

**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**  
§

**SUR-REPLY IN RESPONSE OF THE CLAIMANTS’ ADVISORY  
COMMITTEE TO THE 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**

The Claimants’ Advisory Committee (“CAC”) submits this Sur-Reply in Response to the 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 (“the Reply to the Motion to Terminate”), Dec. 9, 2024, (ECF No. 1817). The Reply to the Motion to Terminate contained new claims and declarations.

### **Background**

The three members of the CAC have devoted over four decades to representing breast implant claimants, including two decades as court-appointed representatives on the CAC in the Dow Corning Settlement Program. Since our appointment in 2004, the CAC has worked closely with the Debtor’s Representatives and Finance Committee to ensure that the settlement program was administered according to the terms of the Plan Documents. Now the Movants seek to terminate funding to the Settlement Fund - funding that would affect the CAC’s compensation petition while concurrently requesting Court-ordered access to the CAC’s **privileged** time records for an alleged “accounting of the payments already made to the CAC” and for the Court to “disregard the CAC’s Response....” This overreach should be denied.

### **Argument**

The Movants claim in their Reply that 1) they were unaware of the CAC’s compensation requests; 2) that the annual budget process is the only way that the CAC can address its compensation; 3) that the CAC has essentially been overly compensated; and 4) that the Movants must receive an accounting of the CAC’s

payments, the basis for any compensation request, and an opportunity to be heard. These are new claims that were not raised in the Motion to Terminate, and accordingly, it compels the CAC to respond.

To prevail, the Movants have the burden to provide a **“specific, detailed request demonstrating an actual need to have access to the underlying privileged time records....”** See Order Establishing Compensation For Claimants’ Advisory Committee Pursuant To Settlement Facility Agreement 4.09(d), July 16, 2004 (ECF No. 125) (emphasis added), attached as Exhibit 1 hereto. The Court reaffirmed that the CAC’s fee submissions are privileged in the Order Regarding Revised 2023 Budget, Sept. 29, 2023 (ECF No. 1734), attached as Exhibit 2 hereto (“The Order Establishing Compensation For Claimants’ Advisory Committee Pursuant To Settlement Facility Agreement 4.09(d) provides that CAC members submit their fee and expense statements directly to the Court and that the underlying time descriptions are subject to privileges.”). They have not met this burden. In fact, the Movants have not articulated a single reason why the CAC’s privileged time records should be made available to them at the pending closure of the Settlement Trust.

The Court has reviewed and approved the CAC’s proposed budget each year for 21 years, and it has reviewed and approved the CAC’s fee submissions every month for the past 21 years. See, e.g. Order Approving Payment of Claimants’

Advisory Committee Fees and Expenses For October 2024, Nov. 27, 2024 (ECF No. 1801), attached as Exhibit 3 hereto (every Order approving the CAC compensation for the past 21 years is identical except for the month and year of the fee submission). No party has ever objected to the CAC's hourly rate during either budget discussions, when the CAC's hourly rate was adjusted for 2007 and 2022, or to the almost 250 Orders that were entered over the past 21 years approving the CAC's fees and expenses.

The July 16, 2004, Order Establishing The CAC's Compensation noted that the Court had consulted with all the parties – including Debtor's Representatives and Claims Administrator. It further noted that the “CAC members have voluntarily agreed for purposes of conserving the assets of the Settlement Fund to reduce their normal hourly billing rate....” See Exhibit 1 at p. 1. The hourly rate was reduced to \$250/hour for attorneys (and \$125 for the non-attorney member), substantially below the \$500 hourly rate that Dow Corning agreed to pay many attorneys for their substantial contribution claims in 2005 and 2006, including CAC member Ernest Hornsby.<sup>1</sup> It was, in fact, half of the approved rate. The hourly rate was adjusted twice over the 21 years of the Settlement Program, in 2007 and 2022. See Order

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<sup>1</sup> For example, Dow Corning agreed to – and the Court approved - the substantial contribution claim of Ernest Hornsby at the hourly rate of \$500 for work performed prior to the Effective Date in 2004. Similarly, Dow Corning agreed to – and the Court approved – the substantial contribution claims of other plaintiff attorneys in the bankruptcy at hourly rates ranging from \$375 - \$550.

