claims to identify claimants who were negatively

[1] The December 21, 2011 letter of Associate U.S. Attorney General Thomas J. Perrelli stated, "Second, it is absolutely critical that your review be fully independent. While Mr. Feinberg has agreed that the GCCF will pay the costs associated with the review, *your work will be overseen and directed by the Department of Justice.* If at any time you are not receiving the cooperation or information you need for you review, please let me know immediately." [Italics in original.] During the course of our engagement, BDO has not had any direct communications with BP, its management or its employees.

impacted, and the observation of the recalculations performed by the GCCF in preparing to make first-time or additional payments[2] or offers for payment to impacted claimants.

In this report, we set forth our findings and observations resulting from our independent evaluation of the GCCF's operations. The complexity of the GCCF process inevitably required development of specialized terminology, which we have used in this report where necessary. However, as we hope that our report will be useful to a wide range of audiences, particularly the hundreds of thousands of individuals and businesses affected by the Spill, we have set forth the results of our independent evaluation as simply and directly as possible.

BDO's findings and observations are only properly understood in the full context of our work. Citation of individual findings and observations without reference to the full context of our independent evaluation as set forth in this report may result in, among other things, misinterpretation of the nature, extent and scope of our work, the direction provided by the DOJ, the cooperation and materials provided by GCCF personnel, and our findings and observations.

II. AREAS OF FOCUS & APPROACH

A. Genesis of the Independent Evaluation

From its inception and throughout the GCCF's history, public officials, potential claimants and other interested parties expressed their expectations about the transparency and timeliness of its operations. In July 2011, following input from these parties, GCCF Administrator, Kenneth Feinberg, reached an agreement with U.S. Attorney General Eric Holder in which Mr. Feinberg agreed that the GCCF would undergo an independent evaluation of its operations and that the independent evaluation would begin before the end of the year. Congress passed legislation that required the DOJ "to identify an independent auditor to evaluate" the GCCF.[3]

After a process that included meetings with representatives of Attorneys General of the Gulf States, the DOJ selected BDO to conduct an independent evaluation, including claims testing, of

[2] "First-time payments" were made to claimants who had not received any payments from the GCCF either because their claim was incorrectly denied or found deficient due to errors identified through our procedures. "Additional payments" were made to claimants who had received payments from the GCCF, but had been underpaid as a result of the errors identified through our procedures.

[3] The GCCF informed us that, from its inception, it contemplated having a third party conduct an independent evaluation at the conclusion of its operations.

The GCCF also was inundated with requests from claimants seeking to have the processing of their claims "escalated," by which the GCCF meant the claimants were seeking to have their claims treated other than in the ordinary course of the claims review process. Often, these requests were initiated through the liaison firms, congressional offices or other government officials, or a claimant's attorney. Feinberg Rozen recognized both that there were claimants who were suffering severe hardship caused by the economic consequences of the Spill and, as a result, deserved to have their claims escalated, and that the GCCF would not be able to give escalated treatment to every claimant seeking it. As a result, Feinberg Rozen tasked BrownGreer with the preparation of a daily report of requests for the escalation of claims. Feinberg Rozen would work with BrownGreer on individual claims and with PwC on business claims to investigate the merits of these requests. Feinberg Rozen ultimately had sole authority to determine that a claim deserved escalated treatment.

Feinberg Rozen informed us that its daily supervision of the claims process included meetings with attorneys or other advisors who represented groups of similarly situated claimants to ensure that these claims were resolved in a consistent and efficient manner. In addition, Feinberg Rozen, on a daily basis, reviewed and determined eligibility and payment questions regarding challenging claims or those that presented policy questions.

