Case No. 14-1090

In the United States Court of Appeals
for the Sixth Circuit

In re: SETTLEMENT FACILITY DOW CORNING TRUST

DOW CORNING CORPORATION; DEBTOR'S REPRESENTATIVES; THE DOW CHEMICAL COMPANY; CORNING, INCORPORATED,

Interested Parties - Appellants,

v.

CLAIMANTS' ADVISORY COMMITTEE; FINANCE COMMITTEE,

Interested Parties - Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1090 Case Name: In re Settlement Facility Dow Corning

Name of counsel: Jeffrey S. Trachtman, Esq.

Pursuant to 6th Cir. R. 26.1, Claimants' Advisory Committee
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on May 27, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey S. Trachtman
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the Court in its decision making.

INTRODUCTION[1]

To obtain support for its Plan in 1999 – which allowed it to exit bankruptcy and resume profitable operations – Dow Corning promised thousands of injured women rupture payments of $25,000 and disease payments of up to $300,000, a portion of which were designated as Premium Payments (or "Premiums") that would be delayed for a few years until adequate funding could be confirmed. Dow Corning also agreed to the process for determining when such adequate funding exists: The neutral Independent Assessor is to prepare annual projections based on an analysis of past claim payment history; the Finance Committee is to determine, based on these projections, when to recommend to the District Court that Premiums be paid; the parties are to cooperate in establishing expedited procedures for the District Court's review of this recommendation; and the District Court's decision whether to accept or reject it is to be honored absent an abuse of discretion.

Dow Corning agreed to the appointment of Analysis Research Planning Corp. ("ARPC") as Independent Assessor ("IA") and the firm now known as Crowe Horwath to serve in the separate, neutral role of Financial Advisor ("FA"). Every year since the Plan went into effect, Dow Corning and the

[1] Abbreviated terms not defined herein have the meanings assigned to them in the Dow Corning Plan Documents and/or Appellants' opening brief ("App. Br.").

other Appellants participated along with the CAC and Finance Committee in ARPC's claims analysis process and never, before this dispute, objected that the agreed-upon methodology was inadequate to support the eventual authorization of Premium Payments.

The two fiduciaries charged with balancing the interests of current and future claimants – the Finance Committee and the CAC[2] – concluded *three years ago* that adequate assurance exists that all future First Priority Payments, plus at least 50 percent of accrued and future Premiums, can be safely distributed within the funding cap. Under the Plan, these determinations are entitled to significant weight. Appellants, in contrast, have no duty to claimants and only one purpose here: to delay indefinitely Dow Corning's obligation to make further payments. Their feigned concern for the interests of future claimants and strained attempts to create a colorable issue on appeal are entitled to little weight or credibility.

The CAC supported the Finance Committee's Recommendation and urged the District Court to approve it so that breast implant claimants in the Settlement Facility – Dow Corning Trust ("SF-DCT" or the "Trust") could finally receive at least a portion of the long-awaited Premiums promised to them 15 years

[2] Appellants oddly characterize the CAC as "an entity established by the Plan Documents to undertake certain specified functions" under the settlement (App. Br. 17), but the Plan itself makes clear that the CAC was appointed "to represent the interests of Personal Injury Claimants after the Effective Date." RE #826-3, Plan, Page ID #13314, § 1.28.

ago. Dow Corning's expert testified at the 1999 confirmation hearing that Premiums were an important incentive to encourage claimants to settle, and he projected that Premiums would be paid by the seventh year of the settlement (now long past), even though he forecasted a significantly *higher* level of claims activity than has actually materialized in the SF-DCT.[3] Consistent with that testimony, claimants were told that Premiums would likely start to be paid "several years" into the settlement program.[4]

The Plan contemplates that the parties will rely largely on the work of two designated neutrals – ARPC and the Finance Committee, with the support of a third, the FA – to determine when claims experience indicates that there are sufficient funds to approve Premium Payments. While the Plan provides Appellants and the CAC with a right to be heard, it does *not* contemplate that disagreements over the approval of Premiums will play out as a full-scale, de novo litigation. To the contrary, as this is merely the implementation of a *settlement*, the parties agreed to cooperate in expedited, streamlined procedures to speed approval for the contemplated payments.

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[3] RE #848-3, Confirmation Hr'g Tr., Page ID #14402.

[4] RE #848-5, Excerpts of Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization ("Disclosure Statement"), Page ID #14412.

Claims experience in the SF-DCT has consistently demonstrated that this "mature tort" is winding down; claims are tapering off; and, as a result, it has long been clear that ample funds will be available to make full Premium Payments as well as all First Priority Payments contemplated under the Plan. It is only because ARPC has built in a number of conservative assumptions and scenarios that its projections in the three years prior to the Recommendation showed *any* possibility of exceeding the funding cap even with payment of full Premiums.

In view of that history, the CAC believed and still believes that the Finance Committee's decision to recommend payment of only 50 percent of accrued Premiums was overly conservative. However, the CAC supported the Recommendation as within the reasonable exercise of the judgment entrusted to the Finance Committee under the Plan. And it cannot be seriously disputed that sufficient funds exist to make *at least* the 50 percent payment approved by the District Court. Appellants' arguments to the contrary in proceedings below constituted either wild speculation regarding far-fetched scenarios or attempts to rewrite the Plan to renege on the deal struck with settling claimants.

Appellants have now abandoned most of their arguments regarding the risk that the 50 percent payments – which are already underway following this Court's denial of Appellants' stay motion – will jeopardize the Trust's ability to pay all base claims within the cap. Instead, they devote much of their brief to three

subsidiary issues that do not bear on the central question of adequate funding: (1) whether approximately $4.8 million NPV in payments to Dow Chemical should have been authorized at the same time as partial Premiums (an issue not in dispute and easily addressed in the District Court); (2) whether, following the payment of Premiums, the balance of the Litigation Fund would, theoretically, be available to pay remaining base claims; and (3) whether the available funding within the settlement cap should be increased to reflect rejection of Dow Corning's claim for a present value adjustment in connection with the Initial Payment. The District Court's statements on the latter two issues are dicta because the court expressly relied on projections that assumed *neither* source of funds would be available to pay settlement claims.

Appellants offer only two arguments going to the merits. First, they argue for a standard of assurance approaching an absolute guarantee rather than the adequate assurance standard applied by the District Court. This "guarantee" standard would be inconsistent with both the language of the Plan documents and the parties' expressed intent to pay Premiums at most seven years into the 16-year settlement program, which began on June 1, 2004, the plan's Effective Date. Second, Appellants challenge the District Court's decision to base its ruling on ARPC's neutral expert work and not consider the opinions of Appellants' expert that attacked ARPC's methodology and suggested reliance on different data and

methods. This ruling was both correct under the Plan documents and well within the District Court's discretion since this is *not* a plenary litigation but merely the implementation of a settlement that specified the methodology to be applied by Plan neutrals.

COUNTER-STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court abused its discretion in addressing only Premium Payments in the Order, when there was no dispute regarding the payment of other categories of Second Priority Payments and nothing in the record suggesting that those other categories could materially affect the Settlement Fund's solvency.

2. Whether the District Court abused its discretion by observing that the Litigation Fund could be accessed to make future First Priority Payments, where the court determined the existence of adequate funding for 50 percent of Second Priority Payments based on the cushion available only within the Settlement Fund.

3. Whether the District Court abused its discretion by observing that the rejection of Dow Corning's claim for a Time Value Credit in connection with the Initial Payment made available an additional $200 million Net Present Value ("NPV"), where the court determined the existence of adequate funding

based on projections that assumed that such funds were not available and therefore excluded them from calculation of the Settlement Fund cushion.

4. Whether the District Court abused its discretion in interpreting the Plan Documents to require "adequate" or "reasonable" assurance of the payment of future First Priority claims, where such interpretation was consistent with Plan language as well as the parties' expressed intention to pay Premiums a few years into the Settlement Program, with adequacy assessed through projections that could never be expected to offer a "guarantee" of future solvency.

5. Whether the District Court abused its discretion in holding that the parties had agreed, in the Plan documents and through their conduct, that the solvency determination should be based on the work of an independent neutral applying a methodology consisting of projections based on claims history, and therefore excluded Appellants' expert testimony offered to show that the agreed-upon methodology was fundamentally flawed.

STATEMENT OF THE CASE AND FACTS

The Premium Payments provided for under the Plan – an extra 20 percent on all approved and paid disease claims and an extra $5,000 for approved and paid rupture claims – are an integral part of the settlement embodied in the Plan. The CAC's predecessor, the Tort Claimants' Committee, joined with Dow Corning to vigorously solicit claimant support for a settlement that included no

cost-of-living increases despite years of bankruptcy-related delay. Claimants were induced to support the settlement, in part, by the promise that they would receive Premiums if, as was expected and has proven true, there was enough money in the Settlement Fund to pay both base and premium claims. Seven years of experience in the SF-DCT as of 2011, coupled with 15 years of experience in the MDL-926 Revised Settlement Program ("RSP")[5], and confirmed by years of reliable projections generated by ARPC, all support the consensus of the Finance Committee, the CAC, and the District Court that it was appropriate to pay at least one-half of the Premiums long promised to claimants.

A. Background and Funding Structure of Dow Corning Settlement[6]

The Plan provides for funding of up to $2.35 billion NPV, $400 million of which is set aside for litigation – leaving a funding sub-cap of $1.95 billion to be used for the payment of settlements. "Qualified Transfers" that count

[5] The RSP was offered by other breast implant manufacturers as a voluntary "opt-in" settlement after the collapse of a global settlement in which Dow Corning had also participated before entering bankruptcy. The Dow Corning settlement was largely modeled on the RSP.

