UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:	§	
	§	**CASE NO. 00-CV-00005-DPH**
DOW CORNING CORPORATION,	§	**(Settlement Facility Matters)**
	§	
REORGANIZED DEBTOR	§	**Hon. Denise Page Hood**

REPLY OF CLAIMANTS' ADVISORY COMMITTEE IN FURTHER SUPPORT OF FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE 50% SECOND PRIORITY PAYMENTS

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The Claimants' Advisory Committee ("CAC") submits this Reply in further support of the Finance Committee's Recommendation[1] and respectfully states as follows:

Preliminary Statement

Dow Corning offers no scenario, much less a plausible one, under which the IA's projections could be off by *$300 million* (the cash equivalent of the projected $100.4 million NPV cushion) in the short time remaining in this settlement. It may not be *mathematically* impossible for that to happen, but it is as close to that as can be without simply waiting until the end of the settlement – which would eliminate *all* uncertainty, but violate the agreement embodied in the Plan.

Instead, Dow Corning seeks to sow confusion on the standard of certainty mandated by the Sixth Circuit, but there is no real disagreement: Sufficient funding must be *virtually*, but not *absolutely*, guaranteed – which means that some very small or slight, but not significant, uncertainty may remain. Case law is of limited help in defining this standard further;

[1] Terms are abbreviated as in the CAC's original Response ("CAC Resp.").

the cases Dow Corning cites concern *promissory* guarantees, like government insurance of bank accounts, not *predictions* of future events subject to *some* inherent uncertainty. While the current facts satisfy *either* the "reasonable doubt" or "any reasonably possibility" standard mentioned by the Finance Committee, the Court should simply apply the Sixth Circuit's words, because the risk of exceeding the cap is now so tiny that funding is "virtually guaranteed" under any reasonable construction of that standard.

Dow Corning tries to transform the standard from virtual to actual certainty by arguing that the IA's methodology of predicting future claims based on prior claims history is barred by the Sixth Circuit's ruling – *i.e.*, that even 50% Second Priority Payments cannot be approved until all base claims have actually been paid or every conceivable speculative risk has been mathematically eliminated. But this violates the Plan, which *expressly mandates* the IA's projection methodology, notwithstanding Dow Corning's tortured reading of the SFA language. And the Disclosure Statement and confirmation hearing confirm the parties' intention to pay Premiums less than halfway through the settlement process, when *more* uncertainty would have remained than exists now. Contrary to Dow Corning's suggestion that the Sixth Circuit intended improperly to rewrite the Plan, the court recognized that its standard would be applied in assessing *projections* when it stressed that it was not requiring absolute certainty.

Dow Corning also rehashes generic attacks on the IA's methodology, groundless in 2011, that have been further disproven by five more years of claims experience. The methodology required by the Plan documents is the same one that Dow Corning's own expert, Frederick Dunbar, used to convince the Bankruptcy Court that the Settlement Fund would satisfy all claims (thus justifying, among other things, the releases sought by the shareholders). As Dr. Peterson explained in his initial Declaration and addresses further in the accompanying Reply

Declaration ("Peterson Reply Decl.") (attached as Exh. 13), the IA's projection technique is the standard and indeed only reasonably available method of predicting future claims in a closed pool of claimants for which no relevant epidemiology is, or could be, available. Routine disclaimer language and built-in uncertainties as to individual aspects of the IA's projections do not change the simple facts that (1) the IA's projections have proven exceptionally accurate and indeed too *high*, and (2) conservative assumptions built into the IA's projections coupled with the huge remaining cushion make it virtually impossible for the cap to be threatened.