E. The Current Status of the GCCF

On March 2, 2012, BP reached an agreement-in-principle with plaintiffs in the class action lawsuit, *In Re: Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, pending in the U.S. District Court for the Eastern District of Louisiana. Pursuant to the agreement-in-principle, BP agreed to pay damages to those who suffered economic or medical harm as a result of the Spill.[46] As part of that litigation, on March 8, 2012, U.S. District Court Judge Carl Barbier issued an order (the "Transition Order") creating a process (the "Transition Process") for transitioning from the GCCF claims process to the court-authorized claims process that would result from the settlement; setting forth the parameters by which claims currently pending with the GCCF would be handled in the Transition Process; and appointing Lafayette-

[46] While the agreement-in-principle did not provide a cap on the amount that BP would be required to pay to claimants, BP estimated the cost of the settlement to be $7.8 billion.

based attorney Patrick Juneau as the Claims Administrator and Lynn Greer, a partner at BrownGreer, as the Transition Coordinator of the Transition Process. (See Exhibit AA.)

The Transition Order also provided that the GCCF would not accept, process or pay claims submitted to it other than those claims for which the claimant had accepted a payment offer made by the GCCF and executed a release prior to February 26, 2012, at 11:59 p.m., and neither BP nor the claimant had filed an appeal. The Transition Order also terminated the GCCF appeals process for all claims except those then pending. With regard to the independent evaluation being conducted by BDO, the Transition Order stated:

> In the event that the federal audit of the GCCF currently being performed by BDO Consulting identifies one or more errors in the application of the GCCF rules and methodologies to specific claims, the GCCF retains the right to correct the error(s) and to issue payments to the claimant(s) at issue in an amount necessary such that the Claimant(s) will have received from the GCCF the same amount as if the error had not occurred. Within 24 hours of the GCCF making such a payment, the GCCF shall provide written notice of the fact and amount of the payment to the Claims Administrator. Any amounts paid pursuant to this provision shall be offset against any payments made by the Transition Facility and the Court Supervised Claims Program, if such payments are made prior to final payment by the Court Supervised Claims Program.

Subsequent to the issuance of the Transition Order, BDO and the GCCF continued the process of identifying instances in which an identified error resulted in an underpayment to a claimant, and the GCCF has made first-time and additional payments and/or offers of payment to those claimants where sufficient information existed in the claim file to do so. As a result of this process, the GCCF has agreed to pay more than $64 million to almost 7,300 claimants.

IV. FINDINGS & OBSERVATIONS

The GCCF was among the largest claims processing facilities in U.S. history and the most significant response to date by a Responsible Party under OPA. As the preceding discussion makes clear, the GCCF evolved over time and faced many challenges. Through our independent evaluation, we have been able to identify practices that led to consequences consistent with some of the concerns identified by the DOJ and public officials and stakeholders in the Gulf States, as well as set forth the context of the GCCF's mandate and its accomplishments. In the following pages, we set forth our findings and observations regarding the GCCF generally and claims processing specifically.

A. Findings & Observations Regarding Claims Processing

Our findings and observations regarding claims processing are based on our testing of claims selected from over one million claims filed with the GCCF, involving over 550,000 claimants. Our selection of individual and business claims from the five Gulf States as well as non-Gulf States included claims that were paid, denied and in-process. For paid claims, we reviewed claims paid during Phase I and Phase II, including Quick Payments, Interim Payments and Final Payments. We compared certain attributes of the claims and the methodology used to determine payment amounts for consistency with the GCCF protocols and methodologies. For certain categories of claimants, we assigned dedicated teams to focus on these claims specifically to determine whether they were processed pursuant to the GCCF protocols and methodologies.

In the following sections of our report, we set forth our findings and observations relating to our review of: (1) claims paid, denied and in-process; and (2) claims with identified errors where the GCCF determined there was sufficient information in the claimant's file to enable a calculation of a first-time or additional payment and/or an offer for payment to the claimant.

1. Claims Paid, Denied or In-Process

With respect to our testing of claims from the entire population of claims processed by the GCCF, while our independent evaluation did uncover instances in which errors were made in the claims evaluation process, in general, the GCCF appeared to have consistently applied its protocols and methodologies in processing claims. To the extent we identified potential

inconsistencies, we inquired about them and determined the basis (for example, guidance in the Operations Manual, Process Alerts, other GCCF directives) for the potential inconsistencies.