[6] Dow Corning gratuitously and misleadingly argues that its products have been proven not to cause disease (App. Br. 7 n.3), but it agreed to a multi-billion dollar settlement at arm's length based on a range of injuries and risks associated with its products, including rupture, product failure, localized injury, and a hotly contested dispute over systemic disease causation. The settlement reflects the parties' assessment of all of these risks and should be enforced fairly according to its terms.

against these caps include Dow Corning's Initial Payment, all insurance proceeds, and any additional amounts eventually drawn against available Payment Ceilings.

Through 2010, the SF-DCT had approved and paid approximately $553 million in disease claims and $441 million in rupture claims. *See* RE #814-13 (filed under seal), 2010 Independent Assessor Report ("IA Report"), Page ID #12607, 12618. Estimated Premium Payments due on these amounts total approximately $222 million in nominal dollars, or approximately $128 million NPV. *Id*., Page ID #12651 (based on payment in 2012).

Premiums are Second Priority Payments that can be paid only with court authorization. Section 7.03 of the Settlement Facility Agreement ("SFA") provides that "the Finance Committee shall file a recommendation and motion with the District Court requesting authorization" to pay Second Priority Payments. RE #826-2, SFA, Page ID #13285, § 7.03(a). The motion must be accompanied by a detailed accounting of claims payments and distributions and a projection and analysis of the cost of paying all pending and future First Priority claims, as described in § 7.01(d). *Id.* Second Priority Payments may be made upon a finding by the District Court "that all Allowed and allowable First Priority Claims and all Allowed and allowable Litigation Payments have been paid or that adequate provision has been made to assure such payment (along with administrative costs) based on the available assets." *Id.* As noted in the Recommendation (RE #814,

Page ID #12355), the SFA does not assign any party the burden of proof in connection with this finding. *See* RE #826-2, SFA, Page ID #13285, § 7.03(a).

Nothing in the Plan Documents suggests, much less commands, that the concept of "adequate provision" to "assure" payment of First Priority Claims constitutes an absolute guarantee. Balancing the competing obligations to assure adequate funding for all First Priority Claims against the promise to claimants that Premiums would be paid if possible, the parties intended a standard of *reasonable or adequate* assurance. *See also id.*, Page ID #13281, § 7.01(c)(v) (granting Finance Committee discretion with court approval "to pay lower priority payments and higher priority payments contemporaneously, so long as the ability to make timely payments of higher priority claims is *reasonably* assured" (emphasis added)). It is undisputed that the SFA authorizes approval of *partial* Premium Payments. Section 7.03(a) itself expressly recites that, upon the District Court making the requisite solvency finding, "the Second Priority Payments, *or some portion thereof*, may be distributed." *Id.*, Page ID #13285, § 7.03(a) (emphasis added).

Because the Plan contemplates that interest and investment income of the Trust may be used to pay claims without affecting the funding cap,[7] the

[7] Section 3.02(a)(ii) of the SFA defines the Settlement Fund as including all monies paid into the Settlement Facility under the Funding Payment Agreement ("FPA") "and all earnings thereon, if any." RE #826-2, SFA, Page ID #13261.

solvency analysis required by § 7.03(a) cannot be performed merely by projecting potential future claims and comparing that amount to future available funding. The FPA provides that the Initial Payment plus all insurance proceeds are to be paid irrevocably into the Trust. Through 2010, the nominal amount of approximately $1.584 billion had been paid into the Trust, and approximately $312 million in interest, investment earnings, realized gains, and other income had accrued. The Trust had paid claims and administrative expenses of approximately $1.575 billion, leaving a cash balance at the end of 2010 of approximately $321 million. RE #814-13 (filed under seal), 2010 IA Report, Page ID #12625. These amounts are all in nominal dollars.

Only when this balance has been paid down and funds are needed to pay claims over a specified reserve can the SF-DCT seek further contributions from Dow Corning. At that point (which has not been reached even today), the Trust may begin to make draws, based on claims actually allowed and paid, up to the maximum Annual Payment Ceiling then in effect. *See* RE #814-4, FPA, Page ID #12423, § 2.01(b). Unused ceilings roll forward with seven percent added each year. *See id.*, Page ID #12425, § 2.02(e).

Because the large remaining balance in the Trust has thus far made it unnecessary to draw additional funds, substantial amounts are available under the Payment Ceilings when needed. Although this Court last year affirmed the District

Court's holding that Dow Corning is not entitled to a Time Value Credit ("TVC") in connection with the timing of the Initial Payment, Dow Corning has asserted on remand that it is entitled to an identical adjustment under other Plan provisions. However, even assuming that Dow Corning prevails in the time value dispute, the available Payment Ceiling in 2011 was approximately $160 million. Since this amount was not used, it rolled over and the total Payment Ceiling available in 2012 was approximately $238 million. At least another $134 million is available in each of the next four years. Cash flow was and is simply not an issue in the approval of Premium Payments.[8]

Instead, the question is how much additional funding will have to be paid into the Trust in order to cover all future claims, and whether authorization of Premium Payments will leave enough within the funding cap to reasonably assure the payment of all future First Priority Claims. The starting point for this analysis is the funding cap itself. Because the Litigation Fund cannot be used to pay Second Priority Claims, the initial cap is the $1.95 billion Settlement Fund. However, at the time of the Recommendation, approximately $27.9 million NPV had already been or was projected to be paid out of the Trust to pay claims and expenses of the Litigation Facility, and this amount is not charged against the

[8] The calculations of the Payments Ceilings were provided by the Financial Advisor and are not substantially in dispute.

Settlement Fund. RE #814-13 (filed under seal), 2010 IA Report, Page ID #12623. Those expenditures reduced the "Litigation Fund" that had to be reserved in future funding to $372 million and increased the amount of total funding that could be paid into the Trust without invading the Litigation Fund to $1.978 billion.

Thus, the measure of solvency before the District Court was whether the NPV of all Qualified Transfers necessary to cover current and future First Priority Claims leaves sufficient room under the $1.978 billion effective funding cap to pay some or all of the accrued Premium Payments.[9]

B. Determining Solvency Based on Claims Experience

The resolution of breast implant claims is a classic "mature tort" as to which a considerable amount of claim data exists. All available indicia show that, under any reasonably foreseeable scenario, Premium Payments can be paid without threatening the ability to pay all future base claims under the funding cap. The discussion that follows again assumes that Dow Corning *prevails* in obtaining time value adjustments in connection with the Initial Payment; if the CAC prevails, that would provide an additional cushion of nearly $200 million NPV, making even

[9] The Recommendation states that approximately $31 million has been paid out in Litigation Claims, RE #814, Recommendation, Page ID #12363; if so, then the Settlement Fund would not be exhausted until Dow Corning was called upon to make Qualified Transfers of approximately $1.981 billion (*i.e.*, $1.95 billion plus $31 million).

more clear that adequate funding exists to pay 100 percent of Premiums immediately.

Expert forecasts prepared for Dow Corning in the bankruptcy proceedings and more recently for the SF-DCT both support the soundness of making at least 50 percent Premium Payments at this time. All forecasts show that the SF-DCT will have sufficient funds to make such payments without threatening the funding cap. Comparison of past forecasts with the actual claims experience in the SF-DCT show that these forecasts were not only reasonable but substantially conservative, *i.e.*, the actual payments made by the SF-DCT have consistently run *below* the upper ends of these forecasts.

At the time of Plan confirmation, Dow Corning's expert, Dr. Frederick Dunbar, projected that the Settlement Facility would be liable for settlement payments (including Premiums) of $2.342 billion (nominal) plus approximately $88 million (nominal) for administrative costs, or a total of $2.43 billion. This translates to $1.88 billion NPV, based on his yearly projections. *See* RE #794-5 (filed under seal), NERA Report, at 20-21. Dr. Dunbar's forecasts were therefore well below the Settlement Fund cap. And yet, actual Class 5, 6.1, and 6.2 claims experience in the SF-DCT ran approximately 20 percent *below* Dr. Dunbar's projections through the first seven years of the program. *Compare id*. at

20 ($1.487 billion projected), *with* RE #814-13 (filed under seal), 2010 IA Report, Page ID #12625 ($1.185 billion actual).

ARPC had by 2011 conducted six full-scale annual projections of the SF-DCT's potential liability, each of which was presented to the District Court after Appellants and the CAC had the opportunity to suggest any necessary corrections or additions. Appellants often submitted extensive *questions* but never objected to the final reports or argued that the projection methodology was fundamentally unreliable.

Each annual projection analyzed potential future liability based both on a "constant" model (assuming that recent claims experience will continue at the same level) and a "decay" model (based on a forecasted downward trajectory in claims experience). The ARPC base case projections under these models include several conservative assumptions, including, for example, that 100 percent of claimants who ever file an acceptable Proof of Manufacturer ("POM") form will ultimately receive either a disease payment or an expedited release payment – which cannot happen, as many claimants will surely fail to surface and apply for either benefit. The projections include allowances for "surges" in claims in connection with filing deadlines for explantation (2014) and disease claims (2019). *See* RE #814-13 (filed under seal), 2010 IA Report, Page ID #12587.

ARPC also ran a series of additional projections over the years to take account of potential contingencies (or "scenarios") that could increase the amount of funding necessary to satisfy all First Priority Payments. Certain of these scenarios (*e.g.*, the projected liability for the SF-DCT if the District Court's rulings on the qualification standards for Disability A and tissue expander implants were upheld) were appropriately included, although the projected amounts were debatable. Other scenarios (*e.g.*, the supposition that significant numbers of failed disease claims would be refiled and qualify at a lower level) appeared to be more speculative. Over time, many of these scenarios have been resolved. For example, this Court's ruling on Disability A eligibility eliminated a contingency of approximately $27 million NPV from ARPC's projections. *See id.*, Page ID #12573.