Finally, Dow Corning's expert declarations fail to identify any reasonable basis for questioning the IA's virtual guarantee conclusion. Dow Corning's principal expert, Paul Hinton, inexplicably argues that the IA should have considered some unspecified epidemiology that does not exist and falsely claims that the IA employed no methods to confirm reliability. Mr. Hinton makes no attempt, as he did in 2011, to criticize the IA's *application* of its methodology, confirming that there is no plausible scenario in which the cap is threatened. Instead, Mr. Hinton stresses the unreliability of estimations conducted much earlier in the claiming process in a different tort – asbestos – in which claims may emerge from the general population over more than 50 years. Tellingly, he ignores both the more relevant precedent of the RSP and the fact that the IA's projections, unlike those in the asbestos cases, have proven to be highly reliable.

Dow Corning's other experts advance the unremarkable and irrelevant propositions that lower priority payments would not be issued at this stage of a claims process (like the Dalkon Shield settlement or an insurance company liquidation) operating under a strict rule of absolute priority. Claimants here agreed to a settlement with different terms, accepting the tiny risk now presented. This Court should enforce the bargain built into the settlement.

Argument

THE COURT SHOULD AUTHORIZE 50% INSTALLMENTS ON ALL CATEGORIES OF SECOND PRIORITY PAYMENTS

The time is well past to eliminate the horizontal inequity identified by the Finance Committee and authorize completion of 50% Premiums and issuance of 50% installments on Class 16 and Increased Severity payments. The Finance Committee's Recommendation is not undermined by its acknowledgement that its Motion might be denied if certain arguments advanced by Dow Corning (but inconsistent with the Plan language and the parties' expressed intentions) were to prevail. *See* Opposition of Dow Corning ("DCC Opp.") at 1. We trust that the Finance Committee will reaffirm that, under a reasonable reading of the Sixth Circuit standard not requiring absolute certainty, it believes sufficient funding is virtually guaranteed.[2]

A. The Sixth Circuit Standard Requires High Confidence But Not Absolute Certainty That The Funding Cushion Will Be Sufficient

There is no material disagreement about the governing standard: Second Priority Payments may be authorized when funding to cover all base claims is "virtually guaranteed" – which Dow Corning concedes was defined by the Sixth Circuit *not* to be an absolute guarantee. DCC Opp. at 7 n.6. While Dow Corning suggests that this mandates the equivalent of a 99.8%

[2] Moreover, the CAC is not barred from endorsing the Finance Committee's horizontal equity argument simply because it successfully opposed Dow Corning's attempt to stay this Court's prior order pending appeal. *See* DCC Opp. at 24. The "invited error" doctrine, analogous to judicial estoppel, bars a party from challenging on appeal an error that it induced the court below to make – such as an erroneous jury instruction that it requested. *See In re Bayer Healthcare and Merial Limited Flea Control Prods. Mktg. & Sales Practices Litig.*, 752 F.3d 1065, 1072-73 (6th Cir. 2014). Here, in contrast, the CAC is not attacking a ruling that it induced this Court to make. The CAC opposed a stay pending appeal in the good faith belief that this Court's ruling was *correct*. Although the Sixth Circuit held that a different standard should have been applied, the CAC was correct that there was (and is) plenty of money to pay Premiums. In any event, the CAC acts as a fiduciary for all claimants and not as a self-interested party. It cannot be estopped from advocating on behalf of *different* claimants affected by the courts' rulings. *Cf. In re An Tze Cheng*, 308 B.R. 448, 454-55 (B.A.P. Cir. 2004) (judicial estoppel generally unavailable where party acts in two different capacities or as fiduciary for different parties), *aff'd & remanded*, 160 F. App'x 644 (9th Cir. 2005).

FDIC bank account guarantee (*id*. at 6-7), the Sixth Circuit was not that specific: "While this standard does not require absolute certainty, it is nonetheless stricter than the 'strong likelihood' or 'more probable than not' levels of confidence that describe 'adequate assurance.'" *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 480 (6th Cir. 2015).

Case law from vastly different contexts does not help inform this standard. Dow Corning cites cases defining *promissory* guarantees – such as a promise to supply a certain amount of lumber, *see Trenchard v. Kell*, 127 F. 596, 598-600 (E.D.N.C. 1904), or to set aside housing units for minority applicants, *see Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 360 (E.D.N.Y. 1982). But the "virtual guarantees" provided by such promises tell us little about the degree of acceptable uncertainty in connection with a *prediction* of future events not within the promissor's control.

