

**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

**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 (the "CAC") submits this response in support of termination of Dow Silicones' funding obligations but requesting that the Court enter the Order only when all claims have been finally resolved or, alternatively, funded by Dow Silicones prior to a final termination of its funding obligations in the Plan.

1. The Korean Appeal Has Not Been Finally Resolved

The conditions for termination of Dow Silicone's funding obligations are set forth in Section 2.01(c) of the Funding Payment Agreement. That provision states:

Dow Corning's obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of either (i) the date when all Allowed Claims in each of Classes 5 through 19 and all other

obligations of the Settlement Facility and the Litigation Facility have been paid, all Claims have been liquidated and paid *or otherwise finally resolved*, and no new timely Claims have been made against the Settlement Facility or the Litigation Facility for two consecutive Funding Periods; or (ii) the payment of all amounts required by this Agreement.

(emphasis added) Currently, there is an appeal brought by the Korean Claimants that has been fully briefed and is pending before the Court of Appeals for the Sixth Circuit, Appeal #24-1653 (collectively “the Korean Claims”).¹ Thus, the Korean Claims have not been “finally resolved” as required by Section 2.01(c). The words “finally resolved” are subject to only one reasonable reading in this context: that the matter has been completely disposed of through settlement, payment, or a final, non-appealable order denying relief. Any other resolution would not be “final” and would still carry the possibility, however remote, of exposure for the Settlement Facility. This is precisely the situation the FPA is designed to *avoid* – the possibility of liability for the Settlement Facility that Dow Corning would have no remaining obligation to satisfy.

Courts have thus used the term “finally resolved” to signify complete resolution *including exhaustion of appeals* in situations where, as here, that is the most logical way to define finality. *See, e.g., Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (holding that “state courts have finally resolved an application for state

¹ The Korean Claimants filed their brief before the Court of Appeals for the Sixth Circuit on October 7, 2024 (ECF #18), and a Joint Response was filed on behalf of the CAC, Debtor’s Representatives, and Finance Committee on November 7, 2024 (ECF #22).

postconviction relief [when] the State’s highest court has issued its mandate or denied review”); *Dealer VSC, LTD. v. Tricor Automotive Group-US-Inc.*, 2022 WL 1951556, at **2-4 (S.D. Ohio 2022) (staying litigation until related state court litigation was “finally resolved,” including appeals, rejecting argument that key issues had been “resolved” by trial court ruling where appeal had been taken); *Adoptive Family #1 and Their Daughter v. Warren Cty., Ohio*, 2019 WL 2425277, at *3 (S.D. Ohio 2019) (approving settlement where “final resolution” of case would require “years of litigation and appeals”).

Granting the motion to terminate before the appeal has been finally resolved places the risk of having inadequate funds to pay these claims on the Settlement Trust, instead of where it properly belongs – on Dow Silicones. The CAC suggests that a more prudent course would be to wait for resolution of the pending appeal. The appeal in Case #24-1653 is fully briefed, and a ruling will likely be issued in months, not years. Alternatively, the second section of 2.01(c) provides a way for Dow Silicones to terminate its funding obligations now even though all claims have not been liquidated, paid, or finally resolved, i.e., “the payment of all amounts required by this Agreement.” If Dow Silicones funds the Settlement Trust (or places the amount in escrow with the Court) in an amount equal to the amount potentially payable to the Korean Claims, it would both assure that the Settlement Trust is adequately funded *and* allow for its future funding obligations to be terminated prior

to the final resolution of the pending motions and appeal. The Settlement Trust and Korean claimants should not bear the burden of having inadequate funds available to pay claims should the Court of Appeals reverse the District Court's Order.

2. There Is A Pending Issue Concerning CAC's "Reasonable Hourly Rate" As Determined by the Court

A second issue that must be finally resolved is that of the CAC's request for a reasonable hourly rate as provided in Section 4.09(d) of the SFA. Under Section 4.09(d), the District Court has the sole authority to determine CAC compensation. If the CAC's compensation request is approved, it could require additional funding from Dow Silicones. Thus, a motion to terminate funding now before this issue is resolved could prejudice the CAC's pending request.

3. Summary

The CAC respectfully requests that the Court approve termination of Dow Silicone's funding obligations when the appeal in Case No. 24-1653 has reached a final resolution and when the CAC's pending request has been finally resolved as required by the FPA, or alternatively, to require Dow Silicones to fund an amount equal to the amount in question in the appeal and the CAC's pending compensation request so that the Settlement Trust does not bear the risk of having inadequate funds once termination occurs. The funds could be placed in escrow with the Court and returned to Dow Silicones if they are not needed so that they would not be subject

to Section 10.03(b) of the Settlement Facility and Fund Distribution Agreement's language concerning excess funds in the Trust.

Dated: December 6, 2024

Respectfully submitted,

/s/

Ernest H. Hornsby
FARMER PRICE LLP
100 Adris Place
Dothan, AL 36303
Telephone: (334) 793-2424
Ernie@farmerprice.com
Claimants' Advisory Committee

/s/

Dianna L. Pendleton-Dominguez
LAW OFFICE OF
DIANNA PENDLETON
401 N. Main Street
St. Marys, OH 45885
Telephone: (419) 394-0717
DPend440@aol.com
Claimants' Advisory Committee

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

In re:

**SETTLEMENT FACILITY DOW
CORNING TRUST**



Case No. 00-CV-00005

Hon. Denise Page Hood

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 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 6, 2024

/s/

Dianna Pendleton-Dominguez
Law Office of Dianna Pendleton
401 N. Main St.
St. Marys, OH 45885
Telephone: (419) 394-0717
dpend440@aol.com
Claimants' Advisory Committee

/s/

Ernest H. Hornsby
FARMER PRICE LLP
100 Adris Place
Dothan, AL 36303
Telephone: (334) 793-2424
Ernie@farmerprice.com
Claimants' Advisory Committee