The high water mark of ARPC's projections each year was thus defined by adding to the forecast of the more conservative "constant" model the total additional sum of all of the projected "scenarios" on the assumption that they would all occur at 100 percent of the projected amounts. Given this conservative approach, it is not surprising that *actual* claims experience in the Trust has run below this upper bound. For example, the IA's reports for 2007 through 2009 projected estimates of total claims that would be paid in the following year of at least $228.4 million, $104.0 million, and $178.5 million, respectively. The actual

claims paid in 2008 through 2010 were $123.3 million, $100.6 million, and $70.1 million – all less than ARPC's one-year forecasts by $105.1 million (46.0%), $3.4 million (3.3%), and $108.4 million (60.7%), respectively, and $216.9 million cumulatively. The 2010 IA Report projected at least $153.5 million in payments, but through September 30, 2011, only $31.5 million had been paid. This further supports the conclusion that ARPC's forecasts are, as intended, upper bounds that generally provide a substantial margin of safety above likely actual payments.

The RSP offered by other breast implant manufacturers provides additional useful information about what to expect as the SF-DCT continues to receive and pay claims. The RSP involved a claimant population similar to SF-DCT's in size, age, and projected liabilities, and was based entirely on breast implant claims, which are also the primary drivers of the SF-DCT's liability. In the RSP, claims experience tapered off sharply in the latter years of the program. After processing and paying overall some 164,670 claims totaling $1.301 billion through 2004, the RSP fell off from 1,240, 1,326, and 1,228 claims paid, respectively, in 2005, 2006, and 2007 to only 804 claims in 2008. The well-publicized announcement that the RSP would close to new claims in 2010 led to

only a small increase in claims paid, with 1,021 claims paid in 2009, 995 claims in 2010, and 650 claims through the first half of 2011.[10]

In short, prior projections and actual claims experience both strongly suggest that future claims can be expected to continue on a downward trajectory. With the passage of time, more and more claimants will have died, relocated, or otherwise become unreachable. Few claims remain in the hands of law firms representing high numbers of claimants. And the closing of MDL-926 did not lead to any appreciable spike in claims in the SF-DCT. All these indicators supported an expectation as of 2011 of further decay in claims.

C. ARPC's 2010 Independent Assessor Report

The last ARPC projections in the record, presented to the District Court on June 9, 2011, were consistent with this expectation. These models projected that, in order to cover all current and projected future base payments, Dow Corning would have to make additional payments into the Trust that would bring its total Qualified Transfers to an NPV of $1.788 billion under the decay model and $1.813 billion under the constant model, leaving a large cushion under the effective cap of $1.978 billion. RE #814-13 (filed under seal), 2010 IA Report, Page ID #12640, 12638. When all currently accrued and future projected Premium

[10] These figures were provided by Ed Gentle, Escrow Agent for MDL-926, and are not disputed.

Payments were added to these models, the total projected Qualified Transfers needed still came in below the cap: the totals were approximately $1.930 billion for the decay model and $1.962 billion for the constant model, varying slightly based on the timing of certain payments. *Id.*, Page ID #12655, 12657 (assuming 2013 payment, which did not occur).

ARPC also ran forecasts adding in the full amounts of four remaining "scenarios": potential liabilities relating to tissue expander implants; a pending motion with respect to expert proof in rupture cases; and certain assumptions relating to (1) future rupture claim filing by claimants with acceptable POMs and (2) re-filing of failed disease claims. It remained unlikely that all four scenarios would materialize in the full amount, but, in any event, the total NPV impact of that eventuality was only about $20.3 million. *See id.*, Page ID #12572.[11]

ARPC projected that, even if *all* of these contingencies fully materialized, total NPV Qualified Transfers needed to satisfy all base payments would total approximately $1.804 billion under the decay model and $1.830 billion under the constant model – both well under the cap. *See id.*, Page ID #12644, 12642. Adding *full* Premiums increased those totals to between $1.952 billion and

[11] The IA Report also refers to certain other potential contingencies regarding increased severity disease payments and certain vaguely described categories of unprocessed claims. *Id.*, Page ID #12575. ARPC has not viewed these additional factors as sufficiently concrete or material to influence its analysis.

$1.967 billion under the decay model (*see id*., Page ID #12661, 12645) (depending on the timing of certain payments) – still under the cap – and between $1.984 billion and $1.999 billion under the constant model (*see id*., Page ID #12659, 12643).

Thus, only the most extremely conservative of ARPC's many projections (the higher "constant" base case *plus* all scenarios materializing *plus full* current and future Premiums) presented a *possibility* of exceeding the cap, and then only by $5-20 million NPV. (In other words, if claims experience was closer to the decay model, then *every other contingency* identified by ARPC could materialize at 100 percent and *full* Premiums could be paid without threatening the funding cap.) Moreover, since none of the "scenarios" were likely to result in any payments during 2011, the highest remaining version of that projection (in which all the contingencies materialized in 2012, itself far-fetched at the time) was $1.992 billion, or only $13 million over the effective cap. *See* RE #814-13 (filed under seal), 2010 IA Report, Page ID #12651. And even today, all of these contingencies have not yet materialized, further reducing the potential NPV shortfall as projected in 2011.

Additionally, as noted, this upper-end 2012 projection included approximately $28 million NPV in projected *future* Premium Payments, which are not part of the future First Priority Payments that must be protected under § 7.03(a)

of the SFA.[12] Removing these future Premiums from the projections reduces the NPV funding required in the most extreme possible (2012) "scenario" projection to $1.964 billion – $15 million *under* the cap.

D. The Finance Committee's Recommendation

Following issuance of the 2010 IA Report, and consistent with the parties' practice in connection with prior reports, the CAC, Debtor's Representatives, and Finance Committee met with ARPC and provided comments and suggested corrections, which ARPC incorporated into its report. On June 9, 2011, the parties appeared before the District Court to present and preliminarily discuss the IA Report.

Following these initial discussions, the Finance Committee determined that it was not prepared at that time to recommend approval of 100 percent of Premium Payments but would consider whether there was adequate assurance of sufficient funding to request payment of a *portion* of accrued Premiums. It therefore obtained additional data from ARPC to describe the impact under the projections contained in the 2010 IA Report of paying 50 percent of

[12] The CAC does not believe that the SF-DCT must guarantee payment of *future* Premium Payments before paying long-owed amounts to those who filed their claims more promptly – although, as explained below, the CAC supported paying future Premiums on a going-forward basis under the Finance Committee's 50 percent recommendation. The CAC was and is confident that sufficient funds will eventually be available to pay future Premiums at *100 percent*, but such payments did not need to be part of the 2011 projection.

Premiums earned through the end of 2010 (*i.e.*, based on "historical" claims). ARPC reported that paying 50 percent of Premiums due on historical claims would leave a cushion of $82.4 million in the Settlement Fund under the more conservative constant model (with payments made in 2012) or $87.8 million (with payments made in 2014). *See* RE #814-14 (filed under seal), June 14, 2011 ARPC Memo, Page ID #12663. These cushions were expressed in NPV dollars, discounted back to 2004 at the rate of seven percent per year; the nominal dollar amount of the cushions would be approximately twice as large – *i.e.*, at least $165 million.

Based on this additional analysis, the Finance Committee concluded that there was adequate assurance of sufficient funding to pay 50 percent of Premiums accrued on historical claims. The Finance Committee thus filed its Recommendation (RE #794) on June 30, 2011.

Thereafter, the Finance Committee decided to obtain additional information and analysis in connection with its Recommendation. ARPC provided the Finance Committee with a memorandum on September 20, 2011 analyzing "claim filing patterns from January through July 2011" and concluding that "the liability estimate provided in the May 2011 IA Report requires no adjustment at this time." RE #814-12 (filed under seal), Sept. 20, 2011 Mem., Page ID #12561. ARPC also provided a memorandum dated September 22, 2011 forecasting the

impact of paying 50 percent Premiums not just for claims approved and paid through December 2010, but also for projected future claims. ARPC concluded that adding such future Premiums at 50 percent, again based on the more conservative constant model, left a residual cushion of $68.3 million NPV based on payments starting in 2012 and $74.7 million NPV based on payments starting in 2014. RE #814-11 (filed under seal), Sept. 22, 2011 Mem., Page ID #12558. These cushion amounts were projected to be adequate to pay approximately 6,550 and 7,160 additional unforecasted disease claims, respectively. *Id.* Based on this additional input, the Finance Committee filed an Amended Recommendation (RE #814) suggesting that the District Court approve 50 percent Premium Payments for both historical and future approved claims.

Without actually basing any of their legal arguments for reversal on these grounds, Appellants seek to create doubt regarding ARPC's projections through a series of unsupported and misleading factual assertions. For example, Appellants dismiss the projections as being "based on a series of untested assumptions" (App. Br. 15); failing to take account of "the underlying incidence of the qualified medical conditions" in the relevant population (*id.*); and supporting an adequate cushion only "if every assumption in the calculations proves to be correct and if claimant behavior does not change in any way" (*id.* at 16). A thorough refutation of these assertions is unnecessary since Appellants do not

argue for reversal on these grounds, but each is baseless: The assumptions on which ARPC's projections are based have indeed been tested over a number of years and have proven to be reliable indicators of future claim patterns; there is no evidence in the record that any relevant epidemiological data exists that could further inform the projections, and Appellants have never purported to identify any; and Appellants' assertion that every assumption must prove true for the projections to be accurate is simply inexplicable.

