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 FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE PARTIAL PREMIUM PAYMENTS

TO THE HONORABLE DENISE PAGE HOOD
UNITED STATES DISTRICT JUDGE:

The Claimants' Advisory Committee ("CAC") submits this Response to the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments (the "Recommendation"), dated October 7, 2011, and respectfully states as follows:

Preliminary Statement

The CAC supports the Finance Committee's Recommendation and urges the Court to approve it promptly so that breast implant claimants in the Settlement Facility – Dow Corning Trust ("SF-DCT" or the "Trust") may receive at least a portion of the Premium Payments promised to them in 1999 as an inducement to support Dow Corning's Plan,[1] which permitted Dow Corning to emerge from bankruptcy and resume profitable operations in 2004. At the time of confirmation, Dow Corning's expert Dr. Frederick Dunbar projected that *full* Premium Payments would be made by the seventh year of the settlement program, which was

[1] Abbreviated terms not defined herein have the meanings assigned to them in the Dow Corning Plan documents.

recently completed, even though he forecasted a significantly *higher* level of claims payments than has actually materialized in the SF-DCT.

The Plan contemplates that the parties will rely largely on the work of two designated neutrals – the Independent Assessor ("ARPC") and the Finance Committee, with support from the Financial Advisor – to determine when claims experience indicates that there will be sufficient funds to approve Premium Payments. While the Plan provides a right to be heard for Dow Corning and the CAC (as well as remaining non-settling claimants in the Litigation Facility who might be affected – a moot point), the Plan does *not* contemplate that disagreements over the approval of Premium Payments will play out as a full-scale, de novo litigation. To the contrary, as this is merely the implementation of a *settlement*, the parties expressly agreed in the Plan to seek expedited, streamlined procedures to speed approval for the contemplated payments. To that end, Dow Corning and the CAC have agreed to cooperate to complete briefing and any necessary limited discovery in time for a final hearing on this matter on December 12, 2011.

As the Recommendation observes, the CAC has been urging the Finance Committee since 2009 to request authorization to make Premium Payments. 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 potential scenarios that its projections over the last three years have shown *any* possibility of exceeding the funding cap.

In view of that history, the CAC believes that the Finance Committee's decision to recommend payment of only 50 percent of accrued premiums at this time is overly conservative, because the consistent experience of the SF-DCT indicates that it is highly likely that enough funds exist to pay *full* premiums. However, the CAC supports the Recommendation as within the reasonable exercise of the judgment entrusted to the Finance Committee under the Plan. There can be no good faith argument that sufficient funds do not exist to make *at least* the 50 percent payment sought by the Recommendation. We hope that all parties can agree on that conclusion, but in the event Dow Corning or any other party determines to contest it, we respectfully request the Court to keep the parties on track towards a prompt resolution of the issue so that Premium Payments can be paid as expeditiously as possible.

Factual Background

The Premium Payments provided for under the Plan – an extra 20 percent on all approved and paid disease claims, and an extra 25 percent (or $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, coupled with 15 years of experience in the MDL-926 Revised Settlement Program ("RSP"), and confirmed by recent projections generated by ARPC, all demonstrate that we have reached an appropriate juncture to issue *at the very least* a significant portion of the promised Premium Payments.

A. Background and Funding Structure of Dow Corning Settlement

As the Court is aware, the Plan provides for funding of up to $2.35 billion Net Present Value ("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 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 $545 million in disease claims and $424 million in rupture claims in Class Five. *See* May 2011 Independent Assessor Report ("IA Report") at 45 (attached to the Recommendation at Ex. L). Estimated Premium Payments due on these amounts total approximately $216 million in nominal dollars, $222 million including payments in Classes 6.1 and 6.2, or a total NPV of approximately $128 million. *Id.* at 89.

Premium Payments are Second Priority Payments that can be paid only with court authorization. Section 7.03 of the Settlement Facility Agreement ("SFA") (attached to the Recommendation as Ex. A) provides that "the Finance Committee shall file a recommendation and motion with the District Court requesting authorization" to pay Second Priority Payments. 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 Section 7.01(d). Second Priority Payments may be made upon a finding by the 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 (at 6), the Plan does not assign any party the burden of proof in connection with this finding.

The concept of "assuring" payment of First Priority claims does not and cannot imply an absolute guarantee. In 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 Court should apply a standard of *reasonable* assurance. *See also* SFA § 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).