Approving 2007 Budget, Dec. 21, 2006 (ECF No. 476) (“The Court also approves the Claimants Advisory Committee’s request to increase the members’ hourly rates, the Court finding the requested hourly rates are reasonable.”), attached as Exhibit 4, and Order Approving 2022 Budget, Dec. 17, 2021 (ECF No. 1635) (“The Court also approves the Claimants Advisory Committee’s request to increase the members’ hourly rates, the Court finding the requested hourly rates are reasonable.”), attached as Exhibit 5. Thus, there is precedent for adjusting the CAC’s hourly rate. It was not set in stone in 2004 just as the salaries of the Claims Administrator and Settlement Facility staff were not set in stone. They were adjusted almost every year to account for merit raises and cost of living adjustments.<sup>2</sup> It should not come as a surprise that at the conclusion of a very successful Settlement Program, the CAC should seek to be reimbursed for its efforts, especially when reducing our hourly rates for decades unquestionably saved Dow Silicones from paying the full funding cap of \$2.35 billion NPV.

As a result of the CAC’s and parties’ efforts, the goal of conserving assets for the claimants’ benefit has been achieved. Every claimant who was eligible and had

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<sup>2</sup> According to the Bureau of Labor Statistics, inflation eroded the value of a dollar over time, so that the \$250 hourly rate set in 2004 is now equivalent to \$417.77 in 2024. See Declaration of Claimants’ Advisory Committee Members, attached as Exhibit 6A. The cumulative price change from 2004 to 2024 is 67.11%. ([www.in2013dollars.com/usinflation/2004?amount=250](http://www.in2013dollars.com/usinflation/2004?amount=250)) *Id.* The two hourly rate increases for the CAC were basically to keep even with inflation over the past two decades.

an approved claim received 100 % of their Base Payment and 100% of their Premium Payment. See Declaration of Claimants' Advisory Committee, at ¶ 10, attached as Exhibit 6 hereto. Every single claimant. In addition, the CAC's advocacy led to the inclusion of 3,146 Notice of Intent claims (\$30 million) approximately 407+ tissue expander claims (approximately \$3.2 million) 533 Late Claims (\$2.5 million) 105+ Release Claims, 5006 Disputed Marshalling claims in Class 7, and many Class 5 and 6 claims who were included based on new product identification protocols negotiated by the CAC. Id. at ¶ 11. These efforts added millions of dollars of value to the settlement for claimants, all while working at reduced hourly rates. The CAC members are the only individuals in the entire Settlement Program who reduced their fees to achieve this goal, placing claimants' interests first and only seeking to be compensated for that when it was assured that funds remained at the conclusion of the program. Id.

If the Movants are surprised by the CAC's compensation request, it is a surprise of their own making. The CAC informed the Finance Committee in November 2021 during the budget preparation process of their intent to seek compensation at the conclusion of the Settlement Trust. Id. at ¶ 13. The CAC shared a detailed memo with the Finance Committee dated November 18, 2021, outlining the reasons for requesting compensation at the conclusion of the Settlement Fund.

Id. There was no “surprise” sprung upon the Finance Committee in our Response brief as alleged by the Movants.

To the contrary, it was the Movants who excluded the CAC from discussions and access to financial data that it is entitled to regarding funding needs of the Settlement Trust since the revised funding protocol was put in place in 2021. Id. at ¶¶ 14 & 15. Now, they ask the Court to “disregard the CAC’s Response...,” (Reply to Motion to Terminate at p.14) as though the CAC is not entitled to participate in closing matters and advocate a position to the Court. This is consistent with how the CAC has been disregarded by the Movants for the past three years on closing matters. In fact, the Finance Committee took the extraordinary step to actively seek to foreclose the CAC from participating in closing matters by requesting that the Court clarify the role of the CAC as it pertained to the closing process.<sup>3</sup> The Court rejected the Finance Committee’s position in its Opinion and Order On Motion For Reconsideration On The Order To Show Cause Submitted By The Finance Committee, Sept. 29, 2023, (ECF No. 1737), attached as Exhibit 7 (“It is clear from

