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**

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

For the reasons set forth in the attached memorandum, Dow Silicones Corporation ("Dow Silicones"), the Debtor's Representatives (the "DRs"), and the Finance Committee (the "FC") (collectively, "Movants") hereby move for an order confirming that Dow Corning's funding obligations under the Amended Joint Plan of Reorganization of Dow Corning Corporation (the "Plan") have terminated and that the conditions for final termination of the Settlement Facility-Dow Corning Trust ("SF-DCT") have been met. As set forth in the attached Memorandum in Support of 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 Agreement ("Memorandum"), Dow Corning's funding obligations are terminated as provided at Section 2.01(c) of the Funding Payment Agreement. The conditions for termination have been satisfied under Section 2.01(c) because (i) all Allowed Claims in each of Classes 5 through 19 have

been resolved through payment or otherwise, and (ii) all other obligations of the Settlement Facility and the Litigation Facility have been paid, and (iii) no new timely Claims have been made against the Settlement Facility or the Litigation Facility for two consecutive Funding Periods. There are no payments due to either the SF-DCT or the Litigation Facility.

Dated: November 15, 2024

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

INTRODUCTION 1

BACKGROUND 2

A. The Bankruptcy Plan. 2

B. Establishment of Settlement Fund and Litigation Fund 4

C. Payment Process and History 5

D. Establishment of Settlement Facility and Incorporation of Litigation Facility 7

E. Processing and Payment of Claims submitted to the Settlement Facility. 8

F. Governance and Oversight 10

G. Termination of Funding and Settlement Facility Required by Plan Documents. 12

H. Confirmation of Resolution of All Claims 14

I. Resolution of Cases Filed Against the Litigation Facility 16

ARGUMENT 17

I. The Conditions to Terminate Funding Have Been Met. 17

A. All Allowed Claims in Classes 5 through 10 Have Been Paid or Otherwise Resolved, All Claims in Classes 11-19 Have Been Liquidated and Paid or Otherwise Resolved, and No New Timely Claims Have Been Made. 18

B. All Allowed Claims In Classes 11 through 19 Have Been Paid, All Claims Have Been Liquidated and Paid or Otherwise Resolved, and No New Timely Claims Have Been Made. 21

C. All Other Obligations of the Settlement Facility and Litigation Facility Have Been Paid 28

II. The Settlement Facility Should be Terminated Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement .. 30

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Bendall et.al v. McGhan Medical Corporation et.al,
No. 14219/93, Order (Ontario Superior Ct., Feb. 5, 2015).....3

In re Dow Corning Corp.,
Case No. 95-20512 (Bankr. E.D. Mich.).....7, 24, 25

Ezra v. DCC Litigation Facility, Inc.,
Case No. 05-cv-30469-DPH, ECF Nos. 113, 114 (E.D. Mich. Sept. 30, 2015)..... 16, 17

Gatza v. DCC Litigation Facility, Inc.,
Case No. 05-cv-30496, ECF Nos. 167, 168 (E.D. Mich. Sept. 29, 2016)..... 16, 17

Harrington v Dow Corning Corporation, et al,
File No. VLC-S-S-C954330 Order Made After Application
(British Columbia Sup. Ct. Dec. 5, 2016) 3

Miller v. DCC Litigation Facility, Inc.,
Case No. 05-cv-30133-DPH, ECF Nos. 88, 89 (E.D. Mich. Sept. 29, 2016)..... 16, 17

In re Settlement Facility Dow Corning Trust,
628 F.3d 769 (6th Cir. 2010).....2

Sutherland v. DCC Litigation Facility, Inc.,
Case No. 05-cv-30276, ECF Nos. 119, 120 (E.D. Mich. Sept. 29, 2016)..... 16, 17

Sutherland v DCC Litigation Facility, Inc.,
Case No. 16-2397, ECF No. 49-1, 55 (6th Cir.).....16

Sutherland v. DCC Litigation Facility, Inc.,
Case No. 23-1976 (6th Cir. June 27, 2024) 17

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court issue an order confirming that Dow Corning's funding obligations under the Amended Joint Plan of Reorganization of Dow Corning Corporation have terminated and that the conditions for final termination of the Settlement Facility-Dow Corning Trust have been met?

   Movants' Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

- Dow Corning Amended Joint Plan of Reorganization
- Settlement Facility and Fund Distribution Agreement
- Dow Corning Settlement Program and Claims Resolution Procedures, Annex A
- Funding Payment Agreement
- Second Amended and Restated Depository Trust Agreement

Dow Silicones Corporation[1] ("Dow Silicones"), the Debtor's Representatives (the "DRs"), and the Finance Committee (the "FC") (collectively, "Movants") respectfully submit this Memorandum in Support of 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.

INTRODUCTION

The Amended Joint Plan of Reorganization of Dow Corning Corporation (the "Plan") (Exhibit 1) became effective on June 1, 2004. The Plan established the settlement program through which eligible personal injury claimants receive payments as set forth in the Plan and Plan Documents.[2] The Plan also established the Litigation Facility as the entity responsible for defending litigated claims asserted against Dow Corning. Both the Litigation Facility and the Settlement Facility were funded with an Initial Payment and, as needed, through additional Funding Payments specified in the Funding Payment Agreement ("FPA") (Exhibit 2).

[1] Dow Corning Corporation changed its name to Dow Silicones Corporation effective February 1, 2018.

[2] Capitalized terms have the meaning defined in the Plan and Plan Documents unless otherwise noted herein.

The Settlement Facility provides deadlines for submission of settlement claims and the final deadline for the submission of such claims was June 3, 2019. As outlined more fully herein, the Settlement Facility has completed processing of all timely claims submitted for settlement benefits and has issued payment for all settlement claims that are eligible for payment. All cases filed against the Litigation Facility have been resolved – as more fully explained herein. The Settlement Facility has paid all administrative Fundable Expenditures – or has retained sufficient assets to make such payments during a wind down period. The claims in Plan Classes 11 – 19 have been resolved as explained below. All funding payments required by the FPA and the procedures established by the FC have been made. Therefore, all requirements for termination of funding and termination of the Settlement Facility and Litigation Facility – as well as other Plan identified positions – have been satisfied.

BACKGROUND

A. The Bankruptcy Plan

Dow Corning filed its petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan on May 15, 1995. The Plan was confirmed in 1999 and became effective on June 1, 2004. *See In re Settlement Facility Dow Corning Trust*, 628 F.3d 769, 771 (6th Cir. 2010).