The SFA authorizes approval of *partial* Premium Payments. Section 7.03(a) itself expressly recites that, upon the Court making the requisite solvency finding, "then the Second Priority Payments, *or some portion thereof*, may be distributed." (Emphasis added). Indeed, the entire SFA is crafted to permit partial or reduced payments as necessary to balance the dual goals of paying claims promptly and maintaining solvency:

- Section 7.01(c)(i) provides that "all categories of payments are subject to reduction if necessary to ensure payment in full of First Priority Payments (subject to the limits of the Settlement Fund and the Litigation Fund)."

- Section 7.02(d) permits installment payments of any type of Allowed Claims if the funds available under Dow Corning's payment obligations are inadequate to pay such claims in full.

- Section 7.03(c) permits claim payments to be reduced or deferred if projections show that reduction is necessary to pay all First Priority claims or to assure equitable distributions to claimants within the funding caps, with subsequent payments permitted if later projections demonstrate the availability of adequate funds.

The solvency analysis required by Section 7.03(a) cannot be performed merely by projecting potential future claims and comparing that amount to future available funding, because the Plan contemplates that interest and investment income of the Trust may be used to pay claims without affecting the funding cap. For example, the Funding Payment Agreement ("FPA") expressly provides that interest earned on $905 million out of the $985 million initial payment after the Interest Accrual Date is *excluded* from the $2.35 billion NPV calculation. *See* FPA § 2.01(a) (attached to the Recommendation as Ex. C). Moreover, Section 3.02(a)(ii) of the SFA defines the Settlement Fund as including all monies paid into the Settlement Facility under the FPA "and all earnings thereon, if any."

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 has been paid into the Trust, and approximately $309 million in interest, investment earnings, realized gains, and other income has accrued. The Trust has paid claims and administrative expenses of approximately $1.575 billion, leaving a cash balance at the end of 2010 of approximately $321 million. IA Report at 63. These amounts are all in nominal dollars.

Only when this balance has been paid down and funds are needed actually to pay claims over a specified reserve (the larger of $1.0 million or three months projected expenses) can the SF-DCT seek further contributions from Dow Corning. At that point, the Trust may begin to make draws, based on claims actually allowed and paid, up to the maximum Payment Ceiling then in effect. The Initial Payment Ceilings are set forth in the FPA at Section 2.01(b), but have been adjusted based on cash paid into the Trust so as to maintain the projected NPV cap of $2.35 billion. Unused ceilings roll forward with seven percent added each year to serve the same purpose. *See* FPA § 2.02(e).

Because the large remaining balance in the Trust has made it unnecessary to draw additional funds, substantial amounts are available under the Payment Ceilings when needed. As the Court is aware, the parties have submitted to the Court for resolution their dispute regarding Dow Corning's asserted right to a Time Value Credit ("TVC") in connection with the Initial Payment. However, even assuming that Dow Corning prevails in this dispute, the available Payment Ceiling in 2011 is approximately $160 million. If this amount is not used and rolls over, the total Payment Ceiling available in 2012 would be approximately $238 million. At least another $134 million is available in each of the next four years. Cash flow is simply not an issue in the approval of Premium Payments.[2]

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 Payments. The starting point for this analysis is the funding cap itself. Because the Litigation Fund cannot be used to pay Second Priority claims, the basic cap is the $1.95 billion Settlement Fund. However, approximately $27.9 million NPV has already been or is 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 Settlement Fund cap. IA Report at 61. That reduces the amount that must be reserved in future funding as the "Litigation Fund" to $372 million, and the amount of total funding that may be paid into the Trust without invading the Litigation Fund now totals $1.979 billion.

[2] The calculations of the Payments Ceilings have been provided by the Financial Advisor.

Thus, the measure of solvency is whether the NPV of all Qualified Transfers necessary to cover current and future First Priority claims leaves sufficient room under the $1.979 billion effective funding cap to pay some or all of the accrued Premium Payments.[3]

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 data exists. All available indicia show that under any reasonably foreseeable scenario Premium Payments may 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 the TVC dispute; if the CAC prevails, that would provide an additional cushion of nearly $200 million, making even clearer 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: that is, 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 Frederick Dunbar projected the Settlement Facility's liabilities net of litigation costs at $2.342 billion (nominal) for claims payments with premiums plus approximately $88 million (nominal) for administrative

[3] The Recommendation states (at 14) that approximately $31 million has been paid out in litigation claims; 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., $1.950 billion plus $31 million).

costs, or a total of $2.43 billion. This translates to $1.88 billion NPV, based on his yearly projections. *See* Recommendation, Ex. E, at 20, 21. Dr. Dunbar's forecasts were therefore well below the Settlement Fund cap. Even so, actual breast implant claims experience in the SF-DCT has been running approximately 25 percent *below* Dr. Dunbar's projections through the first seven years of the program ($1.598 billion projected versus $1.206 billion actual, in nominal dollars).

