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**

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO SUPPLEMENTAL BRIEF TO FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The Claimants' Advisory Committee ("CAC") submits this Response to the Finance Committee's Supplemental Brief ("FC Br.") and in further support of the Finance Committee's Recommendation and Motion for authorization to make 50% Second Priority Payments[1] and respectfully states as follows:

Preliminary Statement

The Finance Committee's Supplemental Brief makes several helpful contributions that should aid this Court in expeditiously approving 50% Second Priority Payments, thereby eliminating the disparity of treatment for claimants who have earned but not received Premium Payments since the Sixth Circuit's decision.

First, the Supplement Brief puts to rest Dow Corning's specious suggestion that the Finance Committee has not unequivocally recommended approval of Second Priority Payments. It also makes clear that the Finance Committee agrees with the CAC in urging the Court not to import a formal standard of proof such as "beyond a reasonable doubt," but instead

[1] Terms are abbreviated as in the parties' prior submissions.

simply to apply the Sixth Circuit's own language in determining adequacy of funding. As the Court held, the "virtual guarantee" standard "does not require absolute certainty" but "is nonetheless stricter than . . . 'strong likelihood' or 'more probable than not' levels of confidence." *In re Settlement Facility Dow Corning Trust*, 592 F. App'x 473, 480 (6th Cir. 2015).

Second, the Finance Committee provides a helpful summary, consistent with the CAC's earlier presentations, of the reasons why the IA's methodology and work product should be regarded as sufficiently conservative and reliable to support a "virtual guarantee" finding. The Finance Committee stresses that the results in the Settlement Facility have consistently run below projections and that the modest bump in claims at the conclusion of the RSP strongly suggests that this settlement, too, will end not with a bang but with a whimper. And, of course, there remains a $300 million margin for error that makes it virtually impossible that approval of 50% Second Priority Payments would threaten the funding cap.

Third, the Finance Committee effectively rebuts Dow Corning's many unsubstantiated arguments regarding potential uncertainties that could cause claims to exceed the IA's projections. As the Finance Committee explains, Dow Corning identifies potential events that are technically possible, but offers no evidence that there is any real likelihood that they could actually occur. Crucially, it fails to demonstrate a genuine possibility that an unexpected surge of claims actually could consume the entire $300 million cushion. The record before the Court establishes that there is, at most, only the faintest and most remote possibility of that happening. Second Priority Payments therefore may be approved based on a factual finding that sufficient funding exists to assure payment of all base claims to a virtual guarantee.

Argument

THE FINANCE COMMITTEE'S SUBMISSION CONFIRMS THAT THE COURT SHOULD PROMPTLY AUTHORIZE 50% INSTALLMENTS ON ALL CATEGORIES OF SECOND PRIORITY PAYMENTS

The Finance Committee submission demonstrates compellingly why the pending Recommendation and Motion should be granted.

A. The Finance Committee Correctly Urges The Court To Apply The Sixth Circuit's Plain Language Rejecting The Need for Absolute Certainty

The Finance Committee has definitively refuted Dow Corning's suggestion that it has failed to take a clear position endorsing a reading of the Sixth Circuit decision that would permit approval of Second Priority Payments. While the Finance Committee's initial submission discussed different potential interpretations of the Sixth Circuit decision and Plan Documents, its post-hearing submission unequivocally rejects Dow Corning's favored interpretation that Second Priority Payments may not be approved until *all* uncertainty has been eliminated:

> [Dow Corning's] premise that the existence of uncertainty or risk defeats a finding of virtual guarantee renders the standard tantamount to absolute certainty, a notion that has been rejected by the Sixth Circuit. The Court of Appeals expressly stated: "because it is impossible to account for all future uncertainties, we will not impose an 'absolute guarantee' standard of confidence." *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 479.

FC Br. at 9.

Instead, the Finance Committee embraces an interpretation that harmonizes the Sixth Circuit's decision with the parties' agreement, embodied in the Plan, that Second Priority Payments may be authorized *during* the course of the settlement, once "adequate provision has been made to assure" payment of all base claims. FC Br. at 10 (citing SFA § 7.03). As the Finance Committee notes, the SFA specifically contemplates that this determination will be based on the IA's projections – as the Sixth Circuit recognized in holding that this Court "*must*

make its decision to authorize Second Priority Payments 'based on the Independent Assessor's analysis and projections.'" FC Br. at 10 (quoting *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 481) (emphasis added). The Finance Committee further explains that, if Dow Corning were correct that *all* risk must be eliminated, there would have been no purpose for the IA's projections, which by definition must be based on the best available information about *future* events, as to which all future risk cannot be eliminated. *See* FC Br. at 10-11.