The Plan created 24 Plan Classes. The Plan Classes relevant to this Motion are Plan Classes 5 through 19. Classes 5, 6, 6A, 6B, 6C, 6D, 6.1, 6.2, 7, 9, 10, 10.1 and 10.2 cover personal injury tort claims involving breast implants and other implanted devices. The classes are defined by the product type and the country of residence of the individual claimant. Class 8 covers tort claims involving certain "raw materials." Classes 6A, 6B, and 6C cover claims addressed in three class action settlements in Canada. These class action settlements were supervised by, and under the jurisdiction of, courts in Quebec, Ontario, and British Columbia, respectively. Each of these settlements was administered by an independent claims administration entity and each was finalized and closed pursuant to orders issued by the pertinent courts in Canada.[3] Class 6D covers certain class actions asserted in Australia and this class was paid and the matter closed under Australian procedures at the time of the Effective Date.[4] Class 11 covers "Co-Defendant" claims (Plan at § 3.2.19); Class 12 covers Physician Claims (Plan at § 3.2.20); Class 13 covers Health Care Provider Claims (Plan at § 3.2.21); Class 14 covers Domestic Health Insurer Claims (Plan at

[3] *See Harrington v Dow Corning Corporation, et al*, File No. VLC-S-S-C954330 Order Made After Application, (British Columbia Sup. Ct. Dec. 5, 2016); *Bendall et.al v. McGhan Medical Corporation et.al,* No. 14219/93, Order (Ontario Superior Ct., Feb. 5, 2015); *Manon Doyer vs. Dow Corning Corporation & Dow Corning Canada Inc.*, Case No. 500-06-000013-934 (Superior Court of Quebec, Nov. 22, 2012), https://collectiva.ca/wp-content/uploads/2015/05/implants_Judgment_2012-11-22.pdf (last visited Nov. 12, 2024).

[4] Class 6D was paid through the "Australia Breast Implant Settlement Option" (Plan at § 1.7 and § 5.8.1), which provided for a separate fund administered in Australia.

§ 3.2.22); Class 14A covers Foreign Health Insurer Claims (Plan at § 3.2.23); Class 15 covers Government Payor Claims (Plan at § 3.2.24); Class 16 covers Shareholder Claims (Plan at § 3.2.25); Class 17 covers General Contribution Claims (Plan at § 3.2.26); Class 18 covers LTCI (long term contraceptive implant) Personal Injury Claims (Plan at § 3.2.27); and Class 19 covers LTCI Other Claims (Plan at § 3.2.28). As explained fully below, Plan Classes 11 – 19 were resolved by operation of the Plan or via payments made at the Effective Date. The discussion in this brief is focused primarily on the resolution of claims submitted to the Settlement Facility and cases filed against the Litigation Facility.

B. Establishment of Settlement Fund and Litigation Fund

The Plan required Dow Corning to: (a) establish a Settlement Fund and a Litigation Fund to be administered by a Settlement Facility and a Litigation Facility, respectively, to liquidate and, to the extent Allowed, pay the claims of settling claimants and non-settling claimants, respectively; (b) pay an initial payment of $985 million plus accrued interest on a portion thereof (collectively, the "Initial Payment") to the Settlement Facility; and (c) make, or cause to be made, additional funding payments to the Settlement Facility up to a maximum of $3.172 billion ($2.35 billion Net Present Value ("NPV") as of the Effective Date) over a 16-year period after the Effective Date. Plan at § 5.3. The $2.35 billion NPV amount is a funding cap and is divided between the Settlement Fund and the Litigation Fund.

The Litigation Fund was allocated $400 million NPV under the terms of the Plan and the Settlement Facility and Fund Distribution Agreement ("SFA") (Exhibit 3). The Settlement Fund was allocated $1.95 billion NPV.[5]

C. Payment Process and History

The Funding Payment Agreement provides for 16 annual Funding Periods, with Dow Corning obligated to fund only up to the amount of the respective "Annual Payment Ceilings" as specified in the FPA. *See* FPA § 2.01(b). The FPA provides that after the Initial Payment is made, insurance proceeds shall automatically be paid to the Settlement Fund and once those assets are depleted, Dow Corning shall fund *only* if and as necessary to satisfy Fundable Expenditures. The payment process requires payment in arrears so that Dow Corning need only fund the actual cost to the Settlement Facility-Dow Corning Trust ("SF-DCT") of funding claim payments and administrative expenses. The Funding Periods commenced on the first anniversary of the Effective Date of the Plan.

The FPA required the Claims Administrator to deliver to Dow Corning each month a "Projected Funds Notice" and an "Actual Expenditures Notice". FPA §

[5] The Settlement Facility processed and paid personal injury claims in Plan Classes 5, 6, 6.1, 6.2, 7, 9, 10, 10.1 and 10.2. The Settlement Fund assets paid for the settlement of the Canadian claims in Classes 6A, 6B, and 6C. *See* FPA at § 2.10. The payment for the Australian Breast Implant Settlement Option was made via stipulation as of the Effective Date and recorded as a credit against Dow Corning's funding obligations in the FPA.

2.02(a) and (b). Dow Corning was required to make payments pursuant to the schedule provided in Section 2.01(b) "*only if and to the extent* that such payments are required to pay Fundable Expenditures[6] and maintain required reserves, after taking into account the cash held by the Settlement Facility and subject to the Annual Payment Ceilings set forth in that schedule (as adjusted)." *Id.* at § 2.02(b)(iii) (emphasis added).

The FPA was structured so that Dow Corning's funding obligations would continue only until claims have been paid or otherwise resolved and no new claims were made for two consecutive funding periods. The FPA states:

> Dow Corning's obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of (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 filed 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.

Id. at § 2.01(c).

Dow Corning paid the Initial Payment and certain additional payments to the Settlement Facility before the Effective Date, as confirmed by a Stipulation and Order dated May 10, 2004 (*In re Dow Corning Corp.*, Case No. 95-20512, ECF No.

[6] Fundable Expenditures are defined as Allowed Claims and expenses of the Settlement Facility and the Litigation Facility. FPA, Recital E.

