No. 06-705

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Respondent The Bank of New York's interests are not implicated by the first question presented.

2. Where the Court of Appeals could have reversed the lower court's denial of fees and expenses due an indenture trustee on the additional basis of a trustee's entitlement to such fees and expenses under the Trust Indenture Act of 1939, and that entitlement is not at issue in any split between the circuits, is certiorari warranted on the issue of whether the Court of Appeals was correct in holding that the indenture trustee may recover its fees and expenses from a solvent debtor to the extent permitted under its contract and applicable non bankruptcy law?

CORPORATE DISCLOSURE STATEMENT

Respondent The Bank of New York is a wholly owned subsidiary of The Bank of New York Company, Inc., which is a publicly traded company. No parent or publicly held company owns 10% or more of The Bank of New York Company Inc.'s stock.

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INTRODUCTION

The Court should deny the request contained in the petition for a writ of certiorari filed by Dow Corning Corporation ("Dow Corning"), a solvent debtor, seeking to defer consideration of its petition until this Court's resolution of the *Travelers* case, a case addressing a creditor's state-law-based entitlement to reimbursement of its attorneys' fees in bankruptcy. *See Travelers Cas. & Sur. Co. v. PG&E Co.*, 167 Fed. Appx. 593 (9th Cir. 2006) (unpublished), *cert. granted*, 127 S.Ct. 377, 2006 WL 1520766, 75 U.S.L.W. 3020 (U.S. Oct. 6, 2006) (No. 05-1429). In the *Travelers* case, this Court will review a split in the circuits the resolution of which is not necessary to resolve the entitlement of respondent The Bank of New York ("BNY" or the "Trustee") to its fees and expenses. Unlike in *Travelers*, in addition to its right to have its fees and expenses paid under applicable state law principles, BNY is also entitled to its fees and expenses as a trustee qualified under the Trust Indenture Act of 1939 (the "TIA") 15 U.S.C. §§ 77aaa *et seq.*

This additional ground upon which the Court of Appeals could have reversed the lower court is a ground not implicated by the split between the circuits. Therefore, the Court's review of this issue is unnecessary and certiorari should be denied as to BNY's entitlement to fees and expenses.

COUNTER-STATEMENT OF THE CASE

The facts underlying this case are complex and illustrate events that have occurred over an extended period of time. Moreover, the result reached by the Sixth Circuit Court of Appeals (the "Court of Appeals") was based on particular facts that are outside the norm in a bankruptcy context because Dow Corning is a solvent debtor.

1. The Indenture

BNY is the successor indenture trustee under an Indenture, dated as of November 1, 1987 and a First Supplemental Indenture dated as of October 21, 1991 (together, the "Indenture"), by and between Dow Corning and Continental Illinois National Bank and Trust Company of Chicago, as trustee. The Indenture provides for the issuance of unsecured debentures, notes, or other evidence of indebtedness in one or more series (the "Securities") by Dow Corning from time to time.

Pursuant to the Indenture, Dow Corning "covenants and agrees to pay or reimburse the Trustee and each predecessor Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by or on behalf of it in accordance with any of the provisions of Indenture ...." Indenture, § 6.6, C.A. Joint App. 1767.

The Indenture also provides that the fees and expenses accrued by the Trustee are deemed "additional indebtedness":

> The obligations of the Issuer under this Section to compensate and indemnify the Trustee and each predecessor Trustee and to pay or reimburse the Trustee and each predecessor Trustee for expenses, disbursements and advances shall constitute additional indebtedness hereunder and shall

> survive the satisfaction and discharge of this Indenture.