As described below, when we determined that a potential inconsistency may in fact be an error, we worked with the GCCF to confirm whether it was an error and determine its likely cause. Upon confirming the error, we worked cooperatively with the GCCF to develop Structured Query Language ("SQL") programs to mine the claims databases and determine the extent to which an issue affecting a specific claim may be mirrored in a broader population of claims. We then worked with the GCCF to confirm our understanding of the GCCF's redetermination of the claims negatively affected by the error and its calculation of any first-time or additional payment and/or an offer for payment due the impacted claimants.

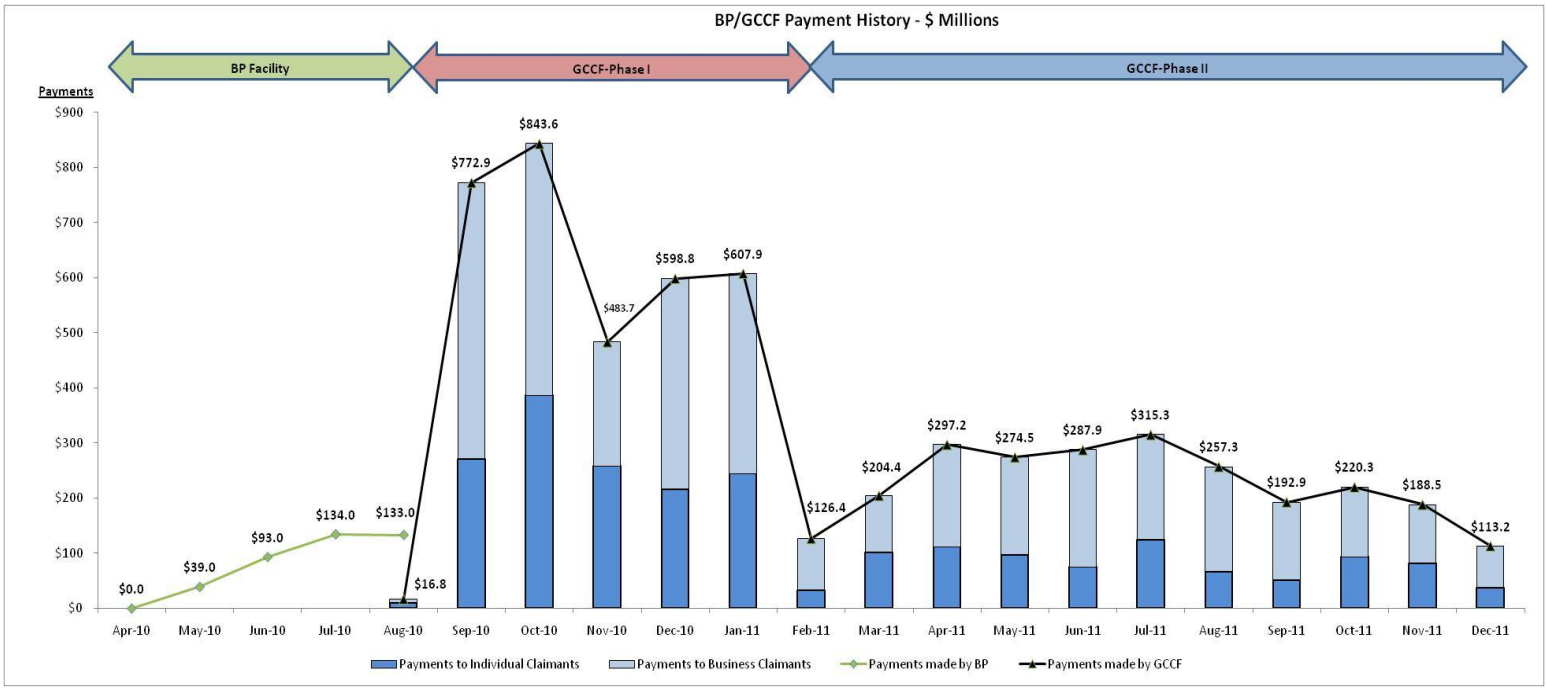
a. Claims Paid

During its one and one-half year tenure, the GCCF processed over one million claims and paid a total of more than $6.2 billion to over 220,000 individual and business claimants (not including the first-time and additional payments and/or offers for payment made as a result of our independent evaluation). In its second full month of operation, the GCCF paid claimants over $840 million – an average of more than $27 million per day – in emergency advance payments.