In fact, ARPC's projections were based on several highly conservative assumptions – suggesting that the cushion was probably significantly *understated*. Most significantly, ARPC's projections used to calculate the cushion were based on the *constant* model, which assumed – implausibly – that there will be no additional drop-off in claims filing in the last few years of the SF-DCT. The much more likely assumption that claims will *decline* at least to some degree is supported by experience in the RSP, where claims trailed off sharply in the final years of the program, and the undeniable fact that claims in the SF-DCT itself have already declined significantly. Moreover, ARPC's projections give no value to the CAC's position in the dispute over a time value adjustment for the Initial Payment (which has prevailed thus far); assume that *all* of ARPC's projected "scenarios" will materialize at the full amount (which is unlikely); and further assume that every single claimant with an approved POM will ultimately seek and receive either a

disease payment or an expedited release payment (which is impossible). These conservative assumptions mean any upward departure in claims experience will likely be offset by downward departures in the resolution of contingencies. *See* RE #825, CAC Resp., Page ID #13199, 13207-09; RE #848, CAC Reply, Page ID #14317-18, 14329-31; RE #848-2, Peterson Decl., Page ID #14358-60 (finding ARPC's forecasts to be sound and conservative), Page ID #14387-88.

Appellants also misleadingly describe the $68.3 million NPV cushion as constituting "a tiny fraction (only 3.5%) of the Settlement Fund" (App. Br. 16), but the portions of the fund already spent are irrelevant to assessing the cushion's margin for error; the relevant question is the ratio between the cushion and remaining *future* projected expenditures. ARPC's highest projection for the amount needed in total future claim payments was $403.0 million NPV, for the base case claims plus scenarios plus Premiums paid in 2011. RE #814-13 (filed under seal), 2010 IA Report, Page ID #12643. This total included Premium Payments for historical claims ($137.4 million), which should be subtracted because they are not subject to projection uncertainty, and full future Premiums ($40.1 million), only half of which should be counted because that is all the District Court has approved. The result is $245.5 million NPV in future payments subject to projection uncertainty. Thus, the cushion is 28 percent ($68.3/$245.5) of the total amount of variable future exposure for the Trust – a far cry from 3.5

percent.[13] Moreover, expressing the cushion in NPV dollars understates the nominal dollars available to pay claims – highly relevant, since individual claims are paid without any cost-of-living or other time-value adjustment. In other words, every dollar of NPV Qualified Transfer charged against the cap towards the end of the settlement program represents approximately *two dollars* of nominal funding actually provided to the Trust to pay claims.

Appellants objected to the Recommendation, arguing principally that (1) Premiums cannot be authorized under the Plan until virtually all claims have been paid, because there must be close to a "guarantee" of adequate funding, and (2) ARPC's methodology was fundamentally flawed because, among other things, it relied on extrapolation from prior claims history, relied on supposedly untested assumptions, did not contain a probability risk analysis, and did not take account of epidemiological data. RE #826, Appellants' Resp., Page ID #13224-28, 13232-42. Dow Corning submitted expert declarations in support of its attacks on ARPC's methodology, but did not identify specific material errors in how ARPC *applied* the methodology it employed. *See generally* RE #826-5 (filed under seal), Hinton Decl.; RE #826-6, Barbagallo Decl., Page ID #13412-17; RE #826-7, Vairo Decl., Page ID #13427-41.

[13] Using the $74.7 million NPV associated with Premiums being paid in 2014, the margin is 30 percent.

The CAC responded, arguing that a "guarantee" standard was neither mandated by Plan document language nor consistent with the parties' intent, and submitted an expert declaration explaining, among other things, that ARPC had applied a commonly used, valid, and reliable methodology; that this methodology did not typically include and did not require a probability risk analysis; and that ARPC could not have incorporated epidemiological data because no such relevant data exists for this tort. RE #848, CAC Reply, Page ID #14319-42; RE #848-2, Peterson Decl., Page ID #14348-89; RE #867 (filed under seal), Suppl. Peterson Decl.[14]

E. The District Court's Decision

In its December 31, 2013 Memorandum Opinion and Order ("Order"), RE #934, the District Court concluded that, in light of the parties' expressed intention to pay Premiums *during* the settlement period and *simultaneously* with ongoing First Priority Payments, adopting Appellants' "guarantee" standard would be "contrary to the purpose of the Premium Payment provision" and would render it "meaningless." *Id.*, Page ID #15771-72. The District Court construed the phrase

[14] Appellants' expert declarations raised certain other arguments, including some based on experience in other mass torts governed by different settlements or involuntary insurance liquidations governed by different standards and not involving implementation of a settlement at all. Appellants have not advanced these arguments on appeal and may not, of course, raise them for the first time only on reply.

"adequate provision" in SFA § 7.01(c)(iv) as modifying the word "assure" in the same sentence and concluded that the parties intended only to require reasonable or adequate assurance. *Id.*, Page ID #15772-73. The court further noted that § 7.01(c)(v) expressly contemplated simultaneous payment of lower and higher priority claims so long as the ability to pay the higher priority claims is "reasonably assured." *Id.*, Page ID #15769-70.

The District Court further held that "the SFA provides that the Court consider the recommendation of the Finance Committee based on the Independent Assessor's analysis and projections" and did not contemplate that any other party would "submit any projections or financial analysis to the Court." *Id.*, Page ID #15775-76. The court thus ruled that it would not consider the exhibits and expert testimony Appellants submitted critiquing ARPC's methodology, stressing that all parties participated in selecting ARPC as the Independent Assessor and took part in ARPC's annual process. *Id.*, Page ID #15776.

Finally, the District Court found that ARPC's projections showed a large enough cushion that "there is more than an adequate provision to assure payments of both First Priority Payments" and 50 percent Premiums. *Id.*, Page ID #15778. While the court stated in dicta that both the Litigation Fund and the funds made available by rejection of Dow Corning's claimed $200 million credit could be considered in analyzing the adequacy of funding (*id.*, Page ID #15774, 15777),

it specifically relied upon the $68 million NPV cushion remaining in the *Settlement Fund* under ARPC's analysis and stressed that the "projections indicate that the $400 million Litigation Fund would not be required in order to pay both First Priority and Premium Payments." *Id.*, Page ID #15778. Similarly, those projections assumed that Dow Corning would *win* the dispute over the $200 million credit, and thus the District Court did not ultimately rely on those funds in determining the adequacy of funding to pay 50 percent Premiums.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion by limiting its discussion in the Order to the question of Premium Payments – the only category of Second Priority Payments as to which any current dispute was pending. The parties agreed below – and agree now – that 50 percent of Class 16 payments to Dow Chemical can and should be issued contemporaneously with the 50 percent Premiums. The only other category of Second Priority Payments – Increased Severity Payments in connection with previously approved disease claims – does not present any ripe issue because the record does not reflect that even a single such claim has been approved for payment. Nor is there any evidence that either of these categories could meaningfully affect the solvency of the Trust, and ARPC considered available data on both in formulating its projections.

The District Court did not abuse its discretion by expressing its view that the Litigation Fund could be accessed to make future First Priority Payments in the unlikely event the projected cushion proves inadequate. The Plan Documents expressly authorize accessing the Litigation Fund in such circumstances, and nothing therein limits that mechanism only to situations in which Second Priority Payments have not been authorized. However, this Court need not reach this question because (1) the District Court did not rely on the availability of the Litigation Fund but rather found adequate funding based on projections limited to the Settlement Fund, and (2) the Settlement Fund is overwhelmingly likely to be sufficient to pay all claims, and thus the issue need not be addressed unless and until the Finance Committee seeks authority to access the Litigation Fund for this purpose.

For similar reasons, the District Court did not abuse its discretion by expressing the view that the $200 million NPV subject to Dow Corning's claim for a time value adjustment in connection with the Initial Payment could be considered available funds under the Premium Payment solvency analysis. Although the underlying dispute remains *sub judice* below, the District Court further noted that ARPC's projections assume that Dow Corning will *prevail* on that issue and therefore excluded those funds from its projections.

The District Court did not abuse its discretion by rejecting Appellants' argument that Premium Payments may not be authorized unless payment of future base claims is "virtually guaranteed." RE #846, Appellants' Resp., Page ID #14279-80; App. Br. 40. The SFA expressly requires only that "adequate" provision has been made to assure payment, and, accordingly, the Disclosure Statement expressly told claimants that Premiums would be released when "payment of First Priority Payments is *adequately* assured." RE #848-5, Disclosure Statement, Page ID #14411 n.3 (emphasis added). Appellants' "virtually guaranteed" standard is based on authorities construing the word "assurance" in the context of commercial agreements where the term is used as a synonym for "guaranty" – *i.e.*, as a *promise*, rather than as a *forecast*, of future ability to pay. The "adequate assurance" language of Bankruptcy Code § 365(b)(1)(C) uses the term in the latter sense and thus provides a better analogy for the applicable inquiry here – setting a standard requiring a *probability*, but not a *certainty*, of sufficient funding.

Finally, the District Court did not abuse its discretion in excluding Appellants' expert testimony seeking to establish that ARPC's methodology of projecting a likely range of future claims based on past claims history is fundamentally unreliable and must be supplemented with other types of analysis, including review of epidemiological data about the underlying population.

ARPC's methodology is *specifically mandated* by the Plan Documents, and the District Court recognized that Appellants had participated in ARPC's process for years without ever claiming that the methodology was inappropriate or unreliable. Appellants' argument that the Plan Documents expressly entitle them to submit expert testimony in connection with any dispute under the Plan is simply incorrect. Appellants' general "right to be heard" is subject to the District Court's inherent discretion over evidentiary matters. It also must be read together with Appellants' express agreement to (1) the methodology prescribed by the Plan Documents; (2) expedited proceedings; and (3) limited appellate review of the District Court's decision. Appellants' suggestion that excluding their experts' declarations violated due process is entirely baseless.