29203 (Bankr. E.D. Mich. May 10, 2004)). *See* FPA at § 2.01(a) ("The full amount of the Initial Payment including interest was paid as confirmed by the Stipulation and Order dated May 10, 2004."). Since the Effective Date, Dow Corning has made all funding payments to the Settlement Facility that have become due and payable under the terms of the Funding Payment Agreement.[7] Exhibit 4, November 10, 2024 Declaration of Brian Chmiel ("Chmiel Declaration"), at ¶ 4. The Settlement Facility, through the Finance Committee and Financial Advisor and under the supervision of the District Court, has exercised sole management of those funds. These Funding Payments provide funds to both the Settlement Facility and for the Litigation Facility pursuant to administrative budgets approved by the District Court and for Allowed payments for settling claims and for litigation costs and settlements.

D. Establishment of Settlement Facility and Incorporation of Litigation Facility

Dow Corning established the Settlement Facility before the Effective Date. By Order dated November 29, 2000, the Court opened this case number 00-CV-00005 in the District Court (the "Settlement Facility Case") and ordered that all orders and documents relating to the Settlement Facility be filed in this case. Order

[7] The Plan Proponents and the Finance Committee along with the Financial Advisor established a procedure under which Dow Silicones paid funds in advance so that the Settlement Facility had assets from which to pay claims. To achieve this, the Financial Advisor and Claims Administrator identified Fundable Expenditures that would become payable each month during the following quarter so that funding would align with payments issued.

Regarding Case Number for Matters Relating to the Settlement Facility Agreement, ECF No. 1.

Dow Corning established the DCC Litigation Facility, Inc.[8] before the Effective Date. On January 1, 2000, the Court opened case no. 00-MC-00001 in the District Court (the "Litigation Facility Case") under which cases against the Litigation Facility were to be filed. Plaintiffs who sought to resolve claims against Dow Corning through litigation were required by the Plan to initiate lawsuits in that case.

E. Processing and Payment of Claims submitted to the Settlement Facility

The Plan offered tort claimants in Plan Classes 5, 6, 7, 9, and 10 the option of settling their claims through a Settlement Program via the Settlement Facility (Plan at §§ 5.4-5.4.2) or litigating their claims against the Litigation Facility. (Class 8 claims were channeled to the litigation option and did not have a settlement option.) Tort claimants who elected to resolve their claims through the settlement option in the Plan are Settling Personal Injury Claimants under the Plan. Plan at § 1.159. The claims of Settling Personal Injury Claimants are reviewed, evaluated, and paid by the Settlement Facility-Dow Corning Trust (the "Settlement Facility" or "SF-

[8] The Plan defines "Litigation Facility" to mean "DCC Litigation Facility, Inc., the DCC subsidiary established to administer and defend against Claims asserted by Non-Settling Personal Injury Claimants, certain Claims in Classes 11 through 17, and LTCI Claims." Plan at § 1.88.

DCT"). The SFA and the Dow Corning Settlement Program and Claims Resolution Procedures, Annex A to SFA ("Annex A") (Exhibit 5) prescribe the rules under which these settling claims were individually evaluated and, if eligible, paid.

Breast Implant Claimants who were implanted with Dow Corning implants were classified in Class 5 (domestic claims) and Class 6 (foreign claims). The Class 6 claims were further subdivided into Classes 6.1 and 6.2 – based on the claimant's country of residence. Covered Other Products claims were classified in Class 9 (domestic) and Class 10 (foreign). Class 10 was subdivided into Classes 10.1 and 10.2 based on the claimant's country of residence. Class 7 included individuals who had a breast implant that was made by a company other than Dow Corning using gel products manufactured by Dow Corning.

Breast Implant Claimants who chose the settlement option could seek compensation for up to three types of claims: explant, rupture and either disease or expedited release. Plan at § 5.4.1.1. The settlement program was structured to allow claimants to submit disease claims over a 16-year period. Individuals whose disease/qualified medical condition manifested at any time during that period could file a claim. Annex A at § 7.09(b)(1). Other Products[9] claimants who chose the

[9] Other Products include such implanted devices as hip and knee joints. *See* Plan § 1.117. Other Products claims defined as "Covered" Other Products were eligible for the settlement option. Those individuals with Non-Covered Other Products were channeled to the litigation option so that they could resolve their claims in litigation against the Litigation Facility.

settlement option could also seek compensation under various claim categories including an expedited option. They could also seek compensation for Medical Condition payments, including implant failure, inflammatory foreign body response, rupture, and TMJ enhancement payments. *Id.* at § 6.03(d). The Other Products claimants who elected the settlement option were required to file their claims by the second anniversary of the Effective Date. *Id.* at 6.03(c). Similarly, Class 7 claimants were required to submit their settlement claim materials by the second anniversary of the Effective Date. The Class 7 claims were resolved and paid pursuant to the Order to Establish Guidelines for Distribution from the Class 7 Silicone Materials Claimants' Fund, ECF No. 1226, PageID.18464 (Dec. 3, 2015).

F. Governance and Oversight

The Claims Administrator appointed by the district court under the terms of the SFA oversees the processing and payment of claims by the Settlement Facility in accordance with the terms of the SFA. *See* Plan at § 1.29; SFA at §§ 4.02, 5.01, 5.04.

The SFA provides for the appointment of the Finance Committee, of which the Claims Administrator is a member, which is responsible for oversight of financial matters of the Settlement Fund and has specific responsibilities regarding the verification and Allowance of claim payments. *See* SFA at §§ 4.02, 4.08.

The SFA also provides for an "Independent Assessor" appointed by the Court, who is to assist the Finance Committee in analyzing the claim filings. SFA at § 4.05. In addition, the Independent Assessor provides the Finance Committee with certain reports. *Id.*

The Financial Advisor appointed by the Cout under the Plan has the primary responsibility for overseeing the investment of all funds paid to and held by the Trust, for providing investment instructions to the Trust, for overseeing the preparation of financial statements as specified at Sections 7.03(d), 7.03(e), and 8.04, and for the accounting statements and audit as specified at Section 8.05. SFA at § 4.04. The Financial Advisor is "responsible for determining the available assets of the Trust, including the available funds in the Litigation Fund and the Settlement Fund, and for matching the assets to claim payment needs as determined by the Independent Assessor". *Id.*

The Settlement Facility, the Finance Committee, the Claims Administrator, as well as the procedures for the distribution of funds, are supervised by the District Court. The District Court performs "all functions relating to the distribution of funds and all determinations regarding the prioritization or availability of payments, specifically including all functions related to Articles III [Transfer of Assets], VII [Payment Distribution Procedures], and VIII [Financial Management] herein." SFA at § 4.01. The District Court retains jurisdiction over the Plan to, *inter alia*, "resolve

controversies and disputes regarding interpretation and implementation of this Plan and the Plan Documents." Plan at § 8.7.3.

