

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

**In re:**

**Case No. 95-CV-20512-DT  
(Chapter 11)**

**DOW CORNING CORPORATION**

**Honorable Denise Page Hood**

**Debtor.**

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**MEMORANDUM OPINION AND ORDER  
REGARDING DEBTOR'S MOTION TO APPROVE  
ADDITIONAL CAPITALIZATION OF DOW CORNING LIMITED**

Dow Corning Corporation, the Debtor in this bankruptcy case, brought this Motion to Approve Additional Capitalization of Dow Corning Limited ("DC Limited"). The Official Committee of Unsecured Creditors ("Commercial Committee") filed an objection to which the Debtor replied. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334(a) and (b), the relief requested being authorized under 11 U.S.C. §363(b)(1).

In its motion, the Debtor seeks authorization of the Court to provide £175 million in additional capital to DC Limited, which DC Limited would then pay to the Debtor to reduce the outstanding principal debt owed by DC Limited to Debtor under a revolving credit agreement (the "Revolver"). The Revolver was approved by the Bankruptcy Court by an order dated January 18, 1996, and provided that the Debtor would lend DC Limited up to £250 million. The Commercial Committee did not object to the original request for authorization of the Revolver.

The Commercial Committee objects to the authorization of the additional capital to DC Limited. The Committee argues that the Debtor has a large amount of cash on its balance sheet, but no creditor has been paid; that the Debtor has not justified the benefit of this transaction to any but the Debtor and its

shareholders; and, that the transaction will not benefit the reorganization. The Committee asserts that the Debtor should “wait to pursue its business objectives that do not assist in the reorganization, just as creditors have been made [to] wait to collect undisputed amounts owned to them by the estate.” (Objection of the Official Committee of Unsecured Creditors to the Debtor’s Motion to Approve Additional Capitalization of Dow Corning Limited, at 4.) The Committee concedes that DC Limited would reduce its liability, but also claims, without support, that the Estate would lose net income. The Committee offers no sound argument against the Debtor’s claim that the additional capitalization will increase the Debtor’s annual cash flow and decrease its tax burden in the amount of approximately \$3.2 million.

The Commercial Committee notes that a court must consider not only whether a sound business purpose supports the proposed use of the estate in evaluating such requests, but the court must also consider whether the requested transaction will “assist” the “reorganization,” citing *In re Enron Corp.*, 2003 WL 1562202, \*19 (Bankr. S.D.N.Y., Mar. 21, 2003); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 155 (D. Del 1999). The Commercial Committee also states that a court should consider, “all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, the creditors and the equity holders, alike,” citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)(citing, *In re Continental Air Lines, Inc.*, 780 F. 2d 1223 (5th Cir. 1986)). The Commercial Committee notes that the circumstances of each individual case must also be considered when determining whether a proffered business justification for such a request is sufficient.

Under the Bankruptcy Code, 11 U.S.C. § 363(b)(1), the court may authorize use of a debtor’s estate property other than in the ordinary course of business. Courts must consider whether a sound business purpose supports the proposed use of the estate when evaluating such a request. *In re*

*Montgomery Ward Holding Corp.*, 242 B.R.147, 153 (Bankr. D. Del. 1999). A sound business decision advanced by a debtor should ordinarily be authorized unless it is “so manifestly unreasonable that it could not be based upon sound business judgment, but only on bad faith, or whim or caprice.” *In re Aerovox, Inc.*, 269 B.R. 74, 80 (Bankr. D. Mass. 2001). The Sixth Circuit noted the broad discretion of the courts to authorize the use of estate funds under §363(b)(1) in *Stephens Ind., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). In that case, the Sixth Circuit cited the factors noted in *Lionel, supra*, including that the court consider whether the use of estate property would advance the reorganization. The Sixth Circuit wrote:

Finally, the Second Circuit attempted to provide some guidance for the bankruptcy courts by stating:

In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. He might, for example, look to such relevant factors as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. This list is not intended to be exclusive, but merely to provide guidance to the bankruptcy judge.

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We adopt the Second Circuit’s reasoning in *In re Lionel Corporation, supra*, and conclude that a bankruptcy court can authorize a sale of all a Chapter 11 debtor’s assets under § 363(b)(1) when a sound business purpose dictates such action.

*Stephens Ind.*, 789 F.2d at 389 (quoting *In re Lionel Corp.*, 722 F.2d at 1071).

DC Limited is an English liability company and a wholly owned subsidiary of the Debtor. The company is located in Barry Wales, and is the only basic silicone plant operated by the Debtor in Europe. DC Limited's basic silicone manufacturing plant is its primary asset. The plant employs over 600 people, providing intermediate products for use in the Debtor's other plants worldwide. DC Limited had planned a major expansion of the Barry, Wales plant prior to the filing of bankruptcy by the Debtor. After the petition in bankruptcy was filed, the Debtor claims that the availability of conventional funding via the capital markets was uncertain and the Revolver was put in place.

The amount of the current debt of approximately £175 million is due December 31, 2005. Currently, DC Limited pays the Debtor monthly interest payments of £750,000 on the outstanding principal, on which the Debtor must pay substantial federal and state income tax. Although the taxes would ordinarily result in an offset to DC Limited by an income tax deduction in the United Kingdom, DC Limited has been operating at a loss and does not have sufficient income against which to deduct the interest paid to the Debtor. The Debtor claims the result is a net cash loss and a net tax burden to the Debtor. The Debtor claims that authorization of additional capital to DC Limited would enable DC Limited to pay the Debtor the outstanding principal debt under the Revolver, resulting in substantial tax benefits to the Debtor.

Ronney Ross Sexton, the Debtor's Treasurer, a certified public accountant with twenty-six years financial experience with the Debtor, testified that the capital contribution will not impair the Plan. Mr. Sexton testified that the capitalization will improve the Estate's cash position because of tax benefits in the amount of \$3.2 million per year, pro rated on a monthly basis. The Commercial Committee has shown no contrary evidence. The Commercial Committee's argument that DC Limited may not become profitable and that it is not prudent to subordinate DC Limited's debt to junior creditors is speculation and without

factual support.

The Court finds that the Debtor has articulated a sound business purpose for the use of estate property in this case. This Court authorizes the additional capitalization of DC Limited up to £100 million in cash for the use and purposes stated in the Debtor's motion, to be immediately paid by DC Limited to the Debtor to reduce the outstanding principal debt under the Revolver. The Court finds that the Debtor has stated a "sound business purpose" for the proposed use of the funds of the estate under the Bankruptcy Code, 11 U.S.C. §363(b)(1).

Accordingly,

IT IS ORDERED that the Debtor's Motion to Approve Additional Capitalization of Dow Corning Limited is GRANTED.

s/ Denise Page Hood  
Denise Page Hood  
United States District Judge

DATED: May 18, 2004