STANDARD OF REVIEW

This Court has traditionally reviewed decisions interpreting a confirmed plan under an "abuse of discretion" standard. *See In re Dow Corning Corp.*, 456 F.3d 668, 675-76 (6th Cir. 2006). Dow Corning itself has advocated for that standard of review in connection with appeals of earlier District Court decisions in this case. *See* Brief of Appellee, *Clark-James v. Settlement Facility Dow Corning Trust*, No. 08-1633, 2008 WL 9865809, at *11 (6th Cir. Dec. 23, 2008) ("The District Court's decision here was based on the plain language of Dow Corning's Amended Joint Plan of Reorganization. It is therefore reviewed for an

abuse of discretion and must be accorded 'significant deference.'" (citation omitted)).

This Court has recently applied a slightly different standard to appeals of Dow Corning Plan interpretation disputes. In *In re Settlement Facility Dow Corning Trust*, 628 F.3d 769 (6th Cir. 2010), the Court acknowledged that, while Judge Hood was not the judge who confirmed the original Plan, she "has presided over this bankruptcy case continuously since 1995" in various capacities and has "acted as the court of first resort" for nine (now twelve) years. *Id.* at 772. As a result, "[t]here is simply no denying that she is much more familiar with this Plan – and with the parties' expectations regarding it – than [this Court is]," and so this Court has held that her readings of the Plan documents warrant "a measure of deference." *Id.* Relatively less deference is owed to the District Court's interpretation of unambiguous Plan language and more, indeed almost complete, deference is given to its weighing of extrinsic evidence. *Id.*

Moreover, the parties themselves specifically agreed that the District Court's decision whether to approve a Finance Committee recommendation with respect to Premium Payments would be subject to reversal only for abuse of discretion. RE #826-2, SFA, Page ID #13285, § 7.03(a). The parties further agreed that the District Court's Plan interpretation "findings" more generally would be subject to review only on a "clearly erroneous" basis. *See* RE #53, Plan

Interpretation Stipulation, Ex. A, Page ID #123, § 2.01(d)(5). Dow Corning has argued that "findings" should be limited to formal findings of fact, but that would be a nonsensical reading of the parties' agreement, since that deferential standard of review applies automatically to fact findings. Rather, the Stipulation reflects the parties' intention to assure greater predictability by creating a broader presumption in favor of the District Court's Plan interpretations than might otherwise apply.[15]

ARGUMENT

I. MOST OF APPELLANTS' ARGUMENTS CONCERN SUBSIDIARY OR UNRIPE ISSUES THAT ARE IMMATERIAL TO THE QUESTION OF ADEQUATE FUNDING

Lacking any real grounds for reversal based on adequacy of funding, Appellants devote the bulk of their appeal brief to three points that can have no effect on that issue.

A. The Propriety of Paying Other, Immaterial Categories of Second Priority Claims Is Not in Dispute and Has Nothing To Do With Adequacy of Funding to Pay Premiums

Appellants' lead issue on appeal is its argument that, by not expressly authorizing the payment of other categories of Second Priority Claims, the District Court provided disparate treatment to similarly situated claimants in violation of

[15] Appellants may argue that parties may not "stipulate" to the standard of review, citing *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697, 712 n.10 (6th Cir. 2006), but that case holds only that parties may not bind the court merely by agreeing *in their appellate briefs* to a particular standard of review. *Id.* It does not bar parties structuring a comprehensive settlement from setting standards to govern future disputes in connecting with implementing the settlement.

the Plan, and even imposed a de facto *modification* of the Plan. App. Br. 26-31. This argument is based primarily on §§ 6.16.5 and 6.16.6 of the Plan, which state that one particular category of payments – Class 16 reimbursements to Dow Chemical for settlement amounts it paid prior to Plan Confirmation – are to be paid "on the same basis and with the same priority as 'Second Priority Payments.'" RE #826-3, Plan, Page ID #13368-69. Appellants do not cite any similar Plan language regarding the other category of Second Priority Payments it identifies – Increased Severity Payments to disease claimants.

Appellants identify no issue of substance – and certainly not any reversible abuse of discretion. The Class 16 claims (including accrued interest) total approximately $17.7 million ($9.6 million NPV). RE #814-13 (filed under seal), IA Report, Page ID #12639. Thus, payment of one-half of this amount would consume only $8.85 million in nominal dollars – or $4.8 million NPV. The other category of Second Priority Payments – Increased Severity claims – has not yet been quantified; indeed, the record does not reflect that *any* such claims have even been processed or approved for payment. ARPC has assigned no specific value to these claims in its projections. *See id.*, Page ID #12638-61.[16]

[16] ARPC noted that Increased Severity Payments for Option 1 disease claims are capped at $15 million NPV and performed a "sensitivity analysis" generously assuming that 10 percent of approved Option 2 disease claimants who received less than the maximum $250,000 payment would qualify for Increased Severity

The parties agreed below that all categories of Second Priority claims could be paid simultaneously, as approved.[17] The District Court did not address this issue in the Order, most likely because there was no disagreement as to the Class 16 claims and, as noted, no evidence of *any* approved Increased Severity claims.

Thus, the District Court did not impose "disparate treatment" (App. Br. 28) or "an improper Plan modification" (*id.* at 29) – it merely did not address a minor issue that was not contested and, as to Increased Severity, not yet ripe. As noted, the parties agree that 50 percent of the Class 16 claims should be paid, and there appears to be no reason why this cannot be implemented by the District Court either now or after the mandate issues in connection with this appeal.

Appellants suggest that the entire recommendation and hearing procedure would have to be conducted anew before the Class 16 claims could be

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Payments. The impact of such payments would be $6.2 million NPV. RE #814-13 (filed under seal), IA Report, Page ID #12575.

[17] *See, e.g.*, RE #826, Appellants' Resp., Page ID #13230 (arguing that District Court "determination of the sufficiency of Settlement Fund assets must allow for the same 50% distribution to *all* categories of Second Priority claimants"); RE #844, Fin. Comm. Reply, Page ID #14230, 14237 n.9 (Finance Committee "supports making the Increased Severity Payments on similar terms to those in the Recommendation" and observes that paying 50 percent Class 16 Claims would not undercut adequate assurance); RE #848, CAC Reply, Page ID #14336 & n.7 (expressing "no objection to the Court authorizing Second Priority Payments due to Dow Chemical on the same percentage basis as are approved for tort claimants" and observing that Increased Severity Payments are not likely to add more than a few million dollars).

paid. *See* App. Br. 27 n.12. But Appellants do not indicate what party would want or need to be heard with respect to payments fixed under the Plan that are to be paid to Dow Corning's shareholder Dow Chemical. Nor would adding these categories of claims require a fresh analysis of overall fund adequacy: ARPC's projections already take account of available information with respect to *all* categories of claims – including *all* types of Second Priority Payments. RE #844, Fin. Comm. Reply, Page ID #14237 & n.1.

Thus, Appellants' lead issue has nothing to do with the District Court's determination that adequate funding exists to pay 50 percent Premiums. Other categories of Second Priority Payments may be made when the claims are approved. No Plan provision requires one category of Second Priority Payments to be held up until *all* categories are reduced to liquidated amounts that may be paid simultaneously. First Priority Payments have been made on a rolling basis, as approved, for a decade even though *some* First Priority Claims have not yet been processed and approved (or, indeed, even asserted). Nothing in the Plan documents requires Second Priority Claims to be treated any differently.

B. The District Court Relied on the Projected Cushion in the Settlement Fund and Thus Its Dicta Regarding Access to the Litigation Fund Need Not Be Addressed on This Appeal

Appellants next take issue with the District Court's observation that the Litigation Fund would, after Premiums are paid, remain available in unforeseen

circumstances to pay remaining First Priority Claims. Appellants argue that the Litigation Fund may be accessed to pay First Priority Claims only in circumstances where no Second Priority Payments have been approved.

Appellants are wrong, but the Court need not reach this issue because (i) the District Court did not rely on theoretical access to the Litigation Fund in finding an adequate cushion to pay 50 percent Premiums, and (ii) it is highly unlikely that the issue will ever actually need to be addressed.

In the Order, the District Court noted certain language in SFA §§ 7.01 and 7.03 indicating that the court should take account of both the Settlement Fund and the Litigation Fund in determining assets that may eventually be available to pay First Priority Claims. RE #934, Order, Page ID #15774. The District Court thus concluded that the Litigation Fund is an "asset" that the court could consider in determining whether there will be sufficient funding. *Id.*

Appellants argue that "[b]ecause the Plan does not authorize the use of the Litigation Fund for *Second* Priority Payments under any circumstances, the Litigation Fund plainly is not an 'available asset' in determining whether the payment of all *First* Priority Payments in full is 'assure[d]' under Sections 7.01(c)(iv) and 7.03(a) of the SFA." App. Br. 41 (emphasis added). Appellants' argument is something of a non sequitur, however, because no party has proposed using the Litigation Fund to pay Second Priority Payments. Under the plain

language of § 7.03(b), if it is eventually necessary to cover remaining First Priority Payments, the District Court may authorize access to the remaining amounts in the Litigation Fund. RE #826-2, SFA, Page ID #13285. And there is no language restricting the Litigation Fund's use only to situations where the Settlement Fund has been exhausted solely by First Priority Payments.