Dow Corning agrees that there is "no discernable difference" between the two possible standards identified by the Finance Committee: "beyond a reasonable doubt" and "beyond any reasonable possibility." *See* DCC Opp. at 9. As noted in the CAC Resp. at 12, 16-17, a reasonable possibility of *some* variation between the IA's projections and actual claims experience does *not* constitute a reasonable possibility that the entire $300 million cushion could be consumed. But the Court need not reformulate the Sixth Circuit's standard. "Virtual guarantee" means close to certain, but still allowing for some tiny amount of uncertainty. The absence of any coherent explanation of how variations from the IA projections could conceivably threaten the cap confirms that this standard is satisfied.

B. The Sixth Circuit's Decision Cannot Be Read To Rewrite The Plan By Barring Reliance On The Very Claim Projection Methodology Specified By The Parties

Dow Corning attempts to convert the "virtual" guarantee into an absolute one by arguing that the SFA "as interpreted by the Sixth Circuit, *precludes* the use of a projection of

unknown future claims as a basis to find that [base claims] are virtually guaranteed" (DCC Opp. at 10) (emphasis added) – even near the end of the settlement program and despite a huge fund cushion. Dow Corning would thus rewrite the Plan to hold Premiums until the *end* of the settlement. Nothing in the Sixth Circuit decision requires this improper result.

To the contrary, the "virtual guarantee" standard must be read consistently with the parties' intention – expressed in the Plan Documents and communicated to claimants – to pay Premiums, if possible, only a few years into the settlement program. *See Bank of N.Y. v. Janowick*, 470 F.3d 264, 270-71 (6th Cir. 2006) (contract construed to effectuate expressed intent of parties in light of circumstances and object of contract). The Plan was structured with material *enhancements* over the RSP, including Premium Payments. Dr. Dunbar's projection of funding adequacy depended on increasing the proportion of claimants who elected to settle rather than litigate when compared to the RSP. *See* NERA Report 4, 7-9 (attached as Exh. 10) (charts discussing impact of enhancements on opt-out rate). As noted in the CAC Resp. (at 3), Dow Corning told tort claimants they would likely receive Premiums after only a few years. Dr. Dunbar's cited testimony was offered in his cross-examination to defend his view that Premiums would encourage claimants to settle even if delayed for *as long as* seven years. *See* Exh. 2.

Dow Corning's argument that the SFA is structured to "avoid *any* risk" to base payments (DCC Opp. at 3) (emphasis added) – another attempt to convert the "virtual" guarantee into an absolute one – is simply incorrect. Dr. Dunbar's projections showed more than $150 million in *100%* Premium Payments being issued in year eight – with more than $150 million in base disease and explant claims still projected and eight years of remaining uncertainty. Exh. 10 at 18. We are now *five years further along* in the settlement program than the point described in Dr. Dunbar's projections, with rupture and explant claims closed, only about $80 million in

remaining base claims projected, and less than three years left in the program. *Compare id.* with Final IA Report at 80. There is *less* risk to base payments now than there would have been under the scenario that Dr. Dunbar presented to the Bankruptcy Court to support confirmation.

In any event, the IA's projection methodology, with its built-in minimal uncertainty, is *required* by the Plan documents. SFA § 7.01(d) directs the Finance Committee and the IA to generate 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*" and specifies that "[s]uch projections shall, to the extent known or knowable, be based upon and take into account" the very claim-history data that Dow Corning says cannot support a reliable projection, including "projected *future* filings with the Settlement Facility." (emphasis added.) Section 7.03(a), in turn, specifies that the Finance Committee's recommendation and motion on 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)*" (emphasis added).