As the CAC urged in its Reply (at 5), the Finance Committee has set aside its earlier discussion of standards of proof such as "beyond a reasonable doubt" and now urges the Court to apply a definition of "virtual guarantee" that "rest[s] exclusively" on the Sixth Circuit's own language, *i.e.*, a standard that "'does not require absolute certainty' but is 'nonetheless stricter than the "strong likelihood" or "more probable than not" level of confidence.'" FC Br. at 8 (citing *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480). The CAC fully agrees with this approach.

The Finance Committee does introduce one unnecessary note of confusion in this connection. It incorrectly suggests that the CAC has urged a different "definition" of virtual guarantee as meaning a "tiny risk," which the Finance Committee rejects as improperly imparting "additional meaning" to the Sixth Circuit's terminology. FC Br. at 7-8. However, in referring at the hearing to a "tiny risk" and, similarly, to a risk that is "very far-fetched and small," the CAC was simply describing the existing factual situation and arguing that it fits within the language of the Sixth Circuit's test. The CAC otherwise stressed that "we don't think it's useful for the Court to adopt any of these other standards or tests"; that "we need to be faithful to the mandate of the Sixth Circuit"; and that "we would just suggest that you apply the words of the Sixth Circuit." Motion Hearing Transcript at 21 (FC Br. Exh. 4). Similarly, in its

Reply, the CAC urged that "the Court need not reformulate the Sixth Circuit's standard" because "'[v]irtual guarantee' means close to certain, but still allowing for some tiny amount of uncertainty." CAC Reply at 5.

Thus, there are only two, not three, "principal positions" (FC Br. at 1): Dow Corning's argument for absolute certainty and the CAC's argument to apply the plain language of the Sixth Circuit decision in harmony with the Plan Documents to permit the approval of Second Priority Payments when the risk of insolvency is small enough to constitute a "virtual guarantee." In its Supplemental Brief, the Finance Committee comes down squarely in favor of the CAC's approach, based directly on the Sixth Circuit's language: "The Finance Committee . . . specifically finds that the IA's projection and statement that with 50% Second Priority Payments there will be sufficient funds for First Priority Payments to be reliable and to constitute a 'virtual guarantee,' which is defined as not 'absolute certainty,' [but] nonetheless stricter than the 'strong likelihood' or 'more probable than not' levels of confidence . . . .'" FC Br. at 24 (quoting *In re Settlement Facility Dow Corning Trust*, 592 F. App'x at 480).

B. The Finance Committee's Submission Correctly Highlights Factors Supporting The Reliability Of The IA's Projections

The CAC agrees with the Finance Committee's overview of the factors supporting the reliability of the IA's projections. As the Finance Committee observes, the IA applies a conventional, widely accepted methodology that has been demonstrated by years of experience to be highly reliable and indeed too conservative, always erring on the side of predicting *more* claims than have actually materialized. "Importantly, the IA's reports have consistently exhibited claim forecasts that exceed . . . the actual claims paid by SF-DCT." FC Br. at 3.

The Finance Committee explains that this result follows from the IA's choice to build into its projections a series of extremely conservative assumptions, including (1) that disease claim filings will continue at a constant level rather than declining, (2) that every single claimant with a valid POM will receive either a disease or expedited payment, and (3) that every single potentially eligible claimant will receive an Option 2 Increased Severity payment. FC Br. at 13-14. Thus, while variations from individual projections will certainly occur, most of them will be in the direction of *less* liability for the SF-DCT; it is highly probable that "the IA's projections for future filings will be *higher* than the actual, and that there will be more rather than less of a surplus for First Priority Payments." FC Br. at 13.

As the Finance Committee further points out, the experience of the RSP in MDL-926 provides significant confirmation for the accuracy of the IA's projections and the extremely low likelihood of an unexpected claim surge massive enough to threaten the funding cap. The RSP involved an overlapping claimant population and similar products – indeed, many claimants were eligible under both settlements. The RSP ended with only a modest bump in claims, many of which were "protective" filings that ultimately did not qualify for payment. The Dow Corning settlement will end nine years later, when claim filing by an aging population will have continued to decline. As the Finance Committee further notes, any surprise surge in 2019 would have to include thousands of claims from the large pool of claimants who filed a POC approximately 20 years ago but have filed no POM or other claim documents since then, despite having received multiple mailings reminding of their right to do so. With actual claims having slowed to a trickle, and the experience of the RSP as a guide, a cap-threatening surge is close to impossible. To the contrary, "[t]hese points provide more confidence that the IA Report has

over-estimated, rather than underestimated, the final liability of the Settlement Facility." FC Br. at 14.

