**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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| **In re:**<br><br>**DOW CORNING CORPORATION,**<br><br>**Reorganized Debtor** | § | **Case No. 00-CV-00005 –DT**<br>**(Settlement Facility Matters)**<br><br>**Hon. Denise Page Hood** |

# RESPONSE OF DOW CORNING CORPORATION AND THE DEBTOR'S REPRESENTATIVES TO THE SUPPLEMENTAL BRIEF TO FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

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## PRELIMINARY STATEMENT

Despite the FC's[1] characterization, there is no dispute about the legal standard that the Court must apply. There is also no dispute that the number of claimants who will apply by the deadline is not known and is not knowable. And there is no dispute that if only a small fraction—between 12 and 17 percent—of the eligible claimants apply, the funds will *not* be sufficient to pay all FPPs—let alone SPPs. There is no dispute that eligible claimants should and must be paid—but they must be paid in the priority required by the Plan.

The CAC has argued that it is unfair to defer payment of the SPPs. But what is truly unfair is to pay tens of millions (or more) now to *lower* priority claimants—who have already received over $1.2 billion—based on the speculative assumption that only 2.8 percent of the 70,000 plus remaining claimants with potential FPPs will file claims.

The virtual guarantee standard is in the Plan for a reason: it protects the higher priority claimants. Their rights cannot be undermined and the lower priority payments cannot be distributed absent objective evidence that the risk to them is

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[1] Unless otherwise noted, capitalized terms have the same meaning as defined in the Opposition of Dow Corning Corporation and the Debtors' Representatives to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments ("Opposition") and in the Reply of Dow Corning Corporation and the Debtors' Representatives to the Response of the Claimants' Advisory Committee to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments ("DCC Reply").

near zero. The assumption that only 1800 out of more than 70,000 eligible individuals will actually file claims is simply a hypothetical scenario: it is not objective evidence and does not demonstrate the near-zero risk demanded for a virtual guarantee.

Apparently recognizing the utter lack of real support for its recommendation, the FC tries to avoid the mandate of the Sixth Circuit by asserting that DCC (or, in reality, the 70,000 plus higher priority claimants) must prove that the IA's assumption is wrong. It is the FC that is wrong. The FC's support for the distribution of SPPs does not even satisfy the FC's own proposed (and insufficient) standard of "reasonable doubt." No prosecutor would proceed with a case that exhibits the number of unknowns and un-knowables involved here. The FC's recommendation rests entirely on inferences—not evidence and knowledge—that with just small variation produce major swings in outcome. The IA's assumption-based calculations do not and cannot rationally and logically support a finding that payment of all FPPs has been established beyond a reasonable doubt, much less has been *virtually guaranteed*. The Court must apply the Plan as written and prohibit distribution of lower priority SPPs at this time. The Motion must be denied. [2]

[2] The FC's recommendation would also distribute payment of approximately $11.9 million to Dow Chemical for its Class 16 claims. IA Report, at 17, 87 (Exh. A to DCC Opposition).

## ARGUMENT

### I. THE STANDARD IS UNDISPUTED AND THE FC'S PURPORTED RECONCILIATION REVIVES AN ARGUMENT REJECTED BY THE SIXTH CIRCUIT.

The Supplemental Brief to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments ("FC Supp. Brief") begins by contesting both the CAC's and DCC's definition of "virtual guarantee" and characterizing them as incorrect and conflicting. FC Supp. Brief at 6-9. The FC then offers a third position, which it describes as a reconciliation of the SFA and the Sixth Circuit's decision. *Id*. at 10. But this reconciliation rests on an erroneous depiction of DCC's position and a new articulation of an argument that the Sixth Circuit previously rejected.

Contrary to the FC's characterization, DCC has never asserted that virtual guarantee means "no risk at all." It has simply recited the definition of virtual guarantee that the Sixth Circuit adopted, *In re Settlement Facility Dow Corning Trust*, 592 Fed. App'x. 473 (6th Cir. 2015), and that is embodied in the case law, *see, e.g.*, DCC Opposition at 7 (*citing, inter alia, Marine Bank v. Weaver,* 455 U.S. 551 (1982) (equating "virtual guarantee" with a 99.8% certainty)). Consistent with those definitions, DCC has stated that the risk to FPPs "must be *near zero."* DCC Opposition at 1 (emphasis added); *see also id.* at 6 (stating standard permits only a "minuscule chance" that FPPs will not be paid); DCC Reply at 1 (stating the Court

cannot authorize the distribution of SPPs "absent reliable evidence that there is *virtually* no risk to FPPs") (emphasis added).