ARPC has conducted six full scale projections of the SF-DCT's potential liability, yearly since 2005, each of which has been presented to the Court after Dow Corning and the CAC had the opportunity to suggest any necessary corrections or additions. Each projection has 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% of claimants who ever file an acceptable Proof of Manufacture (POM) form will ultimately receive either a disease payment or an expedited release payment – something that obviously cannot happen as many claimants will surely fail to surface and apply for either benefit.

ARPC has also run a series of additional projections over the years to take account of potential contingencies ("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 this Court's rulings on 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 will be refiled and qualify at a lower level) appeared to be more speculative. Over time, many of these

scenarios have been resolved. For example, the Sixth Circuit's ruling on Disability A eliminated a contingency of approximately $27 million NPV from ARPC's projections. *See* IA Report at 11.

The upper bound of ARPC's projections each year has thus been defined by adding to the forecast under the more conservative "constant" model the total additional sum of all of the projected "scenarios" on the assumption that they will all occur at 100 percent of the projected amounts. Given ARPC's conservative approach, it is not surprising that *actual* claims experience in the Trust has run below this conservative upper bound. For example, the ARPC reports for 2007 through 2009 projected estimates of total claims that would be paid in the immediately following year of at least $228.4, $104.0, and $178.5 million. The actual claims paid in 2008 through 2010 were $123.3, $100.6, and $70.1 million – under the one-year forecasts by $105.1, $3.4, and $108.4 million respectively. The ARPC report for 2010 projected at least $153.5 million in payments, but through September 30, 2011, only $31.5 million has 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 preceded the SF-DCT by several years due to Dow Corning's bankruptcy, and thus 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 Dow Corning's in size, age, and projected liabilities, and was based entirely on breast implant claims, which are 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.[4]

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

C. ARPC's 2010 Report

The latest ARPC projections, presented to the Court on June 9, 2011, are consistent with this picture. These models project 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 $1.979 billion. IA Report at 78, 76. When all currently accrued and future projected Premium Payments are added to these models, the total projected Qualified Transfers needed still come in below the cap: the totals are approximately $1.930 for the decay model and $1.962 for the constant model, varying slightly based on the timing of certain payments. IA Report at 95, 93 (assuming 2013 payment).

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

[4] These figures were provided by Ed Gentle, Escrow Agent for MDL-926.

proof in rupture cases; and certain assumptions relating to future rupture claim filing by claimants with acceptable POMs and re-filing of failed disease claims. It remains unlikely that all four scenarios will materialize in the full amount, but in any event the total NPV impact of that eventuality is only about $20.4 million. *See* IA Report at 10.[5]

ARPC projects that, even if *all* of these contingencies fully materialize, 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 – well under the cap. Adding *full* premiums increases those totals to between $1.952 billion and $1.967 billion under the decay model (depending on the timing of certain payments) – still under the cap – and between $1.984 billion and $1.999 billion under the constant model.

Thus, only one of ARPC's many projections (the higher "constant" base case *plus* all scenarios materializing *plus full* current and future premiums) presents a possibility of exceeding the cap, and then only by $5-20 million NPV. (In other words, if claims experience is closer to the decay model, then *every other contingency* identified by ARPC can materialize at 100% and *full Premiums could be paid* without threatening the funding cap.) Moreover, since none of the "scenarios" is likely to result in any payments during 2011, the highest remaining version of that projection (in which all the contingencies materialize in 2012, itself far-fetched) is $1.992 billion, or only $13 million over the effective cap.

Additionally, as noted, this upper-end 2012 projection includes approximately $28 million NPV in projected *future* Premium Payments, which are not part of the future First Priority Payments that must be protected under Section 703(a) of the SFA. The CAC does not

[5] The IA Report also refers to certain other potential contingencies regarding increased severity disease payments and certain vaguely described categories of unprocessed claims. IA Report at 13. ARPC has not viewed these additional factors as sufficiently concrete to influence its analysis.

believe that the Facility 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 supports paying future premiums on a going-forward basis under the Finance Committee's 50 percent recommendation. We are confident that sufficient funds will eventually be available to pay future premiums at *100 percent*, but they do not need to be part of the current projection. 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. The CAC respectfully submits that this range of projections provides reasonable assurance of the payment of all future First Priority Payments even after paying 100 percent of *all* current Premium Claims.

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, Debtors' 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 met with the Court to present and preliminarily discuss the IA Report.

