

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

In re:

**SETTLEMENT FACILITY DOW
CORNING TRUST**



**Case No. 00-CV-00005
(Settlement Facility Matters)**

Hon. Denise Page Hood

**REPLY IN SUPPORT OF MOTION TO ESTABLISH FINAL
DISTRIBUTION DEADLINE REGARDING REPLACEMENT CHECKS**

Dow Silicones Corporation (“DSC”), the Debtor’s Representatives (the “DRs”), and the Finance Committee (the “FC”) (collectively, “Movants”) respectfully submit this Reply to the Response of the Claimants’ Advisory Committee to the Motion to Establish Final Distribution Deadline Regarding Replacement Checks for Settlement Claims in the Dow Corning Settlement Program, ECF No. 1705 (“Response”).

BACKGROUND

On March 29, 2023, Movants filed the Motion, ECF No. 1701, to establish the Final Distribution Deadline for replacement checks as set forth in Closing Order 2, ECF 1482.¹ The Motion proposed May 15, 2023 as the Final Distribution Deadline for replacement checks only. On April 3, 2023, the Claimants Advisory Committee (the “CAC”) filed the Response. The Response is surprising and concerning in that

¹ Capitalized terms have the meaning defined in the Motion or Plan and Plan Documents unless otherwise noted herein.

it asserts that the timing and notice issues it raises were in fact presented to the Movants. That assertion is incorrect. None of these issues was raised in any of the more than eight separate meetings among the CAC, FC and DRs, or in response to five separate drafts of the motion (styled as a joint motion) that were circulated for comment. *See* Exh. 1, April 10, 2023 Declaration of Kimberly Smith-Mair (“Smith-Mair Reply Dec.”) at ¶¶7-13. The CAC never indicated any opposition to the Motion or any specific concerns or issues other than a desire to have separate orders addressing replacement checks and any other deadline issues. *Id.* at ¶12.²

The CAC Response is also misleading and incorrect in certain respects: it suggests that the “practice” has been to send individual notices to claimants. That is not correct: no individual notices were sent to claimants for Closing Orders 1, 2, or 5.³ *Id.* at ¶¶14-16. The only Closing Order that directed a mailing to claimants was Closing Order 3, involving a small group of individuals whose address was not verified. That mailing was consistent with the Settlement Facility’s standard address verification process. *Id.* at ¶14. The Response also unfairly suggests that unless the specific order setting the deadline so provides, the Settlement Facility would not post

² The CAC was removed from the filed version of the Motion because they did not provide express permission to sign on their behalf when asked. But they did not at any point object to the Motion. *Id.* at ¶11-12.

³ Closing Order 4 is irrelevant: it does not affect individual claimants. That Closing Order addresses the obligations of law firms to confirm that they have distributed the settlement payments to their clients.

the order on its website. The Settlement Facility routinely posts orders, and Closing Order 2 already provides that notice of the final distribution deadline shall be posted on the website. Of course, the Settlement Facility will comply. *Id.* at ¶¶14-19.⁴

Movants believe that the Response is inconsistent with the CAC's obligations and rights defined by the Plan. The Response does not enforce any obligation of the Plan and it certainly cannot be construed as providing advice and assistance to the Claims Administrator, the Settlement Facility or the FC – when presented in the form of a Response objecting to a Motion that had been under discussion for months without objection. *See* Exh. 2, Settlement Facility and Fund Distribution Agreement, at §4.09(c). The CAC's failure to raise the issues that are set forth in their Response for the three months preceding the filing of the Motion – which was intended to be and was always discussed as a joint motion – is frankly stunning and certainly not consistent with the manner in which the CAC, DRs, and FC have worked to assure an orderly termination of the settlement program.

ARGUMENT

Closing Order 2, entered on March 19, 2019, provides guidance governing the closure of claims and the termination of payments for settlement claims.

Closing Order 2 forbids replacement checks after June 3, 2019 except in two

⁴ Further, nothing in this process or proposed order would prevent the CAC from publicizing the terms of the order in its newsletter, contrary to the CAC's apparent suggestion that they must be ordered to post such information.

limited circumstances. Closing Order 2, ECF 1482, PageID.24095. Closing Order 2 was posted on the Settlement Facility website when it was entered by the Court – in March 2019. Smith-Mair Reply Dec. at ¶18. The vast majority of the uncashed payments – 782 – were issued before 2019. *Id.* at ¶24. The Settlement Facility further advises that in its experience about 50% of the uncashed checks are checks that were issued as replacements in the past based on a prior request. *Id.* at ¶25.