The CAC's characterization of the standard is no different. It acknowledges that the risk must be "very tiny," the possibility of a shortfall must be "almost impossible," and a "virtual guarantee" requires that the risk to FPPs is nearly zero. *See* Exh. A, Motion Hearing Transcript ("Transcript") at 21 and at 13 (CAC's counsel expressing agreement that "the test is what it is and that is not in dispute"); *see also* CAC Response at 15-16 (noting case concluding virtual guarantee is found where risk is 1.13% and asserting that "98-99% certainty of payment" is the "appropriate level of certainty to constitute a 'virtual guarantee'"). [3]

Inexplicably, however, the FC chooses to ignore the parties' agreement as well as its own previous suggestion to apply the familiar criminal standard "beyond a reasonable doubt." Motion at 7. Instead, the FC now seeks to redefine the virtual

[3] The FC criticizes the parties' definition of virtual guarantee by mistakenly citing Sixth Circuit language explaining that virtual guarantee is *not* the lower standard previously advocated by the CAC and the FC. *See* FC Supp. Brief at 8, 24. (asserting that defining "virtual guarantee" as a "tiny risk" has the "drawback" of not resting "exclusively on [this] definition") (*citing In re SF-DCT*, 592 Fed. App'x. at 480). The Sixth Circuit in fact adopted DCC's argument that the requirement to "assure" FPPs means that such payments must be virtually guaranteed. *See id.* at 479-80 ("The New York case cited by the parties interpret the word "assure," made in the context of making future payments, to mean guaranteeing that those payments will be made. … Because it is impossible to account for all possible future uncertainties, we will not impose an 'absolute guarantee' standard of confidence, as that would make SFA § 7.03(a) superfluous. … Accordingly, we adopt the Appellant's terminology of 'virtual guarantee'".). And, as the case law demonstrates, virtual guarantee means "near zero risk."

guarantee standard by asserting that the SFA "contemplates that projections of the IA would be used to determine whether adequate provisions to assure payments exist generally," and that the SFA has a "mandate to analyze known or knowable data using state of the art methodology." FC Supp. Brief at 10, 16 (*citing* SFA § 7.01(d)). The FC says that its new definition "reconciles the SFA's language with the Sixth Circuit's 'virtual guarantee' language" and "attempts to resolve any potential conflict between these sources." FC Supp. Brief at 10.

But there is no conflict and there is no such mandate. The FC's purported reconciliation is nothing more than a rehash of the argument that has already been rejected by the Sixth Circuit. The obvious reason for the FC to suggest a "conflict" is to justify a more lenient standard in order to accommodate the use of uncertain and speculative future projections—the same argument that the CAC asserted in its failed attempt to argue for a lower standard.[4] *See, e.g.*, FC Supp. Brief 16 (stating that "criticisms [of the FC's recommendation] arise from the necessity of making assumptions at all.").[5] The only "necessity" is that FPPs must be virtually

[4] *See* CAC 6th Cir. Brief at 7, 45 (stating that issue for review on appeal included whether a lower standard than a virtual guarantee advocated by DCC was appropriate since "adequacy" of assurance under SFA should be "assessed" through such "projections," which "could never be expected to offer a 'guarantee' of future solvency," and citing the same SFA § 7.01(d) language as supporting use of a lesser standard).

[5] The FC states: "If the elimination of any risk of error is the standard, then there would be no need for the IA's analysis; there would be merely a mathematical

guaranteed before SPPs are distributed. And the only "projections" referenced in Section 7.03 relate to *pending* claims. *See* SFA (Exh. A to Motion) § 7.03(a) (recommendation must "be accompanied by a detailed accounting of the status of Claims payments and distributions … 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).

Of course, the Court must consider future payments in determining whether the virtual guarantee is met, but the SFA does not mandate reliance on projections of unknown future filings. The FC improperly infers a mandate to utilize projections of unknown future claims from sections of the SFA that do not pertain to the standard for distributing SPPs.[6] While the FC states that the projections must meet the virtual

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calculation ensuring absolute certainty of sufficient funding before [SPPs] would be made." FC Supp. Brief at 10. This is a straw argument: DCC does *not* contend that the virtual guarantee standard requires the elimination of *all* risk. Further, this argument is incorrect. If there are pending claims, the IA will inform the decision by providing a computation of the cost of finalizing these known claims.