This express incorporation in §7.03(a) of the claim projections mandated by §7.01(d) renders inexplicable Dow Corning's assertion that §7.03(a) does not "mention any analysis of potential future claims." DCC Opp. at 11 n.11. Section 7.03(a) was obviously intended to require that the Recommendation be accompanied by an analysis of the cost of resolving *all* claims, not just those already "pending." Disregarding the projection of future claims expressly required under the cross-referenced §7.01(d) would defeat the purpose of determining funding adequacy. No party has, before now, advocated such a nonsensical reading of the SFA.

Nor does Dow Corning explain what *other* methodology the parties intended the IA to employ or the Finance Committee to rely on in recommending authorization of Second Priority payments. It has never proposed that the IA employ a different methodology. The inescapable conclusion is that the parties intended and agreed that the decision to authorize Second Priority Payments be based on the IA's methodology of projecting future Settlement Facility liability from past claim filing and payment data – and this agreement was ratified by the Bankruptcy Court, this Court, and the Court of Appeals in approving confirmation of the Plan.

Against this background, the Sixth Circuit's decision more than a decade later interpreting the level of assurance required to approve Second Priority Payments cannot be read to render impossible what the parties agreed to in their court-approved settlement. Courts are not empowered to rewrite bankruptcy plans to change the substantive trade-offs they embody. *See In re Diamond Mortg. Corp.*, 105 B.R. 876, 882 (Bankr. N.D. Ill. 1989) (court cannot alter bargain relied upon by claimants in voting on plan). Rather, the Sixth Circuit's decision must be harmonized with other terms of the Plan and the parties' expressed intentions in adopting it.

Luckily, that is not difficult. The Sixth Circuit did not reject the IA's methodology – it simply required that the level of certainty be higher than "strong likelihood," while stressing that it was *not* mandating certainty. Indeed, the court understood that assurance of adequate funding would be based on *projections* prior to the end of the settlement program and not determined only after 2019 when all claims were already filed: "Because it is impossible to account for all possible *future* uncertainties, we will not impose an 'absolute guarantee' standard." 592 F. App'x at 479 (emphasis added). This is consistent with the IA's Plan-mandated projection methodology.

C. Dow Corning's Generic Attacks On The IA's Methodology Fail To Undercut Its Proven Reliability Or Establish A Reasonable Risk Of Exceeding the Funding Cap

As it did in 2011, Dow Corning attacks the IA's methodology of projecting future liability from past claimant behavior as fundamentally unreliable and based on inherently uncertain assumptions. DCC Opp. 11-17. But as explained in both of Dr. Peterson's Declarations, the methodology employed by the IA is in fact the customary and accepted method of projecting the number and cost of liquidating future claims in this type of closed-population mass tort claims facility, such as the Dalkon Shield Trust. Indeed, Dr. Dunbar used essentially the same methodology to project the volume, amount, and timing of tort claims in the SF-DCT in testifying at confirmation that Dow Corning's financial contribution would be adequate to resolve all claims against Dow Corning and 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). *See* Exh. 10 at 4, 7, 9.

In any event, Dow Corning's claim of unreliability is demonstrably *false* based on more than a decade of actual experience. The IA's forecasts have been consistent, reliable, and *conservative*. Indeed they have always, deliberately, been too *high* – intentionally erring on the side of protecting Dow Corning and avoiding any risk of a shortfall. Whatever doubt Dow Corning might have tried to foster in this regard in 2011 has been even more thoroughly refuted by recent experience.[3] Looking forward, Dow Corning offers no reasonable ground for

[3] In 2011, the IA projected base claim payments for the next five years totaling $296.8 million. The ever-declining claims experience resulted in actual base claim payments of only $101.3 million (and *each year's* total ran below projections). Even adding in the $92.2 million in 50% Premiums paid prior to the Sixth Circuit ruling brings the total claim payments for that five year period to only $193.5 million. *See* Report of Independent Assessor End of Fourth Quarter 2010, Preliminary Report May 20, 2011 at 76 (excerpt attached as Exh. 11); Final IA Report at 80.

questioning the continuing reliability of the IA's projections – much less any real-world basis to expect a liability explosion that could conceivably consume the huge remaining funding cushion.