The summary statistics cited below are based on our access to the GCCF database "frozen" as of December 30, 2011. Approximately 99.8% of the claims paid and 96.8% of the amounts paid related to claims for lost earnings or profits.

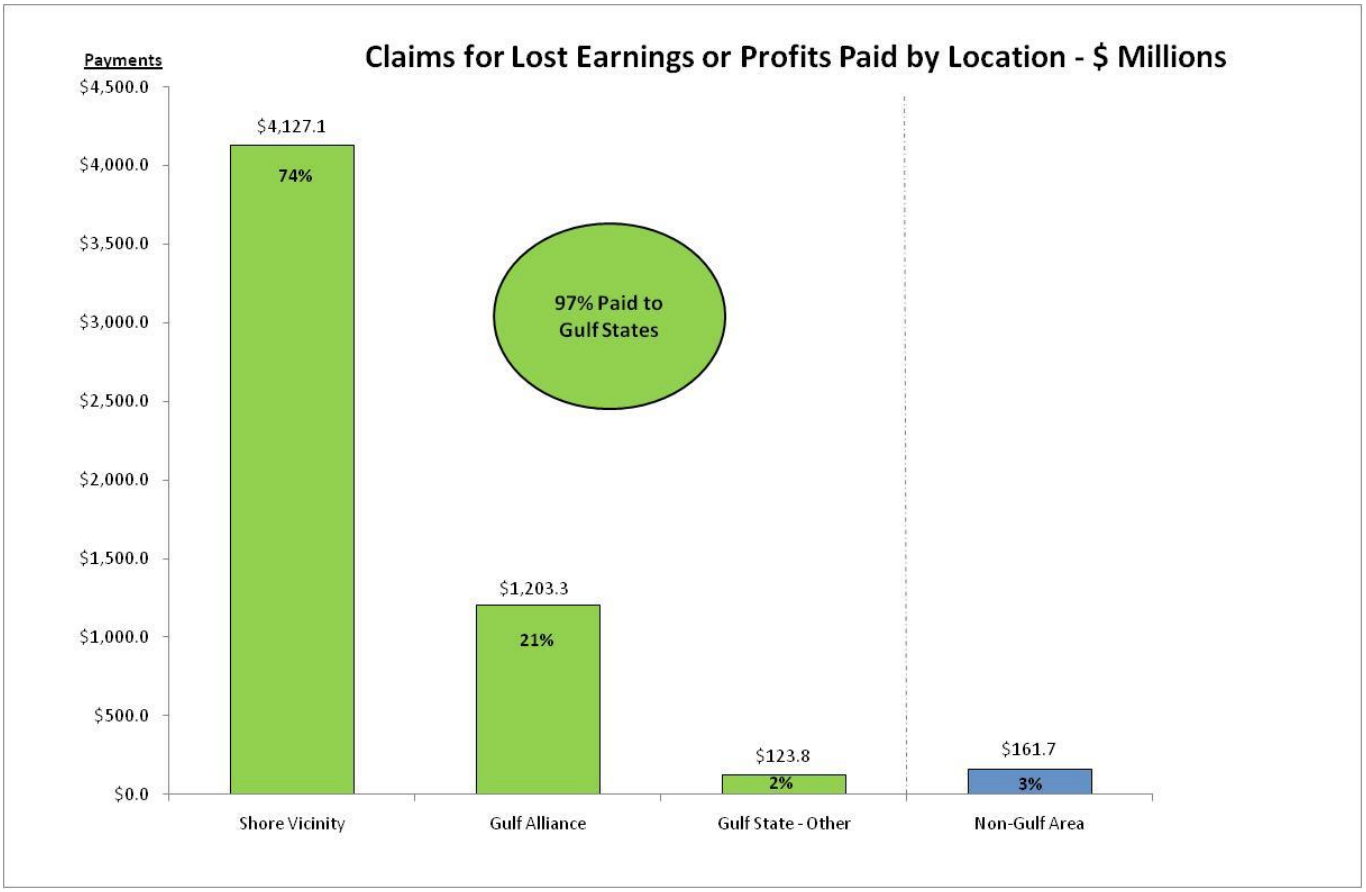
During the BP-operated facility and the GCCF's Phase I and Phase II programs, the following amounts were paid to individuals and businesses each month from April 2010 through December 30, 2011:

