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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 OF DOW SILICONES CORPORATION, THE DEBTOR'S REPRESENTATIVES, AND THE FINANCE COMMITTEE TO THE RESPONSE OF THE CLAIMANTS' ADVISORY COMMITTEE TO THE MOTION TO TERMINATE FUNDING PURSUANT TO SECTION 2.01(C) OF THE FUNDING PAYMENT AGREEMENT AND TO TERMINATE THE SETTLEMENT FACILITY PURSUANT TO SECTION 10.03 OF THE SETTLEMENT FACILITY AND FUND DISTRIBUTION AGREEMENT

Dow Silicones Corporation ("Dow Silicones"), the Debtor's Representatives (the "DRs"), and the Finance Committee (the "FC") (collectively, "Movants") hereby reply to and oppose the positions of the Claimants' Advisory Committee (the "CAC") in their Response to the Motion for Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement ("Response"). Although the Response ostensibly states that the CAC supports the Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement (ECF No. 1796) ("Motion to Terminate"), the actual text of the Response makes clear that the

CAC in fact does not support termination as set forth in the Motion to Terminate and takes a position that could in fact result in leaving the Settlement Facility and the funding obligation "open" indefinitely in violation of the Dow Corning Amended Joint Plan of Reorganization (the "Plan"). The CAC's Response suggests an interpretation of the termination provisions of the Funding Payment Agreement ("FPA") that is directly contrary to the structure of the Plan.

Their proposal demanding additional funding for claims that the CAC itself has argued are not eligible or invalid, and that have repeatedly been found ineligible by the Settlement Facility and the courts, is unsupportable and inexcusable. By taking this position and attempting to thwart the long-standing process for terminating the Plan functions (which the CAC participated in developing and administering) the CAC is violating its obligations under the Plan. And, their proposal that they be paid additional fees (presumably retroactively because there is no current work) based on a "pending" submission which has not been disclosed to the Movants is in contravention of the Court's annual budget process that establishes the payment terms for the CAC fees and expenses. The Movants request that the Court grant the Motion to Terminate as proposed by the Movants.

BACKGROUND

The FC, the DRs, and the CAC have been preparing for the termination of the Settlement Facility since 2016 and have reported jointly to the Court that the

Settlement Facility operations would terminate no later than the end of 2024. *See* Exhibit 1, December 9, 2024 Declaration of Nancy M. Blount ("Blount Declaration") at ¶ 4. At the status conference held in March 2024, the Court asked the parties to provide a schedule for filing a motion to terminate and suggested that the Court could be available to hear the motion in December 2024. *Id*. at ¶ 5. At the status conference held on June 27, 2024, the CAC advised the Court (in response to the Court's question) that they would not contest any motion to terminate by the end of 2024. *Id*. at ¶ 6.

The FC, the DRs, and Dow Silicones filed the Motion to Terminate on November 15, 2024. The CAC advised the Movants that they would join the Motion to Terminate once the Court addressed a pending invoice submitted by the CAC for services of their outside counsel.[1] The Court issued that determination on December 5, 2024. Order Regarding Attorney Fee Applications Submitted by the Claimants' Advisory Committee on Behalf of its Counsel, ECF No. 1805. In a meeting held among the FC, the DRs, and the CAC on December 6, 2024, the CAC, for the first time, advised that there was another – undisclosed – "issue" that they had submitted to the Court and that their joinder in the Motion to Terminate would be affected by that issue. Blount Declaration at ¶ 7. They represented that the "issue" involved

[1] It was never made clear why or how that invoice would affect termination – but presumably the CAC wanted to assure payment before all accounts were closed. Of course, the amount of that invoice had been included in the budget for 2024.

only the CAC. *Id*. The CAC did not advise the DRs or the FC that they had prepared a filing and certainly never during the many months during which the parties discussed the termination motion *ever* suggest that they would not agree to termination at the end of 2024 as had been represented to the Court. *Id*. at ¶ 8. The CAC did not inform the DRs or the FC of their Response before it was filed, and did not seek concurrence in their position. *Id*.

Although the Response states that they agree with termination, they obviously do not agree to termination as set forth in the Motion to Terminate and proposed order. Instead, they contend that the conditions for termination are not met because there remains a pending appeal filed by Korean Claimants. The CAC wants to delay termination until such time as that appeal is ruled upon or they want Dow Silicones to pay into escrow over $6 million which the counsel for Korean Claimants asserts, contrary to the clear evidence, is owed to them in their Cross-Motion to Deny Motion to Terminate Funding Pursuant to Section 2.01(c) of the Funding Payment Agreement and to Terminate the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement and for Order to Make Payments in Default to Korean Claimants ("Cross-Motion") (ECF No. 1802). Cross-Motion at 6. Neither of these options is viable or reasonable and both are contrary to the terms of the Plan.