Despite the suggestion in the Response, the 960 claimants have received extensive notice. They received notice of the obligation to finalize claims and make necessary submissions on or before June 3, 2019. They received letters advising them of their original payment. *See id.* at ¶26. They have been on notice since March 2019 of the terms under which replacement payments may be issued. They have had at a minimum four years in which to request a replacement check and, in fact, a large percentage have previously requested a replacement.⁵

The CAC, the FC, and the DRs (the Closing Committee) conduct regular meetings to plan the process of terminating the Settlement Facility in accordance with the Plan. The issue of the final distribution deadline was on the Closing Committee meeting agendas for eight separate meetings: December 8th, 15th, and

⁵ The process to request a replacement check is simple: the claimant need only call, write, or email the Settlement Facility for instructions. *Id.* at ¶20. Some uncashed checks were issued more than ten years ago. Any of the claimants could have requested a replacement check at any time until June 3, 2019. *Id.* at ¶24.

21st of 2022; February 2nd, 9th and 16th, and March 2nd and 8th of 2023. *Id.* at ¶7. Drafts of the proposed joint motion of the CAC, DRs and FC, including the deadline for replacement payments, were circulated to the Closing Committee including the CAC on February 15, February 16, February 26, March 22, and March 26 of 2023. *Id.* at ¶8. Early drafts proposed that the final distribution deadline would be April 14, 2023, a date that was selected initially by the CAC to coincide with the deadline for providing address verifications mandated in Closing Order 5.⁶ Subsequently, the date was altered to May 1, and then May 8 and in the final draft– May 15, 2023. *Id.* At no time did the CAC propose any changes to the drafts, suggest alternative dates, propose a 90-day period for posting the claims on the website or advocate mailing individual notices to claimants. *Id.* at ¶¶11-13. The filed version of the Motion was circulated to the CAC on March 27, March 28, and March 29, 2023. *Id.* at ¶8. The CAC did not respond to any of these drafts or emails with any comments, objections, or concerns and never indicated that they would be filing a response that objects to the Motion. *Id.* at ¶¶11-13.

The assertion in the Response that extending the deadline by 120 days will not affect closure is not correct. The addition of 90 days will certainly affect the timing of closure. Upon receipt of a payment request, the Settlement Facility must

⁶ The specific discussion at the time related to a deadline for all types of payments not just replacement checks. *Id.* at ¶¶8, 12.

determine whether either of the two conditions for a replacement check applies. If the claimant is deceased, the Settlement Facility will need to obtain and evaluate a death certificate and necessary probate documents – a process that often takes several months. *Id.* at ¶¶21-23.⁷ If the claimant is seeking a replacement check claiming “good cause,” the Claims Administrator must determine whether good cause was provided. *Id.* at ¶21. If the Claims Administrator denies the request, the claimant has a 60-day period to file a further appeal. The claim cannot be finalized until this 60-day period expires and, if the claimant files an appeal, the Appeals Judge must rule before the claim is finalized. Under either process, it can easily take several months before a check is issued. If the deadline were extended until August, checks might be issued in February, which will prevent the Settlement Facility from terminating its operations or bank accounts until September 2024.⁸ If a lien is filed, the process could be extended.

The CAC’s efforts to interject an entirely different procedure and prolonged timeline via the Response should not be accepted. The CAC had ample opportunity to address these issues and failed to do so. This belated effort to impose procedures that were never discussed is inconsistent with their obligations,

⁷ In fact, probate claimants generally are provided 6 months in which to compile and submit the necessary documents. *Id.* at ¶23.

⁸ If the check is not cashed, then there will be another fee for stopping payment and that process also requires instructions to the bank and will take at least a few weeks to accomplish.

their defined role, and the processes employed by the Closing Committee. The Movants believe that the proposed deadline date is fair and reasonable under the circumstances. The claimants have had ample notice and time to request a replacement check. It is appropriate under these circumstances to allow the Settlement Facility to close these claims promptly and continue the process of terminating operations.

CONCLUSION

For the foregoing reason, Movants respectfully request that the Court establish a Final Distribution Deadline of May 15, 2023 for replacement checks. Additionally, the Finance Committee requests⁹ that the Court consider sanctioning the CAC for filing a meritless Response that was intended solely to delay closing of the Settlement Facility. In this circumstance, the Finance Committee urges the Court to deny CAC payment of legal fees and costs associated with its baseless Response.

Dated: April 10, 2023
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⁹ DSC and the Debtor's Representatives do not join in this request.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2023, 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: April 10, 2023

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