[6] The language in Section 7.01(d) that the FC relies on relates to multiple other functions of the IA and not to the standard required to issue SPPs. For example, Section 7.01(d)'s reference to projections of future claims based on "known and knowable" data was required for determining, under Section 7.03*(c)*, whether FPPs would need to be reduced to assure equitable treatment of future *FPPs*. This provision has nothing to do with the clearly stated standard governing the distribution of SPPs. The language in Section 7.03*(a)* on payment of SPPs, in contrast, does not mention projections of future claims. *See Innovative BioDefense, Inc. v. VSP Techs., Inc.*, No. 12 Civ. 3710(ER), 2013 WL 3389008, at *5 (S.D.N.Y. July 3, 2013) ("'Under accepted canons of contract construction,

guarantee standard, their use of such extraneous language in the SFA to justify their recommendation belies that statement.

The FC's circular argument asserts, in effect, that the virtual guarantee standard is met because it is necessary to use projections. It may well be that in some circumstances—where there are far fewer remaining potential claims, for example—there could be a projection that meets the virtual guarantee standard. But as explained below, the current projections cannot constitute a virtual guarantee.

## II. THE FC SEEKS TO AVOID ITS OBLIGATION BY ERRONEOUSLY SHIFTING THE BURDEN TO DCC.

Notwithstanding its acknowledgement that the risks identified by DCC are "real" (FC Supp. Brief at 16), the FC urges the Court to disregard the inherently problematic nature of an assumption-based model because DCC must provide "evidence to support the reality of those risks." *Id*.

This misguided effort to shift the burden to DCC is contrary to both the plain language of the SFA and the Sixth Circuit's mandate. The argument suggests the Court should ignore any inherent risk unless there is affirmative evidence to suggest otherwise. The FC, as the only entity that can file a motion for authority to distribute SPPs, bears the burden to provide evidence to support the virtual guarantee. *Grossman v. Rankin*, 43 N.Y.2d 493, 502 (1977) ("burden is on party

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when certain language is omitted from a provision but placed in other provisions, it must be assumed that the omission was intentional.'") (citations omitted).

asserting the affirmative of an issue"). If the submission does not establish a virtual guarantee of payment of FPPs, the Motion must be denied irrespective of whether there is an objection or any alternative computation or analysis. The Court cannot base a finding of virtual guarantee on the lack of a different future claim projection.

The FC is also incorrect when it asserts that there is no analysis or evidence that contradicts the IA projection. DCC has already established that small changes in the IA's assumptions—based on the information in the claims data—result in material changes in the projection. *See* Hinton Reply Dec. (Exh. A to DCC Reply) at ¶¶ 47-50; November 11, 2011 Declaration of Paul J. Hinton ("Hinton 2011 Dec.") (Exh. 1 to Hinton Reply Dec.) at ¶¶ 46-53. To the extent that the FC seeks alternative computations, they have been provided. And these computations demonstrate precisely why the IA's assumption-based projection does not satisfy the virtual guarantee standard where tens of thousands of claimants remain eligible to file or cure. Small and reasoned changes in assumptions result in very different projections. The FC's effort to support its Motion by shifting the burden must be rejected.

## III. THE IA REPORT DOES NOT MEET THE AGREED STANDARD.

The only way to determine that the risk is close to zero is through objective evidence demonstrating the risks and quantifying the risk and uncertainty. *See* Hinton Feb. 2017 Dec. (Exh. C to DCC Opposition) at ¶¶ 23-24 ("The IA Report does not quantify uncertainty inherent in its projections, and cannot measure uncertainty in estimates arising from underlying drivers of claims not modeled in its methodology. Consequently, the IA Report does not and cannot provide a reliable basis for a finding that [FPPs] would be 'virtually guaranteed'"). There is no such evidence or analysis.[7] Instead, the FC's recommendation is premised on a long series of inferences and extrapolations purporting to predict the future behavior of over 70,000 potential claimants who are eligible to make disease claims and some 20,000 others with pending claims of various types. The recommendation can only be described as inherently speculative and insufficient to meet even the FC's lower—and admittedly insufficient[8]—"reasonable doubt"

[7] The IA Report states only that the virtual guarantee standard is "justified" based on its calculations which consist of a series of extrapolations and inferences and "what if" scenarios—all subject to strong caveats confirming that something as simple as notice to the claimants could change the outcome. *See* IA Report at 3, 6. Ironically, the FC criticizes DCC's arguments as a series of "what if" scenarios yet is willing to accept the IA's "what if" scenarios as the equivalent of a virtual guarantee. *See* FC Supp. Brief at 9.