Figure 2: *BP/GCCF Payment History Chart*



Consistent with the GCCF's established methodology of basing claimant eligibility on a combination of loss location and business type, 97% of the payments made by the GCCF were made to claimants in the Gulf States, almost exclusively to individuals and businesses in the Gulf Coast Shore Vicinity and Gulf Alliance counties. As noted in the graph below, most of the lost earnings or profits ("LEP") payments were made to claimants in the Shore Vicinity (74%) followed by payments to claimants in the Gulf Alliance counties (21%) and in other sections of Gulf States (2%). In contrast, payments to claimants from non-Gulf areas represented a much smaller portion (3%) of the payments made by the GCCF.

Figure 3: *Claims Paid by Location*



In addition to locations primarily impacted by the Spill, industries that were not precluded from filing a claim with the GCCF and had more favorable eligibility requirements (for example, retail, sales and service; food, beverage and lodging; fishing, seafood processing, tourism, rental properties) received most of the payments made by the GCCF while certain other industries (for example, legal, accounting and other professional services; banks and financial institutions; financial services and insurance) had higher eligibility requirements and, accordingly, received a smaller portion of the payments.

The foregoing payment distribution is consistent with the eligibility criteria that granted automatic eligibility to claimants closest to the Gulf. We did not identify any patterns with respect to paid claims that would suggest the GCCF departed from its protocols or methodologies in an attempt to minimize amounts paid generally or to specific types of claimants.

b. Claims Denied

The GCCF data indicate that it denied approximately 60% of the claimants who filed claims. During Phase I, a significant portion of the claims were denied because the GCCF determined that the claimants' business types were not compensable or the claimants failed to submit the required financial documentation. During Phase II, a majority of the claims denied were due to claimants not providing documentation sufficient, according to the GCCF's protocols and methodologies, to establish that their financial losses occurred as a result of the Spill. The remainder of the denied claims during Phase II was largely due to claimants: (1) failing to respond to Deficiency Letters requesting documents necessary for the GCCF to evaluate their claims or submitting insufficient additional information to evaluate their claims; or (2) submitting information that showed their losses were due to alternate causes.

The high incidence of denied claims is consistent with some of the concerns brought to our attention. Media reports concerning the GCCF include discussions of claimant dissatisfaction, including from those whose claims were denied. As described previously, during its early phases and, indeed, throughout its history, the GCCF undertook an outreach program in an effort to encourage potentially eligible claimants to submit claims to the facility. These efforts included, but were not limited to, a mass mailing sent to all claimants who had filed claims during the tenure of the BP-operated facility to inform them of the GCCF's creation; Mr. Feinberg's appearance at Town Hall meetings throughout the Gulf Coast region; the availability of claims forms at the various site offices which the GCCF maintained in the Gulf region; and the creation of a website. Undoubtedly, these outreach efforts, combined with the well-publicized fact that BP had agreed to set aside at least $20 billion to pay claimants, attracted claims from persons who may not have sustained any losses from the Spill and, therefore, were not entitled to payment from the GCCF. Indeed, the GCCF received claims arising out of the Spill, which most directly affected the Gulf Region, from claimants from all 50 states in the United States and from 39 foreign countries, many of whom would have difficulty tying any losses that they sustained to the Spill. Had the GCCF only received claims from eligible claimants, there would have been a very substantial risk that an additional and significant number of claimants with compensable claims had not been reached by the GCCF's outreach efforts and, therefore, had not submitted claims.