Id. Since the Trustee's fees and expenses are "additional indebtedness," interest accrues on all unpaid amounts in accordance with section 3.1 of the Indenture. Indenture, § 3.1, C.A. Joint App. 1763 ("The issuer covenants and agrees for the benefit of each series of Securities that it will duly and punctually pay or cause to be paid the principal of, and interest on, each of the Securities of such series (together with any additional amounts payable pursuant to the terms of such Securities).").[1]

Further, section 5.2 of the Indenture provides that, in the event of a default, Dow Corning will pay the Trustee's collection costs:

> [t]he Issuer will pay to the Trustee...such further amount as shall be sufficient to cover the costs and expenses of collection, including reasonable compensation to the Trustee and each predecessor Trustee, their respective agents, attorneys and counsel, and any expenses and liabilities incurred, and all advances made, by the Trustee. . . .[2]

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[1] The Trustee's right to fees, costs, and expenses, and interest thereon, also constitutes a senior claim to that of the Securities and the Trustee has a lien prior to that of the Noteholders (as defined herein) for such amounts. Indenture, § 6.6, C.A. Joint App. 1767 ("Such additional indebtedness shall be a senior claim to that of the Securities upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the holders of particular Securities or Coupons, and the Securities are hereby subordinated to such senior claim.").

[2] Although Dow Corning was a solvent debtor, it failed to make any scheduled interest payments due on the Securities from May 15, 1995, the date the petition was filed initiating its bankruptcy case, through June 1,

Indenture, § 5.2, C.A. Joint App. 1226. Section 5.2(a) further empowers the Trustee, in the event of Dow Corning's bankruptcy, to file and prove a claim for "reasonable compensation to the Trustee and each predecessor Trustee, and their respective agents, attorneys and counsel, and for reimbursement of all expenses and liabilities incurred, and all advances made, by the Trustee." *Id.*

2. BNY'S Claim and the Rulings Below

On January 14, 1997, BNY timely filed a general unsecured proof of claim (as amended from time to time, the "Claim") on behalf of the holders of certain of the Securities (collectively, the "Noteholders") seeking the outstanding principal, interest, and fees and expenses owed under the Indenture. Claim, C.A. Joint App.1224.

In February 1999, Dow Corning filed its plan of reorganization (the "Plan"). Under the Plan, unsecured claims were classified as "Class 4" and deemed to include, in part, "fees, costs and expenses (including prepayment penalties and liquidated damages), but only to the extent such fees, costs and expenses are allowable under applicable law." Plan, § 5.1, C.A. Joint App. 83. The Plan, as modified, was affirmed by the United States Bankruptcy Court for the Eastern District of Michigan (the "Bankruptcy Court") on November 30, 1999. Order Confirming Amended Joint Plan of Reorganization as Modified, November 30, 1999, C.A. Joint App. 928.

BNY's entitlement to fees, costs and expenses under the Plan was affirmed by the Bankruptcy Court in its December 1, 1999 amended opinion. *In re Dow Corning*

2004, the effective date of the Plan. Accordingly, an event of default existed under the Indenture during this time. *See* Indenture, § 5.1(a), C.A. Joint App. 1764.

Corp., 244 B.R. 678 (Bankr. E.D. Mich. 1999) (finding that "[a] debtor with the financial wherewithal to honor its contractual commitments should be required to do so"). However, despite the clear terms of the Indenture and the December 1, 1999 ruling, Dow Corning objected to BNY's claim for fees, costs, and expenses, arguing, in part, that BNY was not entitled to recover such amounts under "any applicable contractual provisions and/or applicable non-bankruptcy law." Claim Objection No. 85, C.A. Joint App. 1131. BNY moved for summary judgment seeking a ruling that Dow Corning's objection could not be sustained as a matter of law. Motion for Partial Summary Judgment of the Bank of New York With Respect to Objection No.85, C.A. App. 1119. On April 19, 2001, the Bankruptcy Court denied, in part, BNY's summary judgment motion on the issue of fees and costs on the ground that, under applicable law, Class 4 creditors, including BNY, were not entitled to assert contractual claims for fees, costs, and expenses (the "2001 Bankruptcy Court Ruling").[3] C.A. Joint App. 1112-1113.