[8] *See* Exh. A, Transcript at 23 (CAC's counsel confirms that beyond a reasonable doubt standard is not sufficiently stringent).

standard.[9]

Instead, the FC asks this Court simply to accept its own subjective expression of "confidence" in the IA's estimate of what might happen in the remaining years of the settlement. The FC's "confidence" is not a virtual guarantee of FPPs.[10]

### A. The Stated Reasons For The FC's "Confidence" In The IA Estimate Do Not Virtually Guarantee FPPs.

To support its statement of "confidence" in the IA's projections, the FC argues that (i) the IA's methodology is "customary and accepted," (ii) the methodology has proven reliable, (iii) the over 70,000 remaining Class 5 claimants

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[9] *See, e.g.*, *United States v. Moon*, 178 F.3d 1297, 1999 WL 187438, at *3 (6th Cir. 1999) (finding evidence insufficient, as a matter of law, to warrant a finding beyond a reasonable doubt where finding urged by the government "requires putting inferences upon inferences in order to reach a speculative conclusion."); *see also Newman v. Metrish*, 543 F.3d 793, 797 (6th Cir. 2008) (finding reasonable doubt "because we are limited by what inferences reason will allow us to draw.") *A fortiori*, the FC recommendation does not meet the more stringent virtual guarantee standard.

[10] DCC has demonstrated that in this context—with close to 100,000 Class 5 claimants still eligible to file new claims or perfect previously filed claims, the IA analysis cannot demonstrate the requisite certainty. *See* Hinton Reply Declaration. Nowhere has the IA even attempted to analyze the uncertainty. The CAC's expert has acknowledged that no such analysis exists. *See* December 23, 2011 Declaration of Mark Peterson (Exh. 4 to Hinton Reply Dec.) at ¶ 24 (stating, at a time that CAC was arguing for a lower standard, that "[i]t would be extremely difficult to aggregate these multiple computations to reach meaningful conclusions about a forecast's statistical reliability and utility."); *see also* Exh. A, Transcript at 37 (CAC's counsel acknowledging that the IA's methodology does not lend itself to a quantified error analysis).

should be of minimal concern because they have not yet filed a claim, (iv) the IA estimate is "conservative," and (v) the history of the Revised Settlement Program ("RSP") supports the accuracy of the IA's analysis. FC Supp. Brief at 11-15. None of these arguments meet the Sixth Circuit's requirement.

First, the IA methodology is not "customary and accepted" when, as here, the standard requires a virtual guarantee. Rather, this type of methodology is used frequently—because there is no alternative—where the standard does not require certainty or anything close to it. Courts routinely describe this type of methodology as demonstrably uncertain and unreliable, making "any pretense to certainty illusory." *See* DCC Opposition at 18-20 (*quoting In re Armstrong World Industries, Inc.,* 348 B.R. 111, 114-15 (D. Del. 2006).[11] In fact, this methodology has never been considered "reliable" for purposes of a standard that requires

[11] Other commentators and experts express consistent views. *See e.g.,* Exh. B, Rebuttal Report of James J. Heckman to the Reports of Mark A. Peterson and Jennifer L. Biggs, *In re W.R. Grace & Co*., No. 01-01139 (JKF) (Bankr. D. Del. Dec. 7, 2007) ("*In re W.R. Grace*"), ECF No. 17577-1 (Exhibit 1 to Official Committee of Equity Security Holders' Memorandum in Support of Debtors' Motion to Exclude Certain Expert Opinions Relating to Current and Future Asbestos Personal Injury Liability, *In re W.R. Grace*, ECF No. 17577), at ¶¶ 5, 12 (noting "recognized shortcomings in forecasting techniques, specifically those techniques that naively extrapolate from simple historical relationships among variables. These simple extrapolation techniques have led to many recognized failures in reliable predictions and subsequent policies based on those predictions."); Exh. C, Rand Institute for Civil Justice, *Asbestos Litigation* (2005), at xxiii, xxvi ("The difficulties attendant in estimating Manville's liability exposure highlighted for non-bankrupt defendants the difficulties of estimating their own future liabilities … Estimates of the number of people who will file claims in the future—and the costs of those claims—vary widely").

assurance. *See* DCC Opposition at 18-20; Hinton Feb. 2017 Dec. at ¶¶ 9-14.