The Plan also established the Claimants' Advisory Committee ("CAC") and the DRs to assist in the implementation of the Plan's settlement program. *See* Plan at § 1.28 (defining the CAC to mean "those persons selected pursuant to the terms of the [SFA] to represent the interests of Personal Injury Claimants after the Effective Date"); SFA at § 4.09(b).

G. Termination of Funding and Settlement Facility Required by Plan Documents

The FPA provides that Dow Silicones' obligations to provide funding shall terminate once all Allowed claims are paid, all Claims filed 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. FPA at § 2.01(c). Specifically, the FPA states:

> Dow Corning's obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of (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 filed 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. Upon the occurrence of one or more of the events set forth in the immediately preceding sentence, Dow Corning shall seek confirmation from the Court, after notice to all other Parties and the opportunity for hearing, that Dow Corning's funding obligations under this Agreement are terminated.

FPA at § 2.01(c).

The SFA provides for termination of the Settlement Facility upon termination of Dow Corning's funding obligation. Specifically, Section 10.03 of the SFA states:

> (a) Termination Date. The Settlement Facility and Trust shall terminate as soon as practicable after the Reorganized Dow Corning's obligation to fund under the Funding Payment Agreement is terminated in accordance with Section 2.01(c) of the Funding Payment Agreement. The Claims Administrator will use his or her best efforts to substantially complete and terminate the Settlement Facility and Trust within sixty (60) days after such termination of the Funding Payment Agreement. The Claims Administrator shall seek an order from the District Court confirming that it is appropriate to terminate the Settlement Facility.
>
> (b) Closure of the Settlement Facility. Upon termination of the Settlement Facility under this Agreement, the Claims Administrator shall remain authorized to wind up the affairs of the Settlement Facility and the Trust, and thereafter, the Claimants' Advisory Committee shall be authorized to dispose of the balance, if any, of funds in the Settlement Facility after payment of or adequate provision for any remaining Settlement Facility or Trust expenses. Any such funds shall be distributed, if cost effective, pro rata to the holders of Allowed Claims previously paid to Claimants eligible under this Agreement by the Settlement Facility, or, if such distribution would not be cost effective, to a neutral medical research institute or university, selected by the Finance Committee after consulting with the Claimants' Advisory Committee.

SFA at § 10.03.

The Second Amended and Restated Depository Trust Agreement ("DTA")[10]

[10] The DTA has been amended several times throughout the course of the litigation. *See* Order Approving Stipulation to Appoint Successor Paying Agent for the Settlement Facility-Dow Corning Trust Claim Payments and to Amend the

(Exhibit 6) provides for termination of the Trust following the termination of funding obligations:

> 7.03 Termination Of Trust. If the funds in the Escrow Account are distributed under Section 6.08(b), the Trust shall terminate as soon as practicable after the funds are distributed and a final accounting is rendered under Section 6.08(c). In all other cases, the Trust shall terminate as soon as practicable after Dow Corning's obligation to fund under the Funding Payment Agreement is terminated in accordance with Section 2.01(d)[11] of the Funding Payment Agreement, and the Trustee shall cooperate with the Claims Administrator, the Claimants' Advisory Committee and the Debtor's Representatives in the termination of the Trust and winding up its affairs as provided in Section 10.03 of the Settlement Facility Agreement and the distribution of any remaining assets of the Trust as provided by Section 10.03 of the Settlement Facility Agreement. Dow Corning and the Tort Committee or Dow Corning and the Claimants' Advisory Committee, after the Claimants' Advisory Committee has replaced the Tort Committee as a party to this Trust Agreement, will deliver a joint Trustee Direction to the Trustee when this Section 7.03 becomes operative.

DTA at § 7.03.

H. Confirmation of Resolution of All Claims

The FC, the DRs, and the CAC have, with the assistance of the Independent Assessor and the consulting firm engaged to assist in claim audits, conducted

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Depository Trust Agreement, ECF No. 1241 (Jan. 26, 2016); Order Approving Stipulation to Appoint Successor Trustee for the Settlement Facility - Dow Corning Trust Claim Payments and to Amend the Depository Trust Agreement, ECF No. 1630 (Nov. 1, 2021); Order Approving Stipulation to Amend Annex A-2.2 (Fee Schedule for the Paying Agent) to the Second Amended and Restated Depository Trust Agreement, ECF No. 1735 (Sept. 29, 2023).

[11] Although this provision cites Section 2.01(d) of the FPA, there is no such section and this citation is a typographical error. The operative provision of the FPA is 2.01(c).

extensive due diligence to confirm that all claims that have been timely submitted to the Settlement Facility have been resolved. This analysis confirms that the Settlement Facility has resolved every claim timely submitted. Specifically, with respect to claims in Classes 5 and 6, the Settlement Facility received a total 246,949 claims for claimants in Classes 5, 6.1 and 6.2. Exhibit 7, November 15, 2024 Declaration of Kimberly Smith-Mair ("Smith-Mair Declaration"), at Exhibit A. Payments were issued and cleared for 120,646 claims. *Id*. An additional 126,303 claims were closed and resolved. *Id*. The 126,303 claims were closed for various reasons, including failure to cure deficiencies in the claims, failure to submit forms, claimant's claim was a duplicate, failure to present acceptable proof of use of an eligible product, previous settlement that barred the claim, failure to cash a settlement payment check, claims that elected litigation instead of settlement, and claims that were paid through the Canadian or Australian settlements. *Id*.

The due diligence process confirmed further that all claims in Classes 7, 9 and 10 have been paid or resolved. Exhibit 8, November 12, 2024 Declaration of John Wills ("Wills Declaration"), at ¶ 11 Specifically, with respect to Class 7, the due diligence analysis conducted by the Independent Assessor's firm concluded that of 57,490 claims filed, 18,509 were paid and the remainder closed without payment for reasons similar to those identified above with respect to Classes 5 and 6. *Id*. at ¶ 12. With respect to Classes 9 and 10, the due diligence process found that of 6,668

claims filed, 2,595 were paid and the remainder were closed without payment – again for reasons similar to those identified above. *Id.* at ¶ 13.