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<sup>3</sup> The Finance Committee requested that the Court “set a status conference to include the FC and the parties for purposes of clarifying the roles of the FC, the CAC, and Dow Silicones and the Debtor’s Representatives as they relate to the closing process.” See *Reply in Further Support of Finance Committee’s Motion For Order To Show Cause With Respect To Law Firms And Counsel Who Have Failed To Respond To The Audit Survey Required by Closing Order 4*, Apr. 25, 2023, ECF 1711, at p. 7. The Finance Committee also sought sanctions on at least two occasions in 2023 against the CAC – which were denied by the Court – when the CAC disagreed with them over closing issues.

the SFA that the CAC must be involved in and informed of all aspects of the activities of the Settlement Facility and the Finance Committee. The SFA defines the CAC's duties and authorities.... As a signatory of the SFA, the CAC has a significant role in ensuring the purpose of the SFA is accomplished through the closing of the Facility.” at p. 13). The Court noted that SFA 4.09(c)(i) provides that the CAC “shall attend and participate in meetings of the Finance Committee....” Section 4.09(c)(iii) states that the CAC shall be authorized to advise and assist the Settlement Facility, Claims Administrator, Finance Committee, Litigation Facility, Financial Advisor, and Independent Assessor regarding all matters of mutual concern....” Subsection (c)(iv) provides that the CAC “shall be provided with copies of all reports, projections .... or other similar documents concerning the activities of the Settlement Facility ...”

The Movants have not complied with the SFA or the Court's Order of September 29, 2023 (ECF No. 1737). Since 2021, they have held calls and exchanged documents amongst themselves and with the Financial Advisor and excluded the CAC. See Declaration of Claimants' Advisory Committee Members, Exhibit 6, at ¶¶ 14 - 18. They have failed to share financial information with the CAC to which the CAC is entitled. Id. They have not allowed the CAC to have any input into projected funding requests to Dow Silicones and projected expenses of termination and wind down of the Settlement Fund. Id. The last Projected Funds



Notice the CAC received is dated April 10, 2023. Id. at ¶ 16. The Movants should not be permitted to claim surprise based on their own exclusion of the CAC from discussions. Their outrage rings hollow.

The Movants also suggest that the CAC compensation issues should only be raised in annual budget discussions and orders. We disagree, but even so, on August 3, 2024, the Finance Committee requested that the CAC provide a budget to them for the first six months of 2025. Id. at ¶ 19. It was during this time frame that the CAC asked to renew discussions with the Court about its compensation and budget for 2025. Id. at ¶¶ 19 - 20. For reasons as yet unexplained, the Finance Committee did not submit a budget to the parties or Court for 2025. Instead, the CAC first learned on November 5, 2024, that the Financial Advisor had prepared a projected funding analysis for termination and wind down of the Settlement Facility for the first quarter of 2025. Id. at ¶ 21. Moreover, the projected funding analysis had been shared previously with the Debtor's Representatives and Finance Committee. Id. The CAC did not have any input into this document and was not given an explanation as to how the budget was determined. Id.

The projected funding analysis is the basis for the Movant's Motion To Terminate Funding, and yet the CAC, as required by the Plan and this Court's Order, has not been provided any information about how it was prepared and how projected funding needs were calculated. As a result, the CAC is simply unable to state with

any certainty that if termination of funding were granted now as the Movants seek, that there are sufficient funds available to meet all wind down expenses. Moreover, if the CAC had been given an opportunity to participate in the projected funding analysis discussions when the Movants met to discuss it, then the CAC would have properly evaluated the projected funding estimates for the motion to terminate and requested funding for our compensation request.