As the CAC has repeatedly argued, the ultimate question is not whether the IA's projections will prove to be precisely accurate. That is not how projections work. The parties agreed to accept at least some uncertainty in providing that Second Priority Payments could be approved *during* the course of the settlement based on projections rather than being held until the end of the settlement program, as was done in cases like Dalkon Shield. Thus, the real question is whether the IA's projections have been and will continue to be broadly accurate within a certain range. As the Finance Committee recognizes, this has undeniably been the case based on an extensive track record to date, and there is no reason to believe that will change.

The only remaining question, then, is whether the margin of error provided by these projections is virtually guaranteed to be sufficient – *i.e.*, whether it is almost certain that the net results of any upward and downward deviations from the IA's projections will not exceed the upper limit of those projections by $300 million in the short time remaining in the settlement. The record clearly supports that conclusion – as the Finance Committee and CAC both agree. As demonstrated below, Dow Corning's attempt to forestall such a finding by pointing to theoretical uncertainties is unsubstantiated and unconvincing and should not deter this Court from promptly approving Second Priority Payments.

C. The Finance Committee Correctly Rejects Dow Corning's Speculative and Unsubstantiated Criticisms of the IA Report

The Finance Committee's submission (read together with the CAC's prior briefs) convincingly refutes Dow Corning's suggestion that uncertainties with respect to the IA's projections bar this Court from authorizing Second Priority Payments. As the Finance Committee explains, Dow Corning's arguments prove far too much – it "criticize[s][the IA] for

making assumptions at all." FC Br. at 16. But as this Court has held, and the Sixth Circuit has confirmed, the parties agreed that the decision to approve Second Priority Payments would be based on precisely the methodology applied by the IA, which inherently requires a series of assumptions and an accompanying degree of uncertainty. Dow Corning's denigration of "assumptions" and demand for certainty are nothing less than an attempt to rewrite the Plan and renege on commitments it made to induce tort claimants to support it.

While particular assumptions may prove to be incorrect to one degree or another, as discussed above and in the parties' prior submissions, the IA's projections have proven to be exceptionally reliable – in part as a result of continually reviewing, testing, and adjusting the underlying assumptions. And, of course, the broad accuracy of the IA's projections does not depend on any one particular assumption proving to be precisely accurate, but rather is based on the assessment of broad patterns of activity and historical trends. FC Br. at 16 n.11.

Thus, Dow Corning's catalog of variables that may vary, or assumptions that may prove incorrect, does not defeat the "virtual guarantee" showing. As the Finance Committee aptly notes, it is not enough to identify theoretically possible risks – "there must be evidence to support the reality of those risks." FC Br. at 16. As the Finance Committee further explains, "there are always risks of virtually anything happening or not happening. If the SFA had contemplated the elimination of all risk before Second Priority Payments could be made, then the SFA would have required mathematical certainty, not a Finance Committee recommendation based on the IA's report." *Id.* at 17.

Dow Corning's principal criticism of the IA's methodology – the failure to make epidemiology-based projections of likely disease incidence among the remaining POC population – fails for all the reasons described in the CAC's prior submissions (including

Dr. Peterson's declarations). As the Finance Committee points out, Dr. Hinton's analysis of compensable conditions focuses exclusively on the existence of certain symptoms within the general population. He does not analyze the degree of disability caused by such symptoms – a crucial component of eligibility for settlement benefits. FC Br. at 18. The Finance Committee is too tactful in describing Mr. Hinton's conclusions as "misleading." *Id.* In fact, as Dr. Peterson explained in his 2011 and 2012 declarations, Mr. Hinton's entire approach is nonsense: Epidemiology cannot validly be used to predict disease incidence within a self-selected, registered claimant group not representative of the general population (and from which most meritorious claimants have already been removed). Even if it could be, no valid epidemiology even exists for the most common compensable conditions under this settlement. Mr. Hinton's attempt to substitute raw data about the incidence of individual signs and symptoms in the general population is nothing more than junk science. *See* December 23, 2011 Declaration of Mark Peterson ("Peterson 2011 Decl.") (CAC Reply Exh. 14) at 35-39; January 30, 2012 Declaration of Mark Peterson ("Peterson 2012 Decl.") (CAC Reply Exh. 15) at 2-4.