In addition, the CAC's Response reveals, for the first time, that they have submitted a request to the Court for what the Movants assume is an increase in the CAC's hourly rates for their activities as members of the CAC. Response at 4. That request was clearly submitted ex parte – and neither the FC nor the DRs were aware of any such request. It appears from the representations made by the CAC during the December 6 meeting that the CAC may also have contacted the Court ex parte about that request.[2] Since the Settlement Program has reached its end, there are really no remaining tasks for the CAC to perform, and this request necessarily relates to the "past" and is presumably a request for a retroactive increase in fees. The Movants have no information about the scope, nature, or amount of this request.

ARGUMENT

I. The CAC's Analysis of the Requirements for Termination is Contrary to the Plan's Structure and Plain Language

The CAC takes the position that the Settlement Facility cannot be terminated until the pending appeal filed by Korean Claimants is decided by the Sixth Circuit. They assert that the phrase "finally resolved" in Section 2.01(c) of the FPA means that any matters pending in court must be concluded before the Settlement Facility

[2] From time to time the Court has been careful to ask the DRs whether there was any objection to the Court holding an ex parte discussion with the CAC about specific invoices they had submitted – most pertinently the invoice submitted for the outside counsel that was the subject of the Court's recent order. Neither the DRs nor the FC recall any discussion of the request referenced in the CAC Response.

can be terminated. That interpretation is contrary to the structure of the Plan, principles of contract construction, and common sense. First, the term "finally resolved" cannot refer to court proceedings (with respect to claims submitted to the Settlement Facility) because the Plan prohibits appeals to any court of decisions of the Settlement Facility. *See* Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA at § 8.05.[3] As set forth in detail in the Movants' Response to the Cross-Motion filed by Korean Claimants, the language regarding termination of the Settlement Facility must be read in the context of the purpose, structure and function of the Settlement Facility and the Plan's provisions for the final binding resolution of claims by the Settlement Facility. It would be

[3] *See also In re Clark-James*, 08-1633, 2009 WL 9532581, at **2, 3 (6th Cir. Aug. 6, 2009) ("the Plan provides no right of appeal to the district court, except to resolve controversies regarding the interpretation and implementation of the Plan and associated documents."); *See In re Settlement Facility Dow Corning Trust*, 760 F. App'x. 406, 411-412 (6th Cir. Jan. 14, 2019) ("To the extent the Korean Claimants seek to challenge any substantive decisions of the Claims Administrator with respect to any particular claims, such review is beyond the scope of the plan. 'The Plan provides no right of appeal to the Court.'") quoting *In re Settlement Facility Dow Corning Tr.*, No. 12-10314, 2012 WL 4476647, at *2 (E.D. Mich. Sept. 28, 2012); *See also Hawkins v. Claims Adm'r of Settlement Facility*, No. J:21-CV-10764, 2021 WL 8343045, at *1 (E.D. Mich. Oct. 19, 2021) ("The Court has held on several occasions that the Plan provides no right of appeal to the Court by claimants who do not agree with the decisions of the SF-DCT, the Claims Administrator and/or the Appeals Judge."); *In re Settlement Facility Dow Corning Trust, Dale Reardon*, No. 07-CV- 14898, 2008 WL 4427520, at *2 (E.D. Mich. Sept. 30, 2008) ("The Plan provides no right to appeal to the Court…"); *In re Settlement Facility Dow Corning Trust, Mary O'Neil*, No. 00-00005, 2008 WL 907433, at *3 (E.D. Mich. Mar. 31, 2008) ("The Plan provides no right to appeal to the Court…").

inconsistent with the Plan to interpret the phrase "finally resolved" to mean anything other than final resolution by the Settlement Facility. The Plan unequivocally prohibits court review of decisions of the Settlement Facility and to conclude that court review of Settlement Facility determinations must be completed before termination may occur is contrary to this clear prohibition and the intent of the parties in establishing the administrative claim evaluation process. Termination cannot be delayed on the ground that court proceedings must be concluded when such proceedings are prohibited by the Plan. The Plan was carefully structured to avoid such a result. The cases cited by the CAC are inapposite. They do not address the meaning of the term as negotiated in a Plan of Reorganization where settlement procedures are delegated to an administrative process whose decisions may not be appealed to any court.

Second, to adopt such an interpretation would mean that *any* claimant could force the Settlement Facility to stay open in perpetuity simply by filing additional motions.[4] The Court has recently issued two decisions adverse to the Korean Claimants. *See* Order Denying Motion to Stay Pending Appeal, ECF No. 1803; Order Denying Motion for Order to Allow Korean Claimants' Attorney to Receive Attorney's Fees and Expenses Regarding Returned Checks Not Cashed, ECF No.