But the Court need not reach this issue, for two reasons. First, the District Court did not actually rely on the availability of the Litigation Fund in determining that sufficient funds would remain to pay all First Priority claims even after the payment of 50 percent Premiums. Notwithstanding its discussion of the Litigation Fund, the District Court relied, in determining reasonable assurance, on the projected cushion that would remain in the *Settlement* Fund. RE #934, Order, Page ID #15777-78 (noting that payment of 50 percent Premiums would leave $68 million NPV in Settlement Fund to pay unanticipated claims). Indeed, the District Court expressly stated that the projections on which it was relying "indicate that the $400 million Litigation Fund would not be required in order to pay both First Priority and Premium Payments." *Id.*, Page ID #15778.

Second, this issue is unlikely ever to require resolution. The Settlement Fund will most likely be sufficient to pay all First Priority claims even after the payment of *100 percent* Premiums. In the remote event that sufficient funds do not remain towards the end of the settlement program, and the Finance

Committee at that time determines to seek access to the Litigation Fund to pay any remaining claims, the issue Appellants now raise may require decision. But there is no need for the Court to reach it now.

C. The Potential Availability of the $200 Million NPV Subject to **Dow Corning's** Net Present Value Claim Was Not Necessary to the **District Court's** Holding and Is Premature to Address Here

Appellants similarly stretch for an appellate issue based on the District Court's statement in the Order that the approximately $200 million NPV at stake in the dispute over time value adjustments "may be included in the analysis of whether there are sufficient funds to distribute both First and Second Priority Claims." RE #934, Order, Page ID #15777. The District Court previously rejected Dow Corning's attempt to claim such a credit in connection with the timing of the Initial Payment under the Time Value Credit provisions of the Plan Documents, and this Court affirmed that decision last year. *See Dow Corning Corp. v. Claimants' Advisory Comm. (In re Settlement Facility Dow Corning Trust)*, 517 F. App'x 368 (6th Cir. 2013). As Appellants note, Dow Corning continues to seek a similar adjustment under other Plan Document provisions, and this issue remains sub judice in the District Court. App. Br. at 18 n.10.

However, the District Court's statement that this funding is available does not give rise to a tangible appellate issue because, as the District Court also noted, ARPC assumed that Dow Corning would *prevail* on this issue and therefore

excluded the $200 million from its projections. RE #814, Recommendation, Page ID #12359. Thus, the $68 million NPV cushion on which the court actually relied in approving 50 percent Premiums does not assume availability of the disputed funding. Indeed, one of the reasons why ARPC's projections are conservative is that they assign no value to the likelihood that the CAC, rather than Dow Corning, will ultimately prevail. The underlying dispute over the $200 million credit will be resolved in other proceedings and presents no issue of relevance to this appeal.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT THE PLAN REQUIRES ONLY ADEQUATE ASSURANCE OF SUFFICIENT FUNDING, NOT A "VIRTUAL GUARANTEE"

Appellants' argument that Premiums may not be authorized until adequate funding to pay all future base claims is "virtually guaranteed" (App. Br. 40) is inconsistent with the plain language of the Plan Documents, which requires only that all relevant claims "have either been paid or *adequate provision has been made to assure such payments*." RE #826-2, SFA, Page ID #13281, § 7.01(c)(iv) (emphasis added). It would also defeat the parties' intention – expressed in the structure of the Premium Payment provisions and in communications to claimants being asked to vote on the Plan – that Premiums be paid *during* Settlement Program. As the District Court correctly held, delaying Premiums until payment of every last claim was "guaranteed" would be "contrary to the purpose of the

Premium Payment provision" and would render it "meaningless." RE #934, Order, Page ID #15771-72. This holding was correct and certainly no abuse of discretion.

As explained above at 9, Premium Payments may be authorized, following consideration of the likely amount necessary to resolve all future claims, upon a finding "that all Allowed and allowable First Priority claims and all Allowed and allowable Litigation Payments have been paid or that adequate provision has been made to assure such payment (along with administrative costs) based on the available assets." RE #826-2, SFA, Page ID #13285, § 7.03(a). This "adequate provision" language echoes the standard for approving all Second Priority Payments set forth in SFA § 7.01(c)(iv).

Appellants would pluck the word "assure" out of context (ignoring the modifying term "adequate") and, applying a dictionary definition, treat the word as synonymous with "pledge" or "guaranty." *See* App. Br. 37-39. Appellants thus cite old New York commercial cases using the word in the specific context of a *promise* of future payment. *See, e.g.*, *Utils. Eng'g Inst. v. Kofod*, 58 N.Y.S.2d 743, 744-45 (Mun. Ct. 1945) (holding that written "personal assurance" that judgment would be paid was understood by parties as constituting a "guarantee"); *Nat'l Watch Co. v. Weiss*, 163 N.Y.S. 46, 47-48 (Sup. Ct.) (interpreting language of "personal guaranty" in which party "used the words 'personal assurance' in the

sense of personal agreement or personal contract," *i.e.*, "as synonymous with pledge, guaranty, or surety"), *aff'd*, 166 N.Y.S. 1104 (App. Div. 1917).[18]

Such cases do not control here, because the meaning of a word or phrase depends on the context in which it is used. *See Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991) (court below erred in considering contract term "in isolation" rather than basing definition on "clarifying context" of entire contract). Contract language must be read to effectuate the goal of the overall agreement consistent with the purposes and understanding of the parties. *See Winnett v. Caterpillar Inc.*, 553 F.3d 1000, 1008 (6th Cir. 2009).

Here, the word "assure" is used not in the context of a particular party's *promise* of future payment, but rather in connection with a *projection* or *prediction* that adequate funding will be available in administering the SF-DCT. Thus, a more appropriate analogy is provided by cases considering whether there has been "adequate assurance" of future performance of a contract assumed under § 365(b)(1)(C) of the Bankruptcy Code. In that setting, courts have given the

[18] To similar effect are the additional cases Appellants cite regarding the meaning of the unmodified term "assured" in various contexts. *See, e.g.*, *In re Holly's, Inc.*, 140 B.R. 643, 702 n.98 (Bankr. W.D. Mich. 1992) (citing dictionary definition of "assured"); *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 503 (1990) (equating "warranty" and "assurance"). Indeed, one case that Appellants cite defined "assured" as synonymous with "made certain, secure, or fixed" but then went on to equate "reasonable assurance" with a standard of "reasonable certainty" – not an absolute guarantee. *See Davenport v. Ruckman*, 37 N.Y. 568, 573-74 (1868).

phrase a practical, pragmatic construction in light of the facts of each case, generally requiring a level of assurance that "falls considerably short of an absolute guarantee." Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 78:54 (4th ed. 2004). *See, e.g.*, *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (recognizing that "[n]o guarantee is required" for Section 365 "adequate assurance" of future performance and finding standard fulfilled based on "strong likelihood" that restaurant would be able to perform under assigned lease); *In re Sapolin Paints, Inc*., 5 B.R. 412, 414-15, 420-21 (Bankr. E.D.N.Y. 1980) (under Section 365, "adequate assurance" should "be given a practical, pragmatic construction" not beholden to "chimerical possibilities," and thus debtor-in-possession's below-market rental rate provided "adequate assurance" that debtor would either continue to occupy building or find sub-lessee); *see also In re Patriot Place, Ltd.*, 486 B.R. 773, 787, 801-04 (Bankr. W.D. Tex. 2013) (noting "relatively low threshold" employed by courts under Section 365 and finding "adequate assurance" of performance as it was "more probable than not" that lease with 12 years remaining would be fulfilled by tenant restaurant-bar despite various enumerated challenges).

This non-absolute standard is consistent with the plain language of the Plan Documents and the inherent need to balance the interests of current and future claimants. The SFA does not require "assurance" in a vacuum, but rather a finding

that "*adequate* provision has been made to assure" payment of all claims. RE #826-2, SFA, Page ID #13281, § 7.01(c)(iv) (emphasis added). Reading this language as requiring "adequate" or "reasonable" assurance is consistent with other SFA provisions as well. For example, SFA § 7.01(d) requires the Finance Committee to prepare quarterly projections of the "*likely* amount of funds required to pay in full all pending, previously Allowed but unpaid and projected future First Priority Payments" as well as "[c]laims and expenses subject to the Litigation Fund." *Id.*, Page ID #13281-82, § 7.01(d) (emphasis added). This language reflects an understanding that the parties must rely on projections establishing likelihood rather than certainty. Indeed, the very terms "projection" (*id.*, SFA § 7.01(d)) and "assessment" (*id.*, Page ID #13267, § 4.05) imply a degree of inevitable uncertainty.[19] Moreover, SFA § 7.01(c)(v) grants the Finance Committee discretion, with court approval, to issue lower priority payments and higher priority payments contemporaneously, so long as the ability to make timely payments of higher priority claims is "*reasonably* assured." RE #826-2, SFA, Page ID #13281, § 7.01(c)(v) (emphasis added).

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[19] *See, e.g.*, *Projection Definition*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) (defining "projection" as "an estimate of future possibilities based on a current trend); *Assessment Definition*, *Cambridge Business English Dictionary (Cambridge Dictionaries Online)*, http://dictionary.cambridge.org/dictionary/business-english/assessment?q=assessment (last visited May 22, 2014) (defining "assessment" as "the process of considering all the information about a situation . . . and making a judgement").

Appellants suggest that this last provision actually supports *their* reading of § 7.01(c)(iv) and § 7.03(a), arguing that it pertains only to claim categories that have already been approved for payment and thus shows the parties' intention to apply a less stringent standard in that setting. App. Br. 33-35. Appellants take the District Court to task for reading § 7.01(c)(iv) and § 7.01(c)(v) together, calling them "unrelated." App. Br. 36.