I. Resolution of Cases Filed Against the Litigation Facility

The Court entered a series of Case Management Orders that governed the procedures for pre-trial proceedings with respect to all cases filed against the Litigation Facility. Lawsuits were filed and addressed in accordance with the Case Management Orders. Ultimately, all cases filed were either dismissed or settled. Between September 2015 and September 2016, the Court dismissed the last four remaining lawsuits against the Litigation Facility.[12] Three plaintiffs appealed. The Sixth Circuit affirmed the District Court and the U.S. Supreme Court denied a petition for a writ of certiorari.[13] On September 29, 2023, the Court denied motions

[12] *See Ezra v. DCC Litigation Facility, Inc.*, Case No. 05-cv-30469-DPH, ECF Nos. 113, 114 (E.D. Mich. Sept. 30, 2015); *Miller v. DCC Litigation Facility, Inc.*, Case No. 05-cv-30133-DPH, ECF Nos. 88, 89 (E.D. Mich. Sept. 29, 2016); *Gatza v. DCC Litigation Facility, Inc.*, Case No. 05-cv-30496, ECF Nos. 167, 168 (E.D. Mich. Sept. 29, 2016); *Sutherland v. DCC Litigation Facility, Inc.*, Case No. 05-cv-30276, ECF Nos. 119, 120 (E.D. Mich. Sept. 29, 2016).

[13] *Ezra*, Case No. 05-cv-30469-DPH, ECF Nos. 117, 120; *Gatza*, Case No. 05-cv-30496, ECF Nos. 173, 176; *Sutherland*, Case No. 05-cv-30276, ECF No. 121; *Sutherland v DCC Litigation Facility, Inc.*, Case No. 16-2397, ECF Nos. 49-1, 55 (6th Cir.).

from these four plaintiffs to reopen the cases.[14] One plaintiff appealed.[15] The Sixth Circuit affirmed.[16] The plaintiff has filed a petition for writ of certiorari with the U.S. Supreme Court.[17]

ARGUMENT

I. The Conditions to Terminate Funding Have Been Met

The FPA provides that "Dow Corning's obligation to fund up to the amount of the applicable Annual Payment Ceiling shall continue until the earlier of (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 filed 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." FPA at § 2.01(c).

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[14] *See Ezra*, Case No. 05-cv-30469-DPH, ECF No. 132 (E.D. Mich. Sept. 29, 2023); *Miller*, Case No. 05-cv-30133-DPH, ECF No. 99 (E.D. Mich. Sept. 29, 2023); *Gatza*, Case No. 05-cv-30496, ECF No. 188 (E.D. Mich. Sept. 29, 2023); *Sutherland*, Case No. 05-cv-30276, ECF No. 138 (E.D. Mich. Sept. 29, 2023)

[15] *Sutherland*, Case No. 05-cv-30276, ECF No. 138 (E.D. Mich. Sept. 29, 2023), aff'd sub nom., *Sutherland v. DCC Litigation Facility, Inc.*, Case No. 23-1976 (6th Cir. June 27, 2024).

[16] *Id*.

[17] *Sutherland*, Case No. 05-cv-30276, ECF No. 138 (E.D. Mich. Sept. 29, 2023), aff'd sub nom., *Sutherland v. DCC Litigation Facility, Inc.*, Case No. 23-1976 (6th Cir. June 27, 2024), petition for writ of certiorari filed, *Sutherland v. DCC Litigation Facility, Inc.*, Case No. 24-348 (U.S. Sept. 25, 2024).

As noted, the Claims Administrator, the FC, the DRs, the CAC, the Financial Advisor, and the Independent Assessor have all conducted extensive due diligence and their findings demonstrate conclusively that these conditions have been satisfied. *See* Smith-Mair Declaration at ¶¶ 7-13; Wills Declaration at ¶¶ 10-14; Chmiel Declaration at ¶¶ 5-14. The Settlement Facility has processed all timely filed claims and issued final payments for all Allowed claims. *See* Smith-Mair Declaration at ¶ 8; Wills Declaration at ¶ 10; Chmiel Declaration at ¶¶ 5-10. The Financial Advisor has confirmed that all funding payments required of the Reorganized Debtor under the Plan and pursuant to the funding procedures adopted by the Finance Committee have been made timely and that there are no outstanding requests or need for funding payments if the wind down period is completed by the end of March 2025. Chmiel Declaration at ¶ 13.

A. All Allowed Claims in Classes 5 through 10 Have Been Paid or Otherwise Resolved, and No New Timely Claims Have Been Made.

The Claims Administrator confirmed that "(1) all Allowed and payable Claims of Settling Personal Injury Claimants in each of Classes 5 through 10 and all other obligations of the Settlement Facility have been paid, (2) all Claims filed have been liquidated and paid or otherwise finally resolved, and (3) no new timely Claims have been made against the Settlement Facility since June 3, 2019 – which was the final deadline for submission of Disease Claims." Smith-Mair Declaration at ¶ 7. The due diligence process undertaken by the Claims Administrator and her staff in

conjunction with the Independent Assessor and consultants have assured that all timely Settling Personal Injury claims in Classes 5, 6, 6.1, 6.2, 7, 9, 10, 10.1 and 10.2 have been processed and have received a notification of status letter as required by the SFA. *Id.* at ¶ 8. The Claims Administrator, in conjunction with the Financial Advisor and the Independent Assessor, has confirmed that all eligible Settling Personal Injury claimants who complied with the deadlines imposed by the Plan and procedures required by Court Order were sent a payment check. *Id.*; *see also* Chmiel Declaration at ¶¶ 5-9; Wills Declaration at ¶¶ 7, 10-13.[18]

Similarly, the Independent Assessor has independently verified that all proofs of claims filed in the bankruptcy case were transmitted to the SF-DCT as required by the Plan, that the SF-DCT has evaluated each claim and has provided each claim with a determination of either eligible or deficient. Wills Declaration at ¶ 7. The Independent Assessor has concluded that "all timely claims that are eligible for payment and that have met the requirements established by the Court for payment have been sent a payment" and that "there are no pending outstanding claims remaining to be paid." *Id.* at ¶ 10. Claims that did not receive payment were not

[18] Some claimants did not cash their payment checks but such claimants were provided opportunities to seek a reissued check up until the deadline for reissuance imposed by Court Order. *Id.* *See* Joint Stipulation and Agreed Order for Procedures for Addressing Requests to Reissue Payments and to Establish Final Distribution Date for Such Claims, ECF No. 1740 (Oct. 4, 2023).

eligible for payment under the terms of the Plan and/or the applicable Court orders governing the procedures for payment. *Id*.