BNY, along with the committee for commercial creditors (the "Commercial Committee") and other creditors, appealed the 2001 Bankruptcy Court Ruling on the grounds that the ruling substantively modified the Plan and, consequently, the Plan no longer satisfied the requirements of 11 U.S.C. § 1129(b). On March 31, 2004, the United States District Court for the Eastern District of Michigan (the "District Court"), applying an abuse of discretion standard of review, affirmed the 2001 Bankruptcy Court Ruling. C.A. Joint App. 1382. The District Court found that under *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163 (6th Cir. 1985), the unsecured commercial creditors were not entitled to post-petition fees, costs, and expenses because

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[3] This oral ruling was subsequently incorporated by reference in the May 3, 2001 order of the Bankruptcy Court.

such amounts were not incurred in litigating the validity of the contracts. *Id.*

On June 3, 2004, pursuant to the Plan, as modified and confirmed by the District Court, Dow Corning paid to BNY the outstanding principal and interest on the Securities; the Trustee's extraordinary fees, costs and expenses, including its attorneys' fees and expenses, remain unpaid.[4]

3. The Court of Appeals Rules That Attorneys' Fees Should be Allowed

The Court of Appeals reversed the District Court's ruling on attorneys' fees, costs and expenses and stated:

> "If the analogy between the rights of the undersecured creditors to recover interest and that creditors' rights to recover fees, costs and expenses is apt then Class 4 should be able to recover fees, costs and expenses from Dow Corning, a solvent debtor." Pet. App. 23a.

The Court of Appeals expressly found its holding was consistent with the body of cases addressing contract recoveries where a debtor was solvent. *Id.* at 24a. The Court of Appeals considered whether the law in the Sixth Circuit places any limitation upon contractual reimbursement rights for fees and expenses and held that the validity and construction of a contractual claim to such fees is governed by state law. *Id.* at 27a. The Court declined to follow the Ninth Circuit cases that held that attorneys' fees expended litigating issues solely of federal bankruptcy law are not

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[4] In accordance with section 6.6 of the Indenture, the Trustee executed its charging lien against such amounts for its outstanding fees, costs, and expenses, plus a reserve for the costs to pursue the appeal. In the event that BNY is reimbursed for its fees, costs and expenses by Dow Corning, BNY will make a subsequent distribution to the Noteholders to reimburse them for such amounts withheld.

recoverable, noting that the facts of many of those cases were distinguishable from the present case. *Id.* at 29a.

The Court remanded the case for consideration of the fees permitted under specific contracts and applicable state law. *Id.* at 31a.

REASONS THE PETITION SHOULD BE DENIED

Travelers Is Factually Distinguishable Because BNY's Entitlement To Fees Also Derives From The Trust Indenture Act

Dow Corning asserts in its petition that this Court should grant certiorari on its first issue[5], which it describes as the "finality issue", and "[a]t the very least, ... hold the petition pending resolution of *Travelers*."

BNY hereby adopts all of the arguments asserted in the Creditors' Committee Brief in Opposition (the "Committee Opposition") with respect to Dow Corning's Question 2 as well as making an additional argument peculiar to its status in this case as a trustee qualified under the Trust Indenture Act of 1939 (the "TIA") to serve as trustee under the Indenture.

The *Travelers* case is the latest statement by the Ninth Circuit asserting that creditors who otherwise have an entitlement to receive their fees and expenses from a debtor under applicable state law are constrained by federal common law from recovery where the fees and expenses are incurred litigating issues peculiar to federal bankruptcy law.

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[5] As stated in the Sixth Circuit opinion below, 456 F.2d 668, 674 at note 2, BNY as Trustee did not dispute the findings below with respect to default rate or variable interest rates since its position was unaffected by the lower court rulings. As a consequence, this opposition will only address the petition for certiorari with respect to BNY's entitlement to fees and costs under the Indenture.

See Travelers, 167 Fed. Appx. at 594; *In re Pacific Gas and Electric Co.*, No. C-03-3499 PJH (N.D.Cal. Feb.18, 2004). Accordingly, the split in the circuits identified and to be addressed by the Supreme Court will only address that issue.

BNY, in addition to its contractual rights under the Indenture to receive its fees and expenses to the extent allowable under New York law, is also entitled to its fees by virtue of its status as a Trustee qualified under the TIA. While the Court of Appeals did not directly address this point in its decision, it recognized the distinction[6] but was not required to address the argument based upon its broader holding that entitlement to fees and expenses under applicable non-bankruptcy law was sufficient to provide for recovery for fees and expenses from a solvent debtor.