Last, the Movants imply that the CAC has been unjustly enriched by this settlement, noting that some other settlements do not have a claimants' committee that is compensated for its legal work. Movants overlook that in MDL-926 the Plaintiffs' Steering Committee worked on behalf of breast implant claimants and was compensated for its work. They also ignore the fact that the SFA was a document that Dow Corning negotiated and to which it agreed. Dow Corning expressly agreed to the creation of a Claimants' Advisory Committee. In addition, Dow Corning agreed to Section 1.28 of the Amended Joint Plan that defines the role of the CAC and states that the CAC shall "represent the interests of Personal Injury Claimants after the Effective Date," (Amended Joint Plan of Reorganization, 1.28). Further, Dow Corning agreed in the SFA that the CAC shall be compensated (SFA 4.09(d)), and that said compensation shall be established *solely* by the District Court (SFA 4.09(d)). Dow Corning agreed to all of this in 1999 and has participated in the Settlement Program for 21 years without objection. It is irrelevant that the CAC's

role and compensation may not be the same as some other bankruptcy settlements as the Movants allege. The language in the Plan Documents control, and it is simply too late to complain now decades later.

The Movants are also not permitted to publicly disclose information from confidential reports of the Financial Advisor. These reports are not public. The information in them is not public. It was highly improper for the Movants to share any data or summary of data in a pleading like they did in their Reply and attached Declaration.<sup>4</sup> Furthermore, the description of the confidential data was taken out of context and included the cumulative compensation of four law firms, the foreign claimant representative, and the CAC's financial professionals,<sup>5</sup> is inaccurate according to the CAC's records<sup>6</sup>, and is intended solely to protect Dow Silicones' from making additional funding to the Settlement Trust. This is not the role of the

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<sup>4</sup> At the CAC's request, the Movants agreed to redact certain provisions of their Reply and Declarations. They filed the Motion To Strike, Withdraw, Or Otherwise Remove Docketed Reply To Response (ECF No. 1809), on Dec. 21, 2024 (ECF No. 1818), and a Motion To File Certain Material Under Seal on the same date (ECF No. 1815). The Court granted both Motions on Dec. 23, 2024 (ECF No. 1821 and 1822 respectively). The disclosure of confidential data has been publicly available on the court's docket since December 9, 2024. The damage has been done.

<sup>5</sup> The Movants compare the compensation received by the CAC and its "advisors" for the past 21 years to payments made to "regular" Settlement Facility staff. The CAC's advisors include four law firms who assisted the CAC over the past two decades, the foreign claimant representative on the CAC, and the financial analysts who assisted both the CAC and the Finance Committee. Every law firm and financial analyst who performed services was paid at significantly higher hourly rates than the CAC.

<sup>6</sup> The CAC's records show a significant discrepancy from the amount that is attributed to it in the Financial Advisor's Declaration.

neutrals in this case. They are not charged with protecting Dow Silicones from making additional funding contributions if the Court so orders. Further, it makes it impossible for the CAC to respond substantively without also violating the confidential nature of the Settlement Fund's protected information.

The Debtor's Representatives have expressly stated that they do not want to contribute any additional funds to the Settlement Fund even though the negotiated cap for Dow Silicones monetary liability under the Plan is *hundreds of millions* of dollars below the cap. This is the motivating factor in seeking to prevent the CAC from recovering money for having reduced their hourly rate in 2004 to conserve the assets of the Settlement Fund. Their wish in this regard, however, is irrelevant. There is money available under the funding cap,<sup>7</sup> money that the Dows saved by the CAC's actions in conserving the assets of the Settlement Fund, and Dow Silicones cannot escape its funding obligations under the Plan if the Court orders it to contribute additional funds.

### **Relief Requested**

The CAC respectfully requests that the Court reject the Movants' request for "an accounting of the payments already made to the CAC and the basis

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<sup>7</sup> In the Declaration of Brian Chmiel, Financial Advisor, he states that "Dow Silicones has paid \$1.859 billion for the resolution of claims submitted for the 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 to Movants' Reply at ¶ 4. The funding cap in the Dow Plan is \$2.35 billion NPV, well above the actual payments made by Dow Silicones.

upon which any retroactive changes would be made.” The Movants have not met their burden of showing a “specific, detailed request demonstrating an actual need to have access to the underlying privileged time records.” Their request should be denied. The matter of the CAC’s compensation is solely between the CAC and the Court.

Dated: December 23, 2024

Respectfully submitted,

/s/ Ernest H. Hornsby

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§

**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 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 23, 2024

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