The Financial Advisor has also confirmed that there is only one pending, uncashed claim payment; that the SF-DCT issued the final claim payment checks in August of 2024; and that all but one check have either been cashed or have expired. Chmiel Declaration at ¶ 5. The Financial Advisor personally conducted procedures to reconcile the records maintained by the SF-DCT, the Trust, and the Paying Agent to confirm that all distributions are properly documented and that expenditures are in compliance with the budgets approved by the Court. *Id*. at ¶ 3. The Financial Advisor confirmed and/or arranged for the completion and filing of all tax returns during the operation of the SF-DCT. *Id*.

The statistics on the submission and final resolution of claims in classes 5 and 6 are set forth in Exhibit A to the Smith-Mair Declaration. The statistics on the final resolution of claims in classes 7, 9, and 10 are set forth in the declaration of the Independent Assessor. Wills Declaration at ¶¶ 11-13.

With respect to the three Canadian settlements and the Australian settlements, the Plan provided that "the Quebec Class Action Fund, the Ontario Class Action Fund, the B.C. Class Action Fund and the Australia Breast Implant Optional Settlement Fund shall be funded pursuant to the terms of the Funding Payment Agreement." Plan at § 5.9. The FPA states:

> Dow Corning has agreed to make payments pursuant to the Quebec Breast Implant Settlement Agreement, the Ontario Breast Implant Settlement Agreement, the B.C. Class Action Settlement Agreement, and the Australia Breast Implant Settlement Option, to the Quebec Class Action Fund, the Ontario Class Action Fund, the B.C. Class Action Fund, and the Australia Breast Implant Optional Settlement Fund, respectively (the "6A – 6D Funds"). Payments to the 6A – 6D Funds shall be made by the Claims Administrator from the Settlement Facility, to the extent Funds are available to make such payments as they become due to each respective Fund under each respective settlement agreement.

FPA at § 2.10(a). All payments due pursuant to the Quebec Breast Implant Settlement Agreement, the Ontario Breast Implant Settlement Agreement, the B.C. Class Action Settlement Agreement, and the Australia Breast Implant Settlement Option have been made. Chmiel Declaration at ¶ 6.

Claims in Class 8 were required to pursue litigation against the Litigation Facility to resolve their claims. All Class 8 claims and all claims of Personal Injury Tort Claims that elected the litigation option have been either settled or dismissed through the litigation process as explained above. *See supra*. at Section Background(E).

B. All Allowed Claims In Classes 11 through 19 Have Been Paid, All Claims Have Been Liquidated and Paid or Otherwise Resolved, and No New Timely Claims Have Been Made.

All claims in Classes 11 through 19 have also been resolved. The Plan provided for resolution of other claims related to implants in Classes 11 through 17

and for resolution of LTCI-Related Claims in Classes 18 and 19. As set forth below, all of these claims have been paid, liquidated or otherwise resolved under the Plan.

Class 11 is "Co-Defendant Claims". Plan at § 3.2.19. These are defined to mean any Other Claim asserted by a Co-Defendant. *Id*. at § 1.31.[19] The Plan provided for mutual releases and none of those claims were subject to settlement or litigation. *Id*. at § 5.13.1.

Class 12 is "Physician Claims" and Class 13 is Health Care Provider Claims". *Id*. at § 3.2.20, 3.2.21. The Plan provided that "Claimants in Class 12 (Physician Claims) and Class 13 (Health Care Provider Claims) shall have the option to elect to settle their Claims against the Debtor or to litigate the allowability of such Claims." *Id*. at § 5.13.2.[20] These claims were afforded the benefit of a release and injunction

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[19] The Plan defined a "Co-Defendant" to mean:

> a Person, other than a Shareholder-Affiliated Party, Physician, Health Insurer, Government Payor or Health Care Provider, who is named and/or aligned as a co-defendant with the Debtor in any legal proceeding in any way relating to a Breast Implant, a Non-Dow Corning Breast Implant, or Other Product, including, without limitation, Baxter Healthcare Corp., Baxter International, Inc., Minnesota Mining & Manufacturing Co., and Bristol-Myers Squibb Company.

Plan at § 1.30.

[20] The Plan provides that:

> Claims in Classes 12 and 13. Claimants in Class 12 (Physician Claims) and Class 13 (Health Care Provider Claims) shall have the option to

provided that they agreed to become settling claimants. The SF-DCT mailed notices to 4,926 Class 12 Physicians and Class 13 Health Care Providers. Smith-Mair Declaration at ¶ 7. In the event that they declined to settled, these claimants were required to file cases against the Litigation Facility. To the extent that any such claimants sought to litigate, their claims have been resolved in the litigation process and are now closed.

Class 14 is "Domestic Health Insurer Claims" Plan at § 3.2.22. The Plan provided for a "Domestic Health Insurer Settlement Agreement," defined in the Plan to mean "that certain agreement styled the Domestic Health Insurer Settlement Agreement between Dow Corning and certain Domestic Health Insurers pursuant to which Domestic Health Insurers are provided an opportunity to compromise and settle their claims." *Id.* at § 1.57. The Domestic Health Insurer Settlement is a Plan Document. *Id.* at § 1.31. The Plan provided that "Domestic Health Insurers shall

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> elect to settle their Claims against the Debtor or to litigate the allowability of such Claims. Claimants in Classes 12 and 13 who do not affirmatively elect to litigate shall be deemed to have settled their Claims. Settling Physicians and Settling Health Care Providers shall release all Claims against the Debtor and the Released Parties in exchange for the protection of the release and, to the extent applicable, the injunctive provisions of sections 8.3 through 8.5 of the Plan. The Claims held by Non-Settling Physicians and Non-Settling Health Care Providers will be channeled to the Litigation Facility and paid (subject to the terms of the Settlement Facility Agreement and the Funding Payment Agreement) when Allowed.