Lacking any basis to actually posit that the projections could be off by $300 million, Dow Corning cites various cautions and qualifications in the Final IA Report as supposed evidence that the methodology is unreliable. DCC Opp. at 14-16. But this is merely boilerplate disclaimer language reflecting that *all* projections embody some uncertainty. Moreover, in view of the Finance Committee's request that the IA opine on "virtual guarantee," it was reasonable for the IA to make clear that it was not *itself guaranteeing* that its projections would be perfectly accurate in every respect. That was not and is not its task or responsibility.

Dow Corning further faults the IA for declining to opine that *each element* of its projections satisfies the "virtual guarantee" standard. *Id.* at 14. This is silly and betrays a (likely feigned) ignorance of the claim projection process. Each element of a projection is, by its nature, subject to some variation and uncertainty. It is neither possible nor necessary, for example, to *guarantee* that there will be precisely 1836 more disease claims. In the end, there will probably be substantially fewer – but it is also possible that there will be slightly more. The Final IA Report takes into account a wide range of such variables, filtered through several highly conservative assumptions (including no decline in claim filing rates, that *every* claimant with POM will receive an expedited or disease payment, and that *every* claimant receiving less than the maximum Option 2 disease payment will experience increased severity and apply for and receive the maximum possible benefit). It is thus probable that any upward deviations from projections will be offset by downward ones. But even if the net result is an increase over the total liability projected for the Trust in the Final IA Report (which has *never* occurred over more than a decade of projections), there remains a $300 million margin for error that will be more

than ample in all but the most far-fetched circumstances. *Only that final conclusion about the overall adequacy of funding needs to satisfy the "virtual guarantee" standard.*

Seeking to create an impression of uncertainty, Dow Corning stresses the existence of approximately 70,000 registered claimants who have not yet filed a claim. It portrays the IA's methodology as simplistically based on the assumption that "the actions of past claimants will dictate the characteristics and actions of future claimants" (DCC Opp. at 12) and chides the IA for supposedly failing to "evaluate the characteristics of all of these claimants" (*id.* at 13) or to "compute the incidence of eligible conditions in this population" (*id.* at 14).

None of these criticisms is valid. The remaining pool is mostly individuals who filed proofs of claim *20 years ago* and have taken *no* action since then to file a POM or benefit claim, despite receiving repeated notices over many years. Most of these claims will remain dormant, as is the experience in most mass tort claim processes, for several reasons: Some claimants have died. Others have lost touch with the SF-DCT, or lost interest, or don't qualify for a substantial claim. Still others filed POCs but turned out not to have Dow Corning implants.

In any event, the IA does consider a range of variables affecting the remaining population and, as described above, bakes in a series of conservative assumptions as hedges against unexpected changes in claimant behavior. Dow Corning's criticism is ironic because the IA indeed takes account of empirical evidence about *changes* in claimant behavior by including projections based on a decay as well as a constant model. It then errs in favor of Dow Corning by focusing on the more conservative constant model, which has almost always been too high. And the IA has identified characteristics of the remaining population that are (based on experience in this and other mass torts) highly predictive of claiming behavior: they have gone 20 years without making claims, and most remaining claimants are *pro se* or their attorney's only

Dow Corning client. Such claimants are highly unlikely to make a claim after so many years. *See* Peterson Decl. at 12-13; Peterson Reply Decl. at 5.

Dow Corning further vaguely faults the IA for failing to base its projections on epidemiology (DCC Opp. at 17), but no such relevant data has ever been identified. As Dr. Peterson explains, epidemiology cannot accurately predict claims within a closed universe of claimants who do not represent a random sample of the general population. Moreover, no relevant epidemiology even exists for Atypical Connective Tissue Disease, the largest single category of disease claims in the settlement. Peterson Reply Decl. at 6-8.