While the GCCF's outreach is one potential factor leading to the high incidence of denied claims, it likely is not the only one. As noted above, a majority of the claims denied during Phase II were due to claimants not providing documentation sufficient to establish that their financial losses occurred as a result of the Spill. To a large degree, the GCCF's approach to determining claimant eligibility was driven by two factors: (1) loss location; and (2) claimant business type. As discussed in the section above on Paid Claims, 97% of the payments made by the GCCF were made to claimants in the Gulf States, almost exclusively to individuals and businesses with loss locations in the Gulf Coast Shore Vicinity and Gulf Alliance counties. Only 54% of the claims filed with loss locations in the Gulf Shore Vicinity were denied, whereas 70% of the claims with loss locations in the Gulf Alliance Counties and 76% of the claims with loss locations in other areas within the Gulf States were denied. Similarly, in terms of business type, over 92% of the claims paid by the GCCF were paid to claimants in the food, beverage and lodging; retail, sales and service; real estate; fishing; seafood processing and distribution; and tourism and recreation industries.

During Phase II, claimants (other than individual claimants who were deemed automatically eligible by operation of the GCCF's "coattails eligibility" policy) whose loss location and industry type placed them within Group 2 and Group 3 needed to demonstrate that claimed losses were caused by the Spill. For business claimants in Group 2, this requirement could be satisfied by passing the Financial Test. Individual claimants in Group 2 and all claimants in Group 3 were required to provide an SCD, prepared contemporaneously with the event described in the document. Only 2.8% of the individual claimants and 11.3% of the business claimants who, as a result of being in Group 2 or Group 3, were required to provide an SCD were able to actually do so. While we do not take a position on its appropriateness, the GCCF's adoption of the contemporaneous SCD requirement likely was another factor that contributed to the high incidence of claim denials, particularly in locations outside of the Gulf Shore Vicinity.

Additionally, as described earlier, we have observed instances, such as those relating to changes in eligibility requirements and the applicability of the "coattails eligibility," in which a denied claimant would have been deemed eligible for payment from the GCCF had the claimant filed the claim at a later date. Because the GCCF did not apply retroactively the changes that would have made these claimants eligible, unless they filed a new claim with the GCCF, these