But Appellants' reading of this language cannot withstand analysis. Section 7.01(c)(v) is, in fact, directly related to the preceding subsections – it states that "*[n]othing herein* shall be interpreted as limiting the discretion of the Finance Committee . . . ." RE #826-2, SFA, Page ID #13281, § 7.01(c)(v) (emphasis added). In other words, nothing in the preceding subsections describing the standards for authorizing different categories of payments should be seen as a categorical bar on authorizing simultaneous payment of higher and lower priority claims. This subsection therefore appears to give further guidance to the District Court in determining when and whether to authorize claim payments and is not merely meant to address the timing of categories of payments that have already been approved. Language governing only the latter situation more likely would have been included in § 7.02, which covers the mechanics and timing of claim payments, including the potential need to authorize installment payments if cash flow interferes with the timely payment of full benefits.

However, even if Appellants are correct that subsection (v) applies only to categories of previously approved claims, their argument reads too much into the minor difference between "reasonably assure" and "adequate provision to assure." The District Court quite reasonably read these similar and adjacent provisions together, as at minimum they both serve the same general purpose of preventing the payment of lower priority claims from interfering with the payment of higher priority claims. The slight difference in language does not suggest an intent to impose radically different meanings. *See* N.Y. Stat. Law § 236 cmt. (McKinney 1971) (noting "presumption" that "similar meaning . . . attaches to the use of similar words").[20]

Appellants argue that, because the words "provision to" in § 7.01(c)(iv) come between the words "adequate" and "assure," the District Court was somehow required to conclude that the term "assured" was unmodified and absolute. App. Br. 37. But the case Appellants cite for the supposed rule that the words of a sentence must be strictly parsed in this matter actually stands for the opposite proposition: that particular words in a contract should be considered not

[20] Appellants' further citation to the truly unrelated provision stating that the Settlement Facility is intended to "assure that the Trust qualifies as a Qualified Settlement Fund" under the Internal Revenue Code (App. Br. 35 n.18) simply demonstrates that the word "assure" can be used differently in different contexts – *e.g.*, where it relates to a promise rather than a prediction.

in isolation but as they relate to the *overall agreement* between the parties. *See Kass v. Kass*, 91 N.Y.2d 554, 566 (1998).

That larger context only confirms the appropriateness of the District Court's reading. A "virtually guaranteed" standard would be directly at odds with the basic structure of the Plan as described to claimants and presented at confirmation. The parties always contemplated that Premiums would be paid after a delay of only a few years, well *before* conclusion of the 16-year settlement program – an expectation that, in and of itself, precludes enforcement of a "virtually guaranteed" standard. Dr. Dunbar did not, as Appellants have argued, use seven years as an arbitrary marker to project cash flows – he affirmatively testified at confirmation that Premiums "are going to be paid seven years from now." RE #848-3, Confirmation Hr'g Tr., Page ID #14402. Dr. Dunbar offered this testimony not in the context of cash flow projections but to defend his assumption that "more women are likely to accept the settlement offers in the Dow Corning joint plan than actually accepted in the RSP" because the Dow Corning Plan offered "enhanced" benefits – including, significantly, Premium Payments. *Id.*, Page ID #14400-01. Dr. Dunbar's testimony about the timing of Premiums was in the context of cross-examination suggesting that a delay of *as much as* seven years undercut his reliance on the Premiums as an incentive for claimants to settle. *Id.*, Page ID #14402-03.

Dr. Dunbar's testimony was consistent with how the settlement options were presented to claimants. The Disclosure Statement specifically told tort claimants asked to vote on the Plan that Premium Payments would be made "if funds are available after payment of all First Priority Payments is *adequately* assured." RE #848-5, Disclosure Statement, Page ID #14411 n.3 (emphasis added). This language was included in an introductory Plan overview section setting forth the basic elements of the settlement claimants were being asked to ratify. If Dow Corning believed there was a meaningful difference between "adequate provision . . . to assure" and "adequately assured," then the Disclosure Statement was materially misleading. Significantly, Appellants have recognized that this advertised standard of "adequate assurance" is "substantially more lax" than one of absolute "assurance." *See* RE #826, Appellants' Resp., Page ID #13225-26 n.8.

In addition, the Plan and Disclosure Statement were mailed out with a four-page, plain language document entitled Special Note to Breast Implant and Other Personal Injury Claimants (the "Special Note"). RE #848-4, Special Note, Page ID #14404-08. The Special Note told claimants that the Plan offered "[a] $25,000 payment" for rupture and disease payments "ranging from $12,000 to $300,000," both consisting of base payments plus additional Premiums "to be paid later if funds allow." *Id.*, Page ID #14406. The Disclosure Statement similarly

presented the Premium Payments as being part of the compensation offered to claimants rather than some remote and contingent possibility, warning only that the Premium component was likely to be "delayed for several years." RE #848-5, Disclosure Statement, Page ID #14412. *See also id.*, Page ID #14414 (Premium Payments to begin "some years after the Effective Date," with the result that those receiving the earliest payments might have to wait "several years" for their Premiums). Moreover, the basic Settlement Grid included in the Disclosure Statement broke out in two columns, with no further qualification, the amount of "base" and "premium" settlement payments available for different categories of settlement benefits. *Id.*, Page ID #14413.

Claimants voting on the Dow Corning Plan were told to expect Premium Payments less than halfway through the 16-year life of the Settlement Facility – at a time when many millions of dollars in claims would remain to be processed and paid. It is not plausible that the parties intended, in that setting, to require a guarantee of all future base payments – and, of course, that is not what claimants were told. They were told only that future claim payments would have to be "*adequately* assured." *Id.*, Page ID #14411 n.3.

Ultimately, the selection of a standard of certainty for making this determination requires a balancing of the remote risk that the cap might be exceeded against the real and serious harm to thousands of claimants who have

waited years for their promised Premium Payments. As the Finance Committee observed, "[i]t would violate the spirit and terms of the Settlement Facility Agreement to refuse to make Premium Payments to rightful claimants for fear that some unknown scenario might unfold." RE #814, Recommendation, Page ID #12363.

Appellants disingenuously posit the risk of insolvency as if it were a grievous and unthinkable violation of the Bankruptcy Code. *See* App. Br. 38-39 & n.21. But this view gives no weight to important competing considerations, such as the long delay in delivering advertised benefits to an aging claimant population. Even in a worst-case scenario, it is likely that only a small number of claimants towards the end of the 16-year life of the Trust would have their claims reduced or delayed. While that might be an unacceptable risk for parties thrust involuntarily into a bankruptcy or liquidation or where a plan actually required all claims to be paid before Premiums were considered, the Plan was publicized specifically with the "adequately assured" language and the expectation of Premiums being paid after a few years. Thus, all claimants who chose to settle undertook the (small) risk that the projection of adequacy would prove to be incorrect. For Appellants retroactively to change that bargain and insist that the last claimants in the door be exposed to *zero* risk serves neither fairness nor the greater good of the vast bulk of

claimants, but is merely a ploy to delay Dow Corning's payment obligations. It should be rejected.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT APPELLANTS WERE BOUND BY THE METHODOLOGY PRESCRIBED BY THE PLAN AND COULD NOT INTRODUCE EXPERT EVIDENCE CHALLENGING IT

Finally, while avoiding a frontal assault on the merits of the solvency determination, Appellants argue that the District Court committed reversible error by failing to consider the opinion of their expert, Paul Hinton, attacking ARPC's methodology. That decision cannot constitute an abuse of discretion when (1) Appellants themselves expressly agreed to the very methodology employed by ARPC, and (2) Appellants also expressly agreed that the District Court could employ streamlined procedures in evaluating the Finance Committee's Recommendation. Appellants' further suggestion that the exclusion of their expert testimony violates due process is not just baseless but unseemly.

Appellants attack ARPC's methodology on three principal grounds: ARPC's supposed failure to assess the reliability or potential error rate of its methodology (App. Br. 46); its reliance on extrapolations based on supposedly "untested assumptions" (*id.* at 15-16); and the sole reliance on historical claims data as a basis for projections rather than assessing epidemiological data on the prevalence of certain underlying symptoms and conditions in the general population (*id.* at 15).

The easy and complete answer to Appellants' criticisms is that the methodology applied by ARPC is not just permitted but *required* by the Plan Documents. SFA § 7.01(d) specifically directs the Finance Committee and the Independent Assessor to generate quarterly "projections of the likely amount of funds required to pay in full" all pending and future claims and specifies that "[s]uch projections shall, to the extent known or knowable, be based upon and take into account" the very types of data that Appellants say cannot support a reliable projection: "(i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending Claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility." RE #826-2, SFA, Page ID #13281-82, § 7.01(d).

Section 7.03(a), in turn, specifies that the Finance Committee's recommendation and motion seeking authorization of Second Priority Payments "shall be accompanied by a detailed accounting of the status of Claims payments and distributions under the terms of the Settlement and Litigation Facilities, *including a detailed accounting of pending Claims and projections and analysis of the cost of resolution of such pending Claims as described in Section 7.01(d)*." *Id.*, Page ID #13285, § 7.03(a) (emphasis added).

Thus, regardless of the scientific merit of projecting future Settlement Facility liability based on past claim filing and payment data, Appellants already specifically agreed – and the Bankruptcy Court ordered in confirming the Plan – that ARPC should employ precisely this method of claims projection. On this basis alone, the District Court appropriately rejected Appellants' attempt to attack this methodology with their own expert testimony: "The Court will not consider the exhibits and expert testimony submitted by [Appellants] since the SFA provides that the Court consider the recommendation of the Finance Committee based on the Independent Assessor's analysis and projections." RE #934, Order, Page ID #15776.