Second, the track record of the IA's prior projections of monthly filings over the course of the settlement program is irrelevant. Those projections deal only with periods where there were no "disturbances" (in the words of the CAC's expert) to the monthly filing patterns resulting from notice or deadlines and are not relevant to the future. *See* FC Supp. Brief at 13, Peterson Dec. at ¶¶ 12-16. The issue is not monthly filing patterns between surge periods, but the extent of the filing surges that everyone expects in response to notice and the final filing deadline. *See* Hinton Reply Dec. at ¶¶ 11-13; *see also* Exh. A, Transcript at 30-31 (CAC's counsel agreeing that relevant source of uncertainty is "how big a surge in disease claims are we going to get"). On this crucial point, the FC's entire "methodology" is to simply assume that the filing surge will be similar to that experienced at the rupture deadline. There is no track record or basis for this assumption. *See* Hinton Reply Dec. at ¶ 20. And, particularly given the well-documented history of significant filing surges in settlement facilities,[12] there is no

[12] *See, e.g.,* IA Report at 33; Hinton Reply Dec. at ¶ 42; Hinton 2011 Dec. at ¶¶ 68-78 (discussing, *inter alia*, "enormous increase in claim filings" following publicity of filing deadline and extension of deadline in Agent Orange Veteran Payment Program); *see also* Exh. D, Kenneth R. Feinberg, *The September 11th Victim Compensation Fund*, 32 No. 2 Litigation 14, at 16 (Winter 2006) ("one interesting aspect of the program—familiar to many class action litigators—is how the filing rate for the Fund increased as the [deadline] approached. … about half of all participants filed with the program during the last 60 days"). A similar surge was experienced again 12 years after 9/11, when an October 2013 filing deadline

basis to virtually guarantee it will be remotely accurate. Moreover, as previously demonstrated, the IA's computation of the rupture deadline surge erroneously omitted significant data. *See* Hinton 2011 Dec. at ¶ 53.

The FC has submitted a new statement from the IA that addresses the effect of mailings in 2010 to select groups of claimants as well as mailings to advise claimants of the deadline for submitting explant claims. FC Supp. Brief Exh. 3, IA Memo dated April 4, 2017. Far from supporting the FC Motion, the filing data clearly demonstrates the point that DCC has made: claimants will respond to notice and deadlines and the rate of this response is unpredictable. In fact, the new statement neglects to note that the IA's monthly projections often dramatically *underestimated* claim filings. For example:

- A 2014 IA report shows that peak monthly filings for POM and explant claims during the period before the IA predicted a surge were both approximately 10 times higher than projected.[13]

- A 2010 IA report indicated that after 2010 mailings, explant, POM and expedited monthly filings in late 2010 all far exceeded the "high" end IA projections—at their monthly peak, filings were, respectively, approximately

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for the re-opened September 11th Victim Compensation Fund saw approximately 45% of registrants file in the final two weeks before the deadline. *See* Exh. E, Second Annual Status Report, September 11th Victim Compensation Fund (Nov. 2013), at 4 (stating 54,897 registrations by the 10/3/13 filing deadline) and Exh. F, VCF Program Statistics (Sept. 16, 2013) (showing only 30,309 total registrants as of 9/15/13), both available at https://www.vcf.gov/programstatsarchive.html.

[13] *See* Exh. G, Report of the Independent Assessor End of Second Quarter 2014 (Feb. 24, 2015), at 67-68.