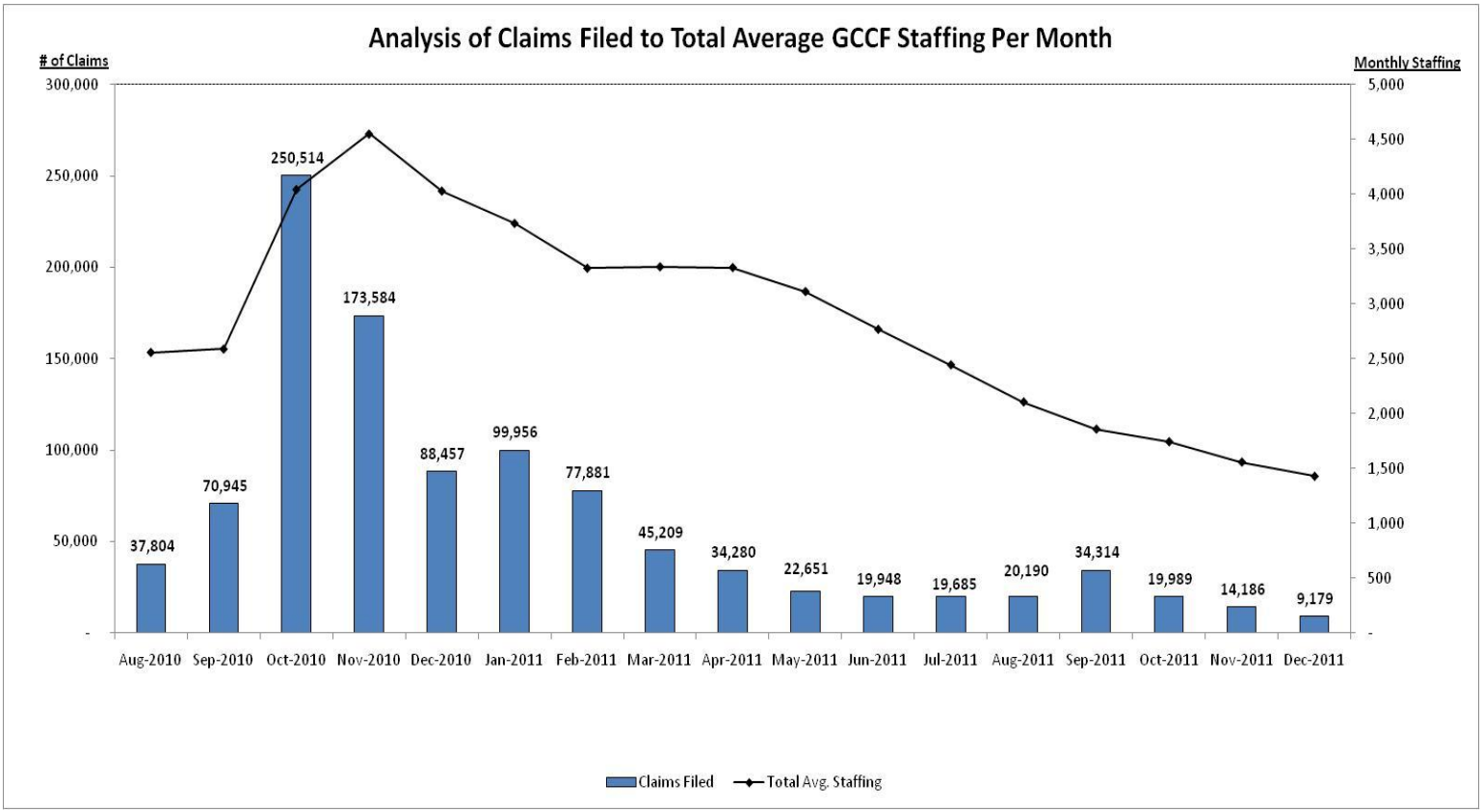
claimants would never receive a payment to which, by the GCCF's own protocols and methodologies, they may have been entitled.

c. Claims In-Process

The timing of processing individual and business claims was affected by a variety of factors, such as the availability of the information needed to process the claim; the quality (completeness, legibility) of the information provided by the claimant; the complexity of the claim, including whether accountants/attorneys were involved and whether there were ongoing negotiations with the claimant to settle the claim; the effectiveness and clarity of the GCCF's communications with the claimants advising them precisely which documents were needed to process and complete their claim; the timing of when the claim was filed (higher volume periods vs. lower volume periods); and whether the GCCF placed the claim on hold pending further refinement of the GCCF's policies and procedures.

In evaluating the timeliness of the GCCF's processing of claims, as the graph below shows, we observed that the GCCF committed significant resources to claims processing in response to fluctuations in claims volume.

Figure 4: *GCCF Staffing Levels*



In addition, significant other attempts were made by the GCCF to meet commitments for timely processing of claims and to expedite payment to claimants. For instance, at several points, the GCCF implemented the Special Determination Letter policy wherein it made the determination to suspend its normal processing procedures and calculate the losses of individual claimants that requested less than $5,000 and business claimants that requested less than $25,000 by multiplying the requested amount by the applicable Future Recovery Factor. Also, there were times when the GCCF adjusted its quality control process for a brief period of time in order to expedite payments to claimants. The Quick Payment option was another approach taken by the GCCF to expedite payments to claimants.