[4] The CAC's definition of resolved is perhaps applicable to the Litigation Facility but, of course, that is not the issue here.

1804. History suggests that those decisions will be appealed. If that is the case, then the termination would be set back yet another year. The Plan provides clear provisions for its own termination and those provisions are based on objective criteria – not on the actions of individual claimants seeking to circumvent the Plan's terms. Termination of funding is not optional or discretionary. Once the Settlement Facility completes its tasks and decides all claims and the claims asserted against the Litigation Facility are concluded, the funding obligation terminates by the terms of the Plan. FPA at § 2.01(c). The Settlement Facility's tasks are indisputably complete and the cases filed against the Litigation Facility have long since been resolved. The Court should keep in mind that in many mass claim settlements, individuals will bring claims or raise questions years after the completion of the settlement process. That does not mean that the settlement administration must remain open. The Plan agreed to by the parties, including the CAC, provides for a limited time period of operation and a funding obligation that requires payment only if and as necessary to pay Allowed claims and related expenses up to a cap. FPA at § 2.01(b). The Plan does not contemplate and does not permit extensions for any reason.

In addition, as set forth in detail in the Movants' Response to the Cross Motion filed by Korean Claimants, there can be no credible argument that the claims asserted by Korean Claimants have not been finally resolved under any interpretation of that

term. As set forth in the uncontroverted declaration testimony of the Claims Administrator (ECF No. 1796-7), Financial Advisor (ECF No. 1796-4) and Independent Assessor (ECF No. 1796-8), all claims have been reviewed and decided by the Settlement Facility and, as applicable, through the administrative appeal process, and all Allowed claims have been paid. *See* ECF No. 1796-7, Smith-Mair Declaration at ¶ 8; ECF No. 1796-8, Wills Declaration at ¶ 10; ECF No. 1796-4, Chmiel Declaration at ¶¶ 5-10. The testimony is dispositive: the termination requirement has been met. But, in addition, even if one were to adopt the CAC's definition of finally resolved (which is incorrect), the claim types listed in the Korean Claimants' Cross-Motion as well as the arguments raised in the pending appeal have been the subject of extensive motion practice in the district court and appellate court.[5] The Korean Claimants' seemingly constant appeals of Settlement Facility

[5] *In re Settlement Facility Dow Corning Tr.*, No. 23-1936, 2024 WL 4710155, at *2 (6th Cir. Nov. 7, 2024) (confirming the establishment of the June 3, 2019 final deadline for filing claims and December 1, 2023 as the final distribution deadline and affirming the district court's order denying Korean Claimants' challenging the establishment of the final distribution date).

In re Settlement Facility Dow Corning Trust, No. 21-2665/22-1750/1753/1771, 2023 WL 2155056 (6th Cir. Feb. 22, 2023) (affirming the application of Closing Order 2, which governs the requirement for securing verified addresses to permit payment).

In re Settlement Facility Dow Corning Trust, 2023 WL 2155056 at *3 ("In Case No. 22-1750 [regarding Korean Claimants' 400 claims mentioned in the Cross-Motion], the district court correctly concluded that the final deadline to file claims was an

decisions and challenges to this Court's authority and its adopting of Closing Orders to assist with termination have been rejected repeatedly by the Sixth Circuit. *In re Settlement Facility Dow Corning Tr.*, No. 23-1936, 2024 WL 4710155, at *1 (Acknowledging the Dow Corning's bankruptcy spawning "seemingly unending series of legal disputes involving numerous parties, [including]… the Korean Claimants… who return to this Court for the fifth time."). The existence of yet another unauthorized appeal cannot be a basis for delaying the termination of funding or for requiring Dow Silicones to establish an escrow account.

The CAC cites three cases in support of its argument that "finally resolved" in this bankruptcy Plan means that all possible court actions must be completed. None of these cases has any bearing on the interpretation of language in the Plan. In *Lawrence v. Fl*orida, 549 U.S. 327 (2007), the Supreme Court addressed the statutory provisions for tolling the time period for seeking federal habeas relief; it is not a decision that interprets the term final resolution. The Court simply notes the procedures for exhausting state court post-conviction proceedings include determination by the highest court in the State. *Dealer VSC, Ltd. v. Tricor Auto.*

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unambiguous plan term to which settling claimants agreed and which it therefore had no authority to modify.").

In re Settlement Facility Dow Corning Tr., No. 00-00005, 2018 WL 11573563, at *1 (E.D. Mich. Dec. 12, 2018) (denying Korean Claimants' Motion for Extension of Class 7 Claimants).