Plan at § 5.13.2

have the option, pursuant to the terms of the Domestic Health Insurer Settlement Agreement, to either (a) settle their claims against the Debtor and the Released Parties or (b) litigate the allowability of their Claims and receive that treatment provided in section 6.05 of the Litigation Facility Agreement. All Domestic Health Insurers who do not timely elect to litigate their Claims will be deemed to have settled their Claims and shall be subject in all respects to the terms of the Domestic Health Insurer Settlement Agreement." *Id*. at § 5.13.3. The Plan also provided that "the Court shall consider approval of the Domestic Health Insurer Settlement Agreement at the hearing on confirmation of the Plan" and that the Confirmation Order "shall approve and provide for the implementation of the Domestic Health Insurer Settlement Agreement." *Id*. at §§ 6.5, 7.15. The November 30, 1999 Order Confirming Amended Joint Plan of Reorganization as Modified, Case No. 95-20512 (Bankr. E.D. Mich. Nov. 30, 1999) ordered that "The Plan, including its attached and incorporated separate agreements, compromises, settlements, and assumptions and rejections of executory contracts and unexpired releases, is confirmed." The Financial Advisor confirms that all payments due for Class 14 under the Domestic Health Insurer Settlement have been made as part of the Effective Date payments. Chmiel Declaration at ¶ 7.

Class 14A is "Foreign Health Insurer Claims." Plan at § 3.2.23. The Plan provided that Foreign Health Insurer Claims "shall be treated in accordance with

section 6.05 of the Litigation Facility Agreement." *Id*. at § 5.13.4. To the extent that any such Foreign Health Insurer Claims filed cases against the Litigation Facility, such claims have been resolved. *See supra*. at Section Background(A).

Class 15 is "Government Payor Claims". *Id*. at § 3.2.24. A Government Payor means a Governmental Unit that has paid or provided medical benefits with respect to a Personal Injury Claim. Government Payor claims are "any Other Claim" (meaning a non-personal injury claim) "asserted by a Government Payor." *Id*. at § 1.73.[21] Such claims asserted on behalf of federal government payors were resolved in a settlement that was paid as part of the Effective Date payments. *See* Chmiel Declaration at ¶ 8; *see also* Stipulation By and Between the Plan Proponents Debtor Dow Corning Corporation, Official Committee of Tort Claimants, And Creditor United States of America Regarding Implementations of Settlement Agreement, *In re Dow Corning Corp.*, Case No. 95-20512 (Bankr. E.D. Mich.), ECF No. 293226 (June 2, 2024).

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[21] A "Government Payor" under the Plan is defined to mean:

> a Governmental Unit that has paid or provided medical benefits with respect to a Personal Injury Claim. For purposes of this definition, "Governmental Unit" shall include, without limitation and in addition to those entities identified in section 101(27) of the Bankruptcy Code, any governmental program that pays for claims by Physicians or Health Care Providers on behalf of Personal Injury Claimants who qualify to receive benefits under such program.

Plan at § 1.72

Class 16 is "Shareholder Claims". Plan at § 3.2.25. Shareholder claims are defined in the Plan to mean "any Other Claim asserted by a Shareholder-Affiliated Party." Plan at § 1.162. The Shareholders retained the right under the Plan to assert claims for reimbursement of certain payments made in litigation involving Dow Corning breast implant. The Settlement Facility Agreement prescribes that the Class 16 reimbursement is to be made on the same basis as all Second Priority Payments. *See* SFA at § 7.01(a)(iii). On December 27, 2017, the Court entered an order approving the payment of the 50% of Second Priority Payments which includes Class 16. ECF. No. 1346. The 50% Class 16 payment in the amount of $12,741,395 was remitted on June 7, 2019. Chmiel Declaration at ¶ 9. On December 31, 2021, in conjunction with the Court Order approving the 2nd 50% of Second Priority payments, the Trust recorded $14,073,724 in Claims Payable for the 2nd 50% Class 16 payment to be remitted to The Dow Chemical Company, subject to the terms of the funding agreement. Chmiel Declaration at ¶ 10. Dow Chemical will agree to waive the payment upon entry of an order in 2024 approving this Motion that is either affirmed on appeal (including any writ of certiorari) or is not appealed.

Class 17 is "General Contribution Claims". Plan at § 3.2.26. General Contribution Claims are defined as "any Other Claim asserted by a Person other than a Co-Defendant, a Health Insurer, a Physician, a Health Care Provider, a

Government Payor or a Shareholder-Affiliated Party." *Id*. at § 1.71. No such claims have been identified and these claims are deemed resolved.

Class 18 is "LTCI Personal Injury Claims" and Class 19 is "LTCI Other Claims." *Id*. at §§ 3.2.27 and 3.2.28; *see also id*. at § 1.92 (defining LTCI Claims); *id*. at § 1.95 (defining "LTCI Personal Injury Claim" to mean "any LTCI Claim asserted by a Personal Injury Claimant"); *id*. at § 1.94 (defining "LTCI Other Claim" to mean "any LTCI Claim asserted by an Other Claimant"). The Plan provided for resolution of Class 18 and 19 and there were no payments made and no payments are due. The Plan states:

> At Closing, the Reorganized Debtor will, in full release, satisfaction and discharge of all Claims in Classes 18 and 19 and all Assumed Third Party Claims related to such Classes, cause the assignment of the LTCI Indemnities to the Litigation Facility. The Litigation Manager will assume full responsibility for resolving Claims in Classes 18 and 19 pursuant to the Litigation Facility Agreement. The sole remedy available to Class 18 and 19 Claimants shall be the Litigation Facility's enforcement of the LTCI Indemnities.

Id. at § 5.14. The Funding Agreement provided in Section 2.11:

> LTCI Indemnities. Dow Corning agrees, subject to the terms hereof, to grant, convey, sell, transfer, set-over and deliver to the Litigation Facility, without warranty or representation, all of Dow Corning's right, title and interest in and to the LTCI Indemnities as provided in the Plan pursuant to the Assignment of LTCI Indemnities (in form substantially the same as attached Exhibit "B") in full satisfaction and payment of the LTCI Claims. The sole source of payment of the LTCI Claims shall be the LTCI Indemnities, and the Manager shall not use any assets contributed by Dow Corning under any other provision of this Agreement to pay any LTCI Claims.

FPA at § 2.11.

In sum, all claims in the relevant classes – Classes 5 – 19 – are fully resolved.