To further evaluate the GCCF's timing of claims processing, using the date of the last document received from the claimant, we selected claims that had been in-process for an extended period of time and requested explanations from the GCCF. The majority of the claims that had been in-process for an extended period of time had extenuating circumstances, including:

- Claims that were referred for investigation of potential indicators of fraud;
- Claims for which the GCCF had requested additional information from the claimants; and
- Business claims in the process of being resolved through discussions between the GCCF and the claimants or their representatives.

As noted above, the GCCF also experienced "holds" on its process at various points for reasons both self-imposed and beyond its control. Furthermore, there were a very limited number of claims that did not appear to have extenuating circumstances or to have been placed on "hold." We provided a list of these in-process claims to the GCCF and upon our inquiry they seemed to have been accelerated and processed.

Concerns regarding the timeliness of claims processing may have been amplified by the high expectations set by the GCCF initially. These high expectations were expressed by Mr. Feinberg in some of his earliest public statements concerning the GCCF's claims evaluation process. Additionally, as mentioned above, the GCCF's Phase I protocol set forth an ambitious timeframe for the processing of claims, a timeframe which Mr. Feinberg later acknowledged the GCCF was not able to meet. The high expectations created by Mr. Feinberg's early statements and the Phase I protocol language concerning claims processing times, when combined with the fact that, for reasons both within and outside the GCCF's control, the processing of certain claims was delayed, likely led to some of the concerns expressed by claimants and brought to our attention by the DOJ regarding the timely processing of claims.

2. Claims with Identified Errors Corrected by the GCCF

While our independent evaluation did uncover instances in which errors were made in the claims evaluation process, in general, the GCCF appeared to have consistently applied its protocols and methodologies in processing claims. During the course of our evaluation, we identified (and received cooperation from the GCCF in further identifying) claims that both BDO and the GCCF agreed were processed erroneously.

Overall, we evaluated aspects of tens of thousands of claims files and programmatically searched the entire database of over one million claims for those with attributes similar to claims found to contain errors. We then supplemented our findings by requesting documents and information from the GCCF and undertook a process with the GCCF to develop an accurate understanding of

the factual information required to complete our independent evaluation. Specifically, upon identifying a potential issue, our approach for resolution included:

- Discussing the factual bases of our findings, the applicable processes and the outcome with the GCCF to confirm that the outcome was the result of an error;
- Determining the likely cause(s) of the error (data input error, coding error or reviewer misapplication of GCCF policies);
- Working cooperatively with the GCCF to develop SQL programs to thoroughly search the entire database of over one million claims to determine whether the identified errors negatively affected other claimants; and
- Confirming our understanding of the GCCF's redetermination of the claim and the GCCF's calculation of any first-time or additional payment and/or an offer for payment due the claimant.

In this regard, approximately 30 GCCF professionals worked with a team of about 15 BDO professionals in Richmond, Virginia for several weeks to perform data mining techniques over the entire population of claims to identify other claims affected by the issues we identified through our claims testing. Roughly 80 SQL queries (averaging about 400 lines of coding syntax with the largest query approximating over 6,000 lines of coding syntax) were processed across the entire population of claims to identify claimants impacted by data input errors, coding errors and reviewer misapplication of GCCF policies.

The claims for these claimants were all re-reviewed either manually (full claims reviews and limited claims reviews) or programmatically to determine whether any claimants were negatively affected by identified errors and, if so, whether any first-time or additional payments and/or offers for payment were necessary. Upon completion of our evaluation, we determined that almost 7,300 claimants were negatively affected by the identified errors, requiring first-time and additional payments and/or offers for payment of more than $64 million. Certain errors identified during our independent evaluation resulted in overpayments being made to claimants. In no instance did the GCCF request that claimants return any of these overpayments (regardless of the amount or circumstances).

The following example illustrates the approach taken when we identified a potential error. We presented a claim to the GCCF where it appeared that the final payment amount offered to a