Grp.-US-Inc., No. 2:21-CV-3880, 2022 WL 1951556 (S.D. Ohio June 6, 2022) involves a petition for a stay of federal court litigation pending resolution of two separate partially related state court proceedings where the federal litigation was in an early stage and the state court litigation was more developed. The federal court granted the stay and found unpersuasive one party's assertion that one state court had resolved a core issue when that decision was on appeal and the two state courts had reached different legal interpretations. *Adoptive Fam. #1 & Their Daughter A v. Warren Cnty., Ohio,* No. 1:18-CV-179, 2019 WL 2425277 (S.D. Ohio June 10, 2019) involves court approval of a proposed class settlement in which the court notes that the settlement is beneficial because it avoids the lengthy process of a final litigated resolution. These cases have no bearing on the interpretation of the terms in *this* Plan to effect its termination where the resolution of claims by the Settlement Facility does not include litigation.

It is also relevant to note that the CAC appears to have accepted at face value the $6 million amount claimed as owed by Korean Claimants. Nearly half of that total amount is attributable to the late filings that this Court and the Sixth Circuit have rejected. *See* December 9, 2024 Declaration of Kimberly Smith-Mair in Support of the Reply and Response to the Cross Motion, ECF No. 1807-1, at ¶ 13(e). The remaining half is attributable to continued disputes about the address requirement. *Id*. It would be unconscionable to adopt this fictious number as the

basis for some sort of "protective" escrow account even were that to be a credible proposal.

Dow Silicones has paid $1.859 billion for the resolution of claims submitted for settlement and in litigation, as well as for claims related to the tort claims (including the domestic health insurer claims, and the government lien claims.) *See* Exhibit 2, December 9, 2024 Declaration of Brian Chmiel ("Chmiel Reply Declaration") at ¶ 4. There are no more claims, and there is no legitimate basis for requiring additional funding.[6] As the Motion to Terminate clearly demonstrates, the funds remaining in the Settlement Facility account are sufficient to complete the wind down activities and achieve final closure of the Settlement Facility.

II. THE CAC'S APPARENT REQUEST FOR RETROACTIVE FEES MUST BE DENIED

The FC and the DRs were not even aware that a request had been made to the Court. Although the Court has authority under the Plan to set rates, there is no provision that suggests that the funding party can be forced to make retroactive payments, without notice, in excess of the administrative budgets that were developed through a detailed procedure involving the parties and the FC in conjunction with and approved by the Court. Each year, the FC prepared a budget

[6] It is relevant to note, in addition, that the Plan does not provide for "advance" funding of claims – which is what has been proposed by the CAC with respect to the Korean Claimants. FPA at § 2.02(b)(iv).

that includes line-item amounts governing the payment of fees and expenses of all court appointed persons and entities including the CAC. *Id*. at ¶ 5. The CAC's annual budget was prepared by the CAC. *Id*. at ¶ 6. The parties reviewed and analyzed the budget each year and once satisfied with the terms of the budget, presented it to the Court for further review. *Id*. The budgets, as they should, have set the limits on the administrative costs of the Settlement Facility operations (and the Litigation Facility operations) since pre-Effective Date claims activities began. To now seek a retroactive increase in those budgets is simply unreasonable and contrary to the 20-year policy developed by the Court to maintain credible and appropriate costs. [redacted]

In the event that the Court wishes to consider the CAC's request, the DRs and FC request an opportunity to be heard after receiving an accounting of the payments

already made to the CAC and the basis upon which any retroactive changes would be made.

CONCLUSION

For the foregoing reasons, Dow Silicones Corporation, the Debtor's Representatives, and the Finance Committee respectfully request that the Court disregard the CAC's Response and grant the Motion to Terminate as proposed by the Movants.

Dated: December 9, 2024

Respectfully submitted,

/s/ Karima Maloney
Karima Maloney
STEPTOE LLP
717 Texas Avenue
Suite 2800
Houston, TX 77002
Telephone: (713) 221-2382
KMaloney@steptoe.com

Counsel for the Finance Committee

/s/ Deborah E. Greenspan
Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com

Debtor's Representative and Attorney for Dow Silicones Corporation

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SETTLEMENT FACILITY DOW CORNING TRUST	§	**Hon. Denise Page Hood**

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2024, 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: December 9, 2024

/s/ Deborah E. Greenspan

Deborah E. Greenspan
BLANK ROME LLP
Michigan Bar # P33632
1825 Eye Street, N.W.
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
Deborah.Greenspan@blankrome.com
Debtor's Representative and Attorney for Dow Silicones Corporation