Not only did Appellants stipulate in the Plan Documents to the methodology to be employed by the Independent Assessor – they also agreed to select ARPC to play that role and actively participated in an annual process through which ARPC provided a draft report with projections; the parties met, reviewed ARPC's work, and offered suggestions and corrections; and ARPC then presented the revised report to the District Court with the parties present. While Appellants scrutinized ARPC's work product and asked many questions, they never objected that the basic methodology being employed was fundamentally unreliable. Nor did they point to any epidemiology or other data on which ARPC should rely instead of extrapolations based on claim history. The District Court

unequivocally rejected any suggestion to this effect: "All parties, including the Debtors' representatives and the shareholders, have had the opportunity to test and challenge the Independent Assessor's Reports throughout the years, *yet no objections have been brought to the Court's attention that the Reports have been misleading or inaccurate*." *Id*., Page ID #15776 (emphasis added).[21]

Appellants nevertheless argue that the Plan Documents unequivocally guarantee their right to offer expert testimony any time they wish in connection with any dispute arising under the Plan. But the only provision Appellants cite for this supposed absolute right merely states that the parties "may file a motion or

[21] In any event, as explained in two rebuttal declarations submitted by the CAC's expert, Dr. Mark Peterson, ARPC employed a customary and accepted method of projecting the number and cost of liquidating future claims in a mass tort claims resolution facility. *See generally* RE #848-2, Peterson Decl., Page ID #14347-97; RE #867 (filed under seal), Suppl. Peterson Decl. Dr. Dunbar used essentially the same methodology to project the volume, amount, and timing of tort claims in the SF-DCT in connection with testifying at confirmation that Dow Corning's financial contribution would be adequate to resolve all claims not just against Dow Corning but also against its shareholders. Dr. Dunbar based his projections largely on claims experience in the RSP, adjusting the results to assume a higher settlement acceptance rate based on the enhanced benefits offered under the Dow Corning settlement (including the promised Premium Payments). RE #848-3, Confirmation Hr'g Tr., Page ID #14401.

In any event, Dr. Peterson explained that this well-accepted method of projecting future claims based on past claims history (i) has proved reliable in this case and (ii) requires neither a formal error rate assessment nor independent consideration of epidemiological data where, as here, no such data is available. RE #848-2, Peterson Decl., Page ID #14358-60, 14360-63; RE #867 (filed under seal), Suppl. Peterson Decl., ¶¶ 5-7.

take any other *appropriate* actions to enforce or to be heard in respect of the obligations in the Plan and in any Plan Document." RE #826-2, SFA, Page ID #13273, § 4.09(c)(v) (emphasis added). This general provision is supplemented by the specific procedures set forth in § 7.03(a) for determining when to issue Second Priority Payments. While that subsection does state generally that the parties "shall have the opportunity to be heard with respect to" the Finance Committee's motion, it also states specifically that "[t]he parties agree to cooperate in expedited procedures for review and resolution of issues under this subsection and consent to an expedited hearing," and that the parties further "agree that any appeal of an order of the District Court regarding the provisions of this subsection shall be on an abuse of discretion standard." *Id.*, Page ID #13285, § 7.03(a).

Neither of these subsections "expressly provide[s]" the right to submit expert evidence in any given proceeding, as Appellants claim. *See* App. Br. 48. To the contrary, the parties agreed that the District Court should rely principally on the work product of neutrals applying a specified methodology. The right to be "heard" does not automatically mean the right to escalate an expedited process into an open-ended, de novo litigation with an expensive and protracted battle of experts.

Appellants' further suggestion that the District Court's exclusion of their expert evidence attacking ARPC's methodology constituted a due process

violation borders on the frivolous. As Appellants' own authority recognizes, due process is not a one-size-fits-all concept; what constitutes required process depends on context. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) ("[Due] process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . 'due process' cannot be imprisoned within the treacherous limits of any formula."). And parties may contractually waive process that might otherwise be due. *See D.H. Overmyer Co. of Ohio v. Frick Co.*, 405 U.S. 174, 185-87 (1972) (upholding constitutionality of cognovit notes – contracts containing confession-of-judgment provisions that waive notice and hearing rights). The exclusion of expert evidence in an expedited proceeding implementing one aspect of a settlement obviously differs from the due process violations challenged in *Armstrong v. Manzo*, 380 U.S. 545, 547-48 (1965), in which a father was deprived of all parental rights without notice or hearing, and *McGrath*, 341 U.S. at 168, in which the government unilaterally branded organizations as subversive with no process of any kind.

The only case Appellants cite as similar to their own situation, *Hand v. Central Transport, Inc.*, 779 F.2d 8 (6th Cir. 1985), is not even a due process case – and, in fact, is completely distinguishable. In *Hand*, this Court reversed a summary judgment based on a magistrate's Report and Recommendation that not only excluded a particular expert affidavit, but also appeared to ignore all of the

arguments and evidence proffered by the objecting party and to address only one facet of the relevant multi-part antitrust analysis. *Id.* at 11. In contrast to this misapplication of summary judgment standards in a de novo litigation, Appellants here complain only of the exclusion of expert testimony attacking a methodology that it had already agreed to in the Plan Documents, as applied by neutral experts it helped select and supervise, in the context of a streamlined procedure implementing a settlement. The District Court's decision to exclude Appellants' expert declarations was not an abuse of discretion, much less a violation of due process.

CONCLUSION

For the reasons stated above, the Order should be affirmed.

Dated: May 27, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Microsoft Word) this brief contains 13,628 words.

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CERTIFICATE OF SERVICE

I certify that on May 27, 2014, I electronically filed a copy of the foregoing Brief of Appellee Claimants' Advisory Committee with the Clerk of the Court through the Court's electronic filing system, which will send notice and a copy of this brief to all registered counsel in this case.

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ADDENDUM DESIGNATING RELEVANT DOCUMENTS IN THE DISTRICT COURT DOCKET (00-0005)

Record Entry	Filing Date	Description	Page ID
53 (Ex. A)	--	Procedures for Resolution of Disputes Under Section 5.05 of the Settlement Facility Agreement and for Other Disputes Regarding the Dow Corning Plan of Reorganization	123
794-5	--	Report of National Economic Research Associates, Summary of Funding Adequacy (filed under seal)	N/A
814	10/7/2011	Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments	12350-12367
814-3	--	Annex B to the Settlement Facility and Fund Distribution Agreement	12412
814-4	--	Funding Payment Agreement	12421-12425
814-11	--	September 22, 2011 ARPC Memorandum Providing Updated Premium Payment Estimates (filed under seal)	12557-12558
814-12	--	September 20, 2011 ARPC Memorandum Regarding Its Review of DCT Claims Filings, January through July 2011 (filed under seal)	12559-12561
814-13	--	Preliminary Report of Independent Assessor, End of Fourth Quarter 2010 (filed under seal)	12572-12661
814-14	--	June 14, 2011 Memorandum from ARPC to David Austern re: Estimated Status of Funds Under Certain Assumptions (filed under seal)	12663

Record Entry	Filing Date	Description	Page ID
825	11/11/2011	Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments	13191-13216
826	11/11/2011	Opposition of Dow Corning Corporation, the Debtor's Representatives and the Shareholders to the Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments	13217-13250
826-2	--	Settlement Facility and Fund Distribution Agreement	13261; 13267; 13273; 13281-13285
826-3	--	Amended Joint Plan of Reorganization	13314; 13368-13369
826-4	--	Amended Joint Plan of Reorganization (continued)	--
826-5	--	Declaration of Paul J. Hinton (filed under seal)	N/A
826-6	--	Declaration of William Barbagallo	13412-13417
826-7 - 826-19	--	Declaration of Georgene M. Vairo	13427-13441
836	11/28/2011	Order Regarding Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents	14183-14199

Record Entry	Filing Date	Description	Page ID
844	12/23/2011	Finance Committee's Reply to Dow Corning's Opposition to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments	14229-14255
846	12/23/2011	Reply of Dow Corning Corporation, the Debtor's Representatives and the Shareholders to the Response of Claimants' Advisory Committee to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments	14278-14293
848	12/23/2011	Reply of Claimants' Advisory Committee in Further Support of to Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments	14315-14345
848-2	--	Declaration of Mark Peterson	14348-14397
848-3	--	Transcript Excerpts from the June 29, 1999 Confirmation Hearing Testimony of Frederick Dunbar	14399-14403
848-4	--	Special Note to Breast Implant and Other Personal Injury Claimants	14405-14408
848-5	--	Excerpts from Amended Joint Disclosure Statement with Respect to Amended Joint Plan of Reorganization	14410-14414

Record Entry	Filing Date	Description	Page ID
858-1	--	Sur Reply of Dow Corning Corporation, the Debtor's Representatives and the Shareholders with Respect to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments	14446-14467
867	1/30/2012	Supplemental Declaration of Mark Peterson (filed under seal)	N/A
917	8/5/2013	Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment	15662-15683
922	9/9/2013	Opposition of Dow Corning Corporation to the Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment	15688-15712
923	9/27/2013	Reply in Further Support of Motion of Claimants' Advisory Committee for Order Resolving Dispute Regarding Treatment of Initial Payment	15713-15728
934	12/31/2013	Memorandum Opinion and Order Regarding Partial Premium Payment Distribution Recommendation by the Finance Committee	15761-15779
935	1/16/2014	Dow Corning, Debtor's Representatives and Shareholders' Notice of Appeal to the Sixth Circuit	15780-15782

Record Entry	Filing Date	Description	Page ID
936	1/16/2014	Dow Corning Corporation, Debtor's Representatives and Shareholders' Motion to Stay the Court's Ruling Regarding Partial Premium Payment Distribution Recommendation by the Finance Committee Pending Appeal	15803-15822
951	2/3/2014	Response of Claimants' Advisory Committee in Opposition to Motion to Stay the Court's Ruling Regarding Partial Premium Payment Distribution	15891-15916
954	2/5/2014	Order Denying Motion to Stay Pending Appeal	15928-15934