2x, 8x, and 25x higher than projected.[14]

Third, the FC's dismissive assumptions about the 70,000 individuals who can still file claims underscores the insufficiency of the IA's future claim projections. The FC's recommendation rests on the assumption that only 2.8 percent of the more than 70,000 Class 5 claimants remaining will file claims. Hinton Reply Dec. at ¶ 49 and Appendix Table 2.1. Of course, no one knows how many individuals will file claims. We do know, however, that if only a relatively small fraction—between 12 and 17 percent—file, the so-called "surplus" of funds will not be sufficient to pay FPPs if the Court approves the FC's Motion. *See* Hinton Reply Dec. at ¶¶ 48-50. To use the FC's own "test"—the FC has not *proved* that at least 12 to 17 percent of claimants will *not* file. Instead, the FC tries to support the IA's assumption that only 2.8 percent will file by asserting, with no proof, that the claimants have lost interest in the settlement program, and asserting (incorrectly) that these prospective claimants "have failed to act despite receiving multiple mailings over many years." FC Supp. Brief at 15, 19-20. As DCC has demonstrated, however, there has been no notice to the majority of these individuals of the final disease filing deadline since the initial claim packages were distributed in 2003. The "multiple mailings" to the majority of these claimants did not contain notice of the disease filing deadline. Rather, they contained

[14] *See* Exh. H, Report of the Independent Assessor End of Fourth Quarter 2010 (May 20, 2011), at 69-72.

information only about the rupture and explant deadlines.[15] Claimants without a rupture or who had not had their implants removed would ignore such notices. *See id.;* FC Supp. Brief Exhs. 9, 11. The fact that these claimants have not filed yet has no bearing on their future actions: there has been no need for them to make any filing (POM or disease) yet.[16]

Fourth, the FC's assertions that the IA estimate is premised on a series of "conservative" assumptions is not supportable:

- The FC argues that the IA conservatively assumed filings would stay constant and not decline. FC Supp. Brief at 12-13. Yet, a "conservative" approach would assume filings would increase, a potential not even considered in the IA Report. And, of course, these assumptions of monthly filing patterns have nothing to do with the central question of how large a filing surge will occur at the deadline and in response to notice. *See supra*. at 12-14.

- The FC argues the IA conservatively assumed every claimant with valid POM will receive either a disease or an expedited payment. What the IA assumed is that almost all of them would qualify only for an expedited claim and would *not* file a disease claim. There is nothing "conservative" about such an assumption, or about the IA's assumption that only a tiny number of claimants who have not yet filed POM will end up doing so—even though there has been no requirement for them to act yet. *See*

[15] A portion of the remaining claimants received letters in 2010 reminding them that the final filing deadline would occur 9 years later. *See* Exh. C to DCC Reply (letter index).

[16] Similarly, there is no basis to virtually guarantee the IA's assumption that only 2% of thousands of claimants with deficient POMs will be able to cure, other than the FC's bald statement that "[g]iven the strict requirements for providing acceptable POM, the likelihood of cure after this significant passage of time is slim." FC Supp. Brief at 22. *See also* DCC Opposition at 15; Hinton Reply Dec. at ¶¶ 23-25.

Hinton Reply Dec. at ¶¶ 41-45.

- The FC also argues the IA conservatively included a worst case forecast for Increased Severity claims. As DCC already described, this is simply not the case. *See id.* at ¶ 26.

Additionally, the FC asserts that the IA's estimate is supported by the experience of the MDL-926 and its RSP. FC Supp. Brief at 14. But the RSP experience is not directly relevant. In the RSP, claimants with the most common compensable conditions—equivalent to Disease Option I claims—had to be filed in 1994 before the commencement of RSP processing. January 12, 2012 Supplemental Declaration of Paul J. Hinton (Exh. 2 to Hinton Reply Dec.) at ¶ 10. The filings at the end of the RSP consisted of the less common conditions equivalent to Disease Option II. In contrast, the Plan allows claimants with the common Disease Option 1 conditions to file claims until the end of the program. *See id.;* Annex A (Exh. B to DCC Reply) at §6.02(d)(viii). Even an assumption-based computation should recognize the fact that more individuals will suffer from the common Option 1 conditions than the less-prevalent Option 2 conditions that were the primary submission at the end of the RSP. The RSP does not support a finding that FPPs are virtually guaranteed.

Finally, as previously noted, the FC is in the process of auditing and reconciling the claim data. While the FC indicates that there is no criticism of the data, the reconciliation process—which is not complete—has revealed significant

numbers of filings that require additional review and that may result in additional claim payments not previously included in any computation.[17] This fact alone requires a conclusion that the IA analysis cannot provide the requisite certainty.