The mere existence of a large pool of inactive POC filers is no barrier to the necessary assurance finding. Indeed, *Dow Corning always contemplated paying Premiums while thousands of claims remained unresolved.* That was an important part of the deal on which the CAC linked arms with Dow Corning and urged claimants to vote for its Plan. Dow Corning should not be permitted to change that bargain and render its Plan solicitation a lie by categorically barring any further Second Priority Payments until the end of the settlement program. "Virtual guarantee" must be read to permit Premiums to be paid, despite a pool of remaining POCs, when it is clear to a high (but not absolute) level of certainty that adequate funds will be available to pay all base claims. We are well past that point today.

Ultimately, it is not "highly speculative" (DCC Opp. at 14) to conclude that few of these long-ago POC filers will surface at this late date to prove that they had a Dow Corning breast implant and make a claim for a covered disease. We know this because these people have had since 2004 (and even before) to submit a claim, and they haven't. We know this because the substantially overlapping RSP population generated only a modest bump in claims when that settlement closed in 2010 – and this one will close almost a decade later, when even more

claimants will have died, moved, or lost interest. Claim filing has slowed to a trickle. There is *nothing* to support the suggestion, running contrary to all experience, that this population will suddenly start filing not hundreds, not thousands, but well more than *10,000* new, meritorious disease claims totaling nearly half the value of all disease claims paid since 2004.

D. Dow Corning's Experts Provide No Basis For Questioning Funding Adequacy

Dow Corning's expert declarations fail to establish any meaningful possibility that partial Second Priority Payments could threaten the funding cap. Dow's principal expert Paul Hinton offers a short, conclusory declaration considerably scaled back from his 65-page 2011 submission. He now makes no effort to criticize the IA's *application* of its methodology – or to show how changes in assumptions could alter the outcome – implicitly conceding that no reasonably foreseeable variations could threaten the $300 million cushion. Instead, Mr. Hinton inexplicably focuses on the estimations of future claims offered by dueling experts in various asbestos bankruptcies. Hinton Decl. at 5. But these cases are of scant relevance here.[4]

Mr. Hinton offers only vague, general, and misleading criticisms of the IA's methodology itself, suggesting that it is merely a crude extrapolation and that the "most widely accepted method for making mass tort forecasts" employs epidemiology and other means of analyzing "risk exposure" and "injury incidence rate" in the underlying population (Hinton Decl.

[4] The cited cases involved litigation over the amounts needed to fund trusts. Here, in contrast, the claiming process is winding down and almost complete. Moreover, asbestos cases involve a 50-year claiming horizon in which disease claims emerge in the general population, including from claimants who are not even yet aware that they were exposed to asbestos. *See* Peterson Reply Decl. at 3-4. Here, in contrast, the issue is how many claims will trickle in during the last three years of a lengthy process from a fixed pool of registered claimants who have received multiple notices of their opportunity to claim. That is why the IA's forecasts have proven reliable while those in the cited cases have not. Mr. Hinton ignores the more relevant precedent of the RSP, which involved an overlapping population in the same tort and wound down with only a modest bump of final claims. The "hindsight" of which Dow Corning warns based on the asbestos experience (DCC Opp. at 20) is already available for breast implants – and the IA's projections have fared quite well.

at 6-7), which appear to be just different ways of saying epidemiology.[5]

Mr. Hinton ignores that the IA's methodology is, in fact, the standard method for making claim projections with respect to a closed universe of registered claimants in a mature, data-rich claims process. Peterson Decl. at 3, 12-13; Peterson Reply Decl. at 1, 4-5, 7-8. Indeed, because epidemiology covering a closed universe does not even exist, projecting from claims history is the *only* method available in such circumstances. *Id.* at 7-8.