C. All Other Obligations of the Settlement Facility and Litigation Facility Have Been Paid

All other obligations of the Settlement Facility have been paid. These include payment of all Fundable Expenditures – basically administrative expenses of operations as authorized by the budget approved by the Court as verified by the Clams Administrator. Smith-Mair Declaration at ¶ 7. All Allowed administrative costs have been paid or provision has been made to make such final payments as are authorized by the Court. Chmiel Declaration at ¶ 11. The Financial Advisor has further confirmed that the investment managers originally engaged to invest the assets of the Settlement Fund have completed their tasks and have been appropriately discharged; the bank accounts established for the distribution of claim payments have been closed or will be closed upon completion of wind down activities authorized by the Court; that the bank account established for the payment of administrative expenses will be closed upon completion of any wind down activities authorized by the Court; and that arrangements have been made to complete the final audit and tax return for the SF-DCT at the conclusion of the wind down process. *Id.* at ¶ 12.

The Financial Advisor, the Claims Administrator and the Independent Assessor have confirmed that the funds remaining in the Trust account are sufficient

to pay all amounts that will be due under the budget approved by the Court and also to conclude wind-down activities for a 90 day period (which is longer than the wind down period contemplated in the Plan). Even if the wind down takes 90 days, there is no need for any further funding assuming that this Motion is approved by the end of December 2024. *See* Chmiel Declaration at ¶ 14; Smith-Mair Declaration at ¶ 11; Wills Declaration at ¶ 14. The staff of the SF-DCT has already been reduced, further reductions will occur at the end of 2024, and the SF-DCT's office space lease was terminated at the end of June 2024. Smith-Mair Declaration at ¶ 9. The Independent Assessor has determined that "[t]here is no further need for claim review staff or claim payment staff." Wills Declaration at ¶ 10.

The costs associated with the wind down process include preparing the final compilation and disposition of electronic claim data, closure of bank accounts, final accounting, final audit, final tax returns and any analysis required for a final report to the Court, although the expectation is that the final report will be submitted near the end of 2024. Currently, the claims data is maintained in a cloud-based storage system, which requires maintenance and has a monthly cost. Smith-Mair Declaration at ¶ 10. The Claims Administrator will prepare a document memorializing the final resolution of each claim submitted to the SF-DCT and that document will be provided to the Court as part of a final report. *Id*. Once that document is completed, there is no need to maintain the data in the cloud-based

storage and it can be transferred to a hard drive – which will then eliminate the costs and personnel associated with maintaining the cloud-based system. *Id*. The wind-down process will also include completion of the final 2024 financial audit and submission of final tax returns for the Trust. These tasks will be completed by the Financial Advisor and the cost for the audit and tax filing has been accounted for and is covered by the existing funds. Once the final payments have been made to the staff and to vendors, the bank accounts will be closed and the cost associated with those accounts will be eliminated. There are no other activities that need be undertaken at this point in time. Accordingly, there is no reason to anticipate that the wind down will take longer than the 60 days estimated in the Plan, but the current fund assets are sufficient to cover 90-day wind down period.

The funding obligations have been completed and there is no reason for any further funding. Dow Silicones and the other Movants respectfully seek an order confirming that Dow Corning's funding obligations are terminated pursuant to FPA § 2.01(c).

II. The Settlement Facility Should be Terminated Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement

The SFA provides that the "Settlement Facility and Trust shall terminate as soon as practicable after the Reorganized Dow Corning's obligation to fund under the Funding Payment Agreement is terminated in accordance with Section 2.01(c) of the Funding Payment Agreement." SFA at § 10.03(a). As set forth above, the

funding obligations under the FPA should be terminated, and thus it is appropriate that the Settlement Facility should terminate. The SFA provides that the Claims Administrator "will use his or her best efforts to substantially complete and terminate the Settlement Facility and Trust within sixty (60) days after such termination of the Funding Payment Agreement." *Id*. The Claims Administrator confirms that they do not anticipate that it will take more than 60 to 90 days following entry of an Order terminating funding to substantially complete and terminate the Settlement Facility, and as noted that the costs of completing and terminating the Trust within this period is within the amount remaining in the SF-DCT account. *See* Smith-Mair Declaration at ¶ 11.

The tasks necessary to complete the wind down are outlined above. Under the termination provision of Section 10.03(b) of the SFA, any funds remaining in the Trust account at the conclusion of the wind down activities are to be distributed "if cost effective, pro rata to the holders of Allowed Claims previously paid to Claimants eligible under this Agreement by the Settlement Facility, or, if such distribution would not be cost effective, to a neutral medical research institute or university, selected by the Finance Committee after consulting with the Claimants' Advisory Committee." SFA at § 10.03(b). The amount remaining is not projected to be substantial and it therefore would not be cost effective to distribute funds to the claimants. (The cost of verifying addresses and printing and mailing checks

would exceed the remainder and would require maintenance of bank accounts.) Accordingly, the Finance Committee and CAC will determine and make arrangements for the disposition of any remaining funds as provided in the SFA.

The parties are required by the DTA to provide a directive to the Trustee advising of the closure of the Trust once all wind down activities are complete. DTA at § 7.03. Once wind down activities are complete, the parties will provide a notification to the Court and request an order from the Court that will terminate and dissolve all positions appointed by the Court under the Plan – including the CAC, Debtor's Representatives, Finance Committee, Trust, Trustee, Independent Assessor, Claims Administrator and the Financial Advisor (once the final audit and tax filings are complete). The parties will provide to the Court a proposed form of order. Dow Silicones will dissolve the Litigation Facility Inc.

For these reasons, the Movants respectfully request an order from the District Court confirming that it is appropriate to terminate the Settlement Facility pursuant to Section 10.03(a) of the SFA once the wind down activities are complete, assuming that this Motion is approved by the end of December.

CONCLUSION

For the foregoing reason, Dow Silicones Corporation, the Debtor's Representatives, and the Finance Committee respectfully request that the Court enter an order that Dow Corning's funding obligations are terminated pursuant to Section

2.01(c) of the Funding Payment Agreement and authorizing the wind down and future termination of the Settlement Facility Pursuant to Section 10.03 of the Settlement Facility and Fund Distribution Agreement.

Dated: November 15, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	§	**Case No. 00-CV-00005**
SETTLEMENT FACILITY DOW CORNING TRUST	§	**Hon. Denise Page Hood**

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 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: November 15, 2024

/s/ Deborah E. Greenspan

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