**B. The FC Misstates Or Ignores DCC's Evidence.**

The FC cavalierly rejects DCC's challenges to the IA Report, alleging that DCC's arguments are either "factually inadequate, do not fit the prediction methodology, or have no evidentiary support." FC Supp. Brief at 24. In fact, the FC fails to even consider the evidence presented by DCC's experts. The FC simply ignores the Rosen and Vairo Declarations, which demonstrate the type of assurance required before allowing the distribution of lower priority payments from limited funds operating under standards consistent with the virtual guarantee requirement. The FC also misstates the evidence presented by DCC's expert Paul Hinton. The FC says that the IA "reviewed literature on relevant diseases" and found it "unlikely" that the relevant population would "see an increase in 'defined' diseases." FC Supp. Brief at 18. Yet, DCC's expert showed the high prevalence rate of many conditions required for assertion of Disease claims, which demonstrates significant risk to the assumptions in the IA Report. *See* Hinton

[17] For example, the SF-DCT has provided an initial report intended to identify rupture claims submitted without a claim form that have never received a notification of status letter and that may be eligible for a rupture payment. This initial report advises that there are over 21,000 such claims. *See* Exh. I (May 16, 2017 email from S. Washington to A. Phillips). The IA does not account for all these claims. *See* IA Report at 13; Hinton Reply Dec. at ¶ 25.

Reply Dec. at ¶¶ 32-39.

Further, despite acknowledging that the risks to FPPs cited by DCC "are real," the FC asks this Court to ignore the "virtual guarantee" standard by claiming that those risks must "fit" the IA methodology and that "[r]isks or uncertainties that do not fit into the [allegedly] accepted methodology" cannot deter a finding that the standard has been met. FC Supp. Brief at 16-17. This flawed reasoning is erroneous legally and factually. As noted above, DCC's criticism of the FC's reliance on the IA Report in these circumstances does "fit" the methodology. DCC's expert showed, for example, that using the IA's own methodology but simply changing one or two assumptions eliminated the proclaimed "surplus" that resulted from nothing more than application of the assumptions used by the IA. *See* Hinton Reply Dec. at ¶¶ 47-50. Not only did Hinton's critique "fit" the IA's methodology, it showed why that methodology fails to meet the virtual guarantee standard—and to the extent criticism and evidence must "fit" something, it must "fit" a proper analysis of whether the "virtual guarantee" standard has been satisfied.

Finally, the FC mischaracterizes DCC's position when it argues that the "fundamental criticism of the IA's methodology arises out of an inability to eliminate all future risks" or that there "cannot be any assumptions." FC Supp. Brief at 15-16. DCC's position is not that assumptions and projections are

impermissible or that all future risk must be eliminated—the "virtual guarantee" standard requires near zero risk, but not zero risk. Rather, DCC's position is that a projection may be used *only* if it meets the "virtual guarantee" standard. As the Sixth Circuit explained:

> one of Appellant's experts criticized ARPC's methodology for failing to specify the level of confidence in its projections. This criticism does not allege that the projections are necessarily "misleading or inaccurate," but rather that they do not prove what they are cited as proving, i.e., high confidence in an accurate and precise projection.

*In re SF-DCT*, 592 Fed. App'x. at 480. That same criticism applies now because the FC has again chosen to rely on the same insufficient analysis that does nothing to quantify the many risks that remain inherent in the IA's assumptions and projections. Using the FC's own position: in the absence of any such evidence, there is simply no basis to find that the estimate relied on by the FC "virtually guarantees" FPPs.

Although the FC states it "remains concerned about bankruptcy inequities should Second Priority Payments not be authorized" (FC Supp. Brief at 25), DCC respectfully submits that the appropriate answer is that deferring second payments to those who already received their first payments until all the FPPs are "virtually guaranteed" is both (i) the equitable solution dictated by bankruptcy principles to assure that *Second* Priority Payments do not put *First* Priority Payments needlessly at risk, and (ii) mandated by the Plan requirements and the Sixth Circuit's ruling.

## Conclusion

For the foregoing reasons and those set forth in the Opposition and DCC's Reply, DCC and the DRs respectfully request that the Court deny the Recommendation and Motion.

Dated: May 17, 2017

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

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| **IN RE:** | | |
| **DOW CORNING CORPORATION,** | § | **Case No. 00-CV-00005 -DT (Settlement Facility Matters)** |
| **REORGANIZED DEBTOR** | § | **Hon. Denise Page Hood** |

## CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2017, I electronically filed the *Response of Dow Corning Corporation and the Debtor's Representatives to the Supplemental Brief to Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments* with the Clerk of the Court using the ECF system. The persons listed below were sent notification through the ECF system.

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