Mr. Hinton's characterizations also oversimplify and distort the IA's methodology, which (1) includes two parallel projection models to act as a sensitivity analysis, (2) is regularly adjusted and corrected to account for changing circumstances and new data, (3) does take into account the behavior of claimants in *not claiming* for nearly 20 years as well as the key characteristic of *pro se* or sole client status; and (4) perhaps most importantly has proven to be extraordinarily reliable.[6]

Dow Corning's other two expert opinions are even farther afield. Professor Georgene Vairo recycles her 2011 opinion ("Vairo 2011 Decl.") (Doc # 826-7) regarding the Dalkon Shield settlement, which unlike this one required that all current claims *and* all meritorious late claims *actually be paid in full* before the Trust could authorize pro rata

[5] The only support cited for this assertion is a book by Dr. Dunbar focusing on the methodology in *asbestos* cases and other mass torts where experts have attempted to forecast future claims from an entire exposed population – a process that often involves epidemiology. *See* Frederick D. Dunbar, Denise N. Martin, and Phoebus J. Dhrymes, Estimating Future Claims: Case Studies from Mass Tort and Product Liability 1-7, 63-75 (Andrews Publications 2004) (excerpts attached as Exh. 12). In contrast, when Dr. Dunbar opined at confirmation on the funds needed to ensure payment of all claims against Dow Corning from a finite pool of claimants who had filed POCs, he relied primarily on extrapolating future claims from past claims history. *See* Exh. 10.

[6] Mr. Hinton's suggestions that the Dow Corning settlement is not "a stable environment" (Hinton Decl. at 7) simply ignores reality. We are near the end of a claims process that has consistently run *below* the IA's projections – a pattern confirmed by the anticlimactic conclusion to the RSP. Dr. Dunbar's book cited by Mr. Hinton itself confirms that older claimants tend to claim less frequently. *See* Exh. 12 at 75.

distribution of surplus funds in lieu of punitive damages. Vairo 2011 Decl. ¶ 19. It thus is not surprising – but of no relevance here – that the Dalkon Shield Trustees required that all claims be either paid or *submitted and valued* before bending the rules of their settlement to issue pro rata payments. *Id.* ¶ 25. This was not the application of a "virtual certainty" standard, as Dow Corning misleadingly states (DCC Opp. at 23); rather the Trustees acted only when they were *actually* "certain . . . under a *worst case* scenario." Vairo 2011 Decl. ¶ 24.[7]

In short, Dow Corning offers no concrete reason to fear that the Settlement Fund cannot handle 50% Second Priority Payments and still comfortably cover all base claims. Tort claimants bargained to live with the infinitesimal risk thus created. Dow Corning's purported concern over that risk masks a singular purpose of delay. We respectfully urge the Court to authorize such payments as soon as possible so that this long-deferred promise may finally be honored for all qualifying claimants.

Conclusion

For the reasons stated above and in our earlier submissions, the CAC respectfully requests that the Court grant the Recommendation; authorize the SF-DCT to issue 50% installments on Second Priority Payments as and when they are approved for payment under the Plan; and grant such further relief as justice requires.

[7] Dow Corning's third expert, Jonathan Rosen, argues that the approval of Second Priority Payments should be subject to the same standards as the insurance company liquidation he supervised under a bankruptcy-like New Hampshire statute. Rosen Decl. at 4. Mr. Rosen's opinion is irrelevant for exactly the same reason as Professor Vairo's: Insurance liquidations require that all senior claims be *paid* or specifically reserved for before junior claims receive *anything*. But Dow Corning and the tort claimants agreed to a different standard here, and thus late-filing claimants in the SF-DCT are *not* similarly situated to involuntary first priority creditors in a liquidation or bankruptcy.

Dated: New York, New York
March 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2017 a true and correct copy of the following document was electronically filed with the Clerk of the Court using the ECF system, which will send notice and copies to all registered counsel in this case:

REPLY OF CLAIMANTS' ADVISORY COMMITTEE IN FURTHER SUPPORT OF FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO AUTHORIZE 50% SECOND PRIORITY PAYMENTS

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