BNY's entitlement to its fees and expenses as a Trustee qualified under the TIA is an additional ground on which the Court of Appeals could have reversed the lower court and a ground not addressed by the split between the circuits. BNY raised this issue below and it was before the Sixth Circuit.

The expectation of any purchaser of public debt is that its debt will be paid in full prior to any return to the shareholders of the debtor. The Trust Indenture Act of 1939, the act under which the Indenture between Dow Corning and the Noteholders is qualified, made such expectation the law.

In 1939, Congress enacted the Trust Indenture Act to protect the holders of public debt and ensure the national public interest in integrity of the marketplace. 15 U.S.C. §§ 77aaa *et seq.* (1939). The "TIA is part of the large and complicated body of federal law covering securities transactions .... As a securities statute, it is designed to

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[6] 456 F.2d at 674, note 2.

vindicate a federal policy of protecting investors." *In re Nucorp Energies Securities Litigation,* 772 F.2d 1486, 1489 (9th Cir. 1985) (citations omitted). By adopting a mechanism that (1) appointed an indenture trustee to guard against infringement of the debt holders' interest and (2) required public disclosure by the obligor upon which the investor could rely, the TIA effected a means for the bondholder to receive "adequate current information with respect to [an obligor's] financial condition and the performance of its obligations under the indenture." S. Rep. No. 76-248, 76th Cong., 1st Sess. 3626-3654 (1939). Indeed, pursuant to 15 U.S.C. § 77fff(c), it is unlawful to sell debt securities to the public unless they are issued pursuant to a TIA qualified indenture. To qualify under the TIA, the indenture must contain the provisions set forth in 15 U.S.C. §§ 77jjj - 77qqq, and if they are not in the indenture, they apply automatically as a matter of law. *See* 15 U.S.C. § 77rrr(c).

As guardian of the debt holders' interests under the TIA, the Trustee is endowed with special powers, "the first of these is the power . . . to recover judgment against the obligor for the *whole* amount due and unpaid, in the event of a principal default, or an interest default. . . ." 15 U.S.C. § 77qqq(a)(1) (emphasis added). The indenture itself serves as a contract upon which the public investor can rely, S. Rep. No. 76-248, at p. 3628, and Congress emphasized this mandate for payment in full twice in the TIA, once as a right of the bondholders and a second time as a power of the indenture trustee. *See* 15 U.S.C. §§ 77ppp and 77qqq. Congress intended to safeguard full payment on the contract to the public debt holder, including the whole amount of the fees, costs, and expenses incurred by the indenture trustee, for which the obligor contracted and any subsequent purchasers traded. Thus, for the bondholder, an important protection of TIA is the uncompromised right to payment. *See* 15 U.S.C. § 77ppp(b). Such rights are "absolute and

unconditional." *UPIC & Co. v. Kinder Care Learning Centers,* 793 F. Supp. 448, 455 (S.D.N.Y. 1992)."[7]

While the Court of Appeals did not reach the separate issue briefed by BNY in connection with its entitlement to fees and expenses, such argument constitutes a separate and valid basis upon which the court could have reached the issue without implicating the split in the circuits to be addressed in *Travelers.* Accordingly, if the Court does not otherwise determine to deny certiorari on the grounds set forth in the Committee's Opposition, BNY submits, that with respect to its claim, certiorari should not be granted.

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[7] Dow Corning addressed this argument in its reply asserting that BNY had waived the argument below and attempting to limit fees recoverable under the TIA to limited situations. BNY, in its reply, responded to these assertions by focusing on the trustee's and holder's rights to payment of the "whole amount" owed and explained that 15 U.S.C. § 77ooo(e), an allegedly limiting provision, at most provides that in a suit instituted by the trustee (which this action is not), if the parties do not agree, the court may in its discretion assess reasonable costs.

CONCLUSION

The petition for writ of certiorari should be denied and not held pending the resolution of *Travelers*.

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