Even more fundamentally, Dow Corning has not identified *any* epidemiological evidence that would materially *change* the IA's projections or suggest any real-world risk of an unexpected claim explosion that could threaten the funding cap. The one concrete example in Mr. Hinton's most recent declaration – a single epidemiological study regarding lupus – is in no way inconsistent with the IA's projections. *See* Hinton Reply Decl. at ¶ 38 n.24. Mr. Hinton fails to establish, at the threshold, that the study he cites applies a definition of lupus consistent with the diagnostic and documentation requirements of SFA Annex A or otherwise corresponds to eligibility requirements under the Plan. He argues that the study supports the likelihood of 90 additional approved lupus claims, but does not establish that this would be surprising given the

1168 lupus claims already paid under the settlement (Final IA Report at 50) or that it would be in any way inconsistent with the IA's projections, much less threaten the funding cap. Dow Corning has not cited any other epidemiology that it says the IA should have considered and that would have materially altered its projections. Its criticism is thus a complete red herring, tantamount to a statement that *no* methodology exists that could support approval of Second Priority Payments during the settlement.

In fact, what little other epidemiology appears to be available tends to confirm, rather than undercut, the reliability of the IA's projections. For example, the Finance Committee cites published studies suggesting that certain of the more serious (and high valued) compensable conditions (including Sjoren Syndrome/Systemic Lupus Erythematous and Scleroderma) tend to manifest in patients younger than 50, while 90% of potential remaining claimants are 55 or older. *See* FC Br. at 22-23. While the CAC does not believe that such studies, standing alone and unaccompanied by qualified expert opinion, are independently probative of likely future claims experience, they are nevertheless broadly consistent with the IA's projections, and, more particularly, with the common experience in claims facilities that aging populations tend to generate fewer claims. *See* Peterson 2011 Decl. (CAC Reply Exh. 14) at 28-31; Peterson 2012 Decl. (CAC Reply Exh. 15) at 9-13.

The Finance Committee appropriately dismisses Dow Corning's other criticisms of the IA's projections as speculative and inconsistent with experience and common sense. Again emphasizing that most remaining potential claimants have taken no action in more than 20 years despite receiving repeated notices, the Finance Committee concludes "[t]here is no evidence that any meaningful number of claimants might be determined to be eligible who are not currently accounted for in the settlement facility." FC Br. at 19. As the Finance Committee

notes, notice of the June 2014 Explant Deadline was sent to the complete mailing list of 189,700 unrepresented claimants, along with 15,161 law firms representing 67,840 claimants. This massive notice program resulted in only 484 expedited release forms and 112 disease forms. *See* FC Br. at 19-20.

The Finance Committee similarly points out that Dow Corning's additional arguments challenging the IA's assumptions with respect to such factors as future surges, acceptance and cure rates, and average claim values are all based on sheer speculation that runs contrary to actual experience. FC Br. at 20-23. Finally, the Finance Committee notes that an audit conducted by the Claro Group identified no material issues with respect to the Settlement Facility's claims processing, eliminating any real possibility that a change in processing procedures could materially affect the funding cap. *See* FC Br. at 19 n.13.

Once again, the question is not whether one or more of the uncertainties Dow Corning flags may in fact materialize. Experience shows that most variations from the IA's projections will be *downward* departures, *adding to* rather than eroding the $300 million cushion. Certain individual variations may add small amounts of liability for the Trust, but these will almost certainly be offset by the downward deviations.

The bottom line, however, is that Dow Corning has identified no plausible reason to conclude – and introduced no evidence – that a potential net *upward* deviation so extreme as to consume the cushion is realistically possible. Rather, on this record, the risk of such a bizarre occurrence is appropriately characterized as "tiny," "far-fetched," or "remote." It is a very small risk indeed. The Sixth Circuit has already said that *some* risk must be permitted, given the structure and logic of the SFA. Dow Corning has not coherently explained how much risk is too much risk, adhering stubbornly to the unsustainable position that *any* risk is unacceptable. But

that is not what the parties bargained for, as the Sixth Circuit has confirmed. If this record, at this late point in the settlement process, does not support approval of Second Priority Payments, it is hard to imagine what greater assurance the parties could possibly have contemplated, consistent with the expressed intent to pay Premiums *during* the settlement process.

Finally, like the Finance Committee, the CAC remains concerned about the inequity of denying one group of claimants benefits that have already been awarded to the vast majority of similarly situated parties. The amount at stake is relatively small in the larger context of this settlement, but the payments are meaningful for thousands of claimants who have waited many years to receive them, and the risk being imposed on the last claimants who will file in 2019 is infinitesimal. Further delay serves only Dow Corning's interest in postponing and devaluing payments to claimants who receive no cost of living adjustments and will increasingly die or fall out of touch with the SF-DCT as months and years go by. These long overdue payments should be approved and issued as soon as the Court is able to rule.

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.

Dated: New York, New York
May 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 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:

RESPONSE OF CLAIMANTS' ADVISORY COMMITTEE TO SUPPLEMENTAL BRIEF TO FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

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