Following these initial discussions, the Finance Committee determined that it was not prepared at this 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 the premiums earned through the end of 2010 (i.e., based on "historical" claims). ARPC reported that paying 50 percent of the 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* Recommendation, Ex. M. These cushions are 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 on June 29, 2011, serving it on the only parties entitled to be heard on this matter: the Debtors' Representatives, the Shareholders, the CAC, and non-settling claimants holding unresolved claims in the Litigation Facility. *See* SFA § 7.03(a).[6] The Court entered an initial scheduling order in connection with the Recommendation on August 15, 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." Recommendation, Ex. K, at 3. ARPC also provided a memorandum dated September 22, 2011 forecasting the impact of approving 50 percent premium payments 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

[6] The Plan Proponents provided in the SFA that notice should be given to non-settling claimants in the event any recommendation for the approval of Second Priority Claims could affect the funds available to resolve claims in the Litigation Facility. Since claims processing in the Litigation Facility is substantially completed and approximately $370 million NPV remains available in the Litigation Fund, this concern is moot and there should be no reason for any remaining non-settling claimants to be heard on this matter. *Settling* claimants within the SF-DCT are not provided with standing under the SFA to challenge the Finance Committee's Recommendation, among other reasons because their interests are represented by the CAC. Prior to the deadline for responding to the Recommendation, a representative of certain settling Korean claimants filed an objection. These claimants lack standing to object to the Recommendation, but the CAC will in any event address this objection in its reply.

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. Recommendation, Ex. J, at 2. These cushion amounts were projected to be adequate to pay approximately 6,550 and 7,160 additional unforecasted disease claims, respectively. *Id.*

The parties thereafter conferred with the Court, which entered a revised scheduling order on October 4, 2011 directing that simultaneous initial responses to the Recommendation be filed on or before November 11, 2011 and simultaneous replies (limited, pursuant to the August 15 order, to the Finance Committee and those parties that file initial responses) on or before November 30, 2011. Pursuant to the August 15 order, the parties filing papers are to discuss any need for discovery and bring the matter before the Court if they cannot agree, and in any event complete any discovery prior to the final hearing on the Recommendation. Under the revised schedule set in the October 4 order, that hearing is scheduled for December 12, 2011.

Argument

THE RECOMMENDATION TO PAY AT LEAST HALF OF ACCRUED AND FUTURE PREMIUM PAYMENTS SHOULD BE APPROVED SINCE THE AVAILABLE DATA SUPPORTS THE PAYMENT OF FULL PREMIUMS

The CAC respectfully suggests that the significant information available from years of experience in processing and paying claims in the SF-DCT would support a finding that *full* Premium Payments can be approved. There exists, today, reasonable assurance that all First Priority Payments contemplated under the Plan plus full Premium Payments can be made without exceeding $1.979 billion in Qualified Transfers (the Settlement Fund cap plus Qualified Transfers charged to the Litigation Fund). However, the CAC recognizes that, under the Plan, the parties agreed to entrust the judgment about when to make Premium Payments to the Finance Committee, based on input from ARPC and with approval of the Court. Absent a significant

abuse of the Finance Committee's discretion, the parties should abide by its judgment. The CAC thus endorses the Finance Committee's decision to recommend the authorization to pay 50 percent of accrued and future premiums at this time. Approval of this conservative Recommendation should not be a close call.

At the outset, as demonstrated above, the Plan clearly contemplates that any and all Allowed Claims may be paid in installments or reduced in amount as necessary to assure an adequate funding stream. Indeed, the SFA *specifically* contemplates that the Court might authorize the payment of "Second Priority Payments, or *some portion thereof*." SFA § 7.03(a) (emphasis added). We do not understand that Dow Corning disputes the Court's basic authority under the Plan to order issuance of partial Premium Payments.

Nor can there be any good faith dispute that ample funds exist to pay 50 percent of premiums. As noted above, to make this determination, the Court must find that all First Priority claims have been paid or that "adequate provision has been made to assure such payment." *Id.* The CAC believes that this language was intended to require only a finding of reasonable assurance, not an absolute guarantee, since the parties specifically did *not* require that all First Priority Payments actually be *made* before Premium Payments could be authorized.

As noted in the Recommendation (at 6-7), in the analogous setting of contract assumption under Section 365(b)(1)(C) of the Bankruptcy Code, courts have given the phrase "adequate assurance of future performance" 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. 1993 & Supp. 2010). Here, similarly, the Court should apply a standard of reasonable assurance that reflects the balance between the interests of current and future

claimants built into the Plan documents. As reflected in the Confirmation record, the parties expected that premiums *would already have been paid by now* even though Dow Corning's expert projected that the Trust would have already paid out approximately $264 million *more* in claims by the end of the seventh year of the settlement program than has actually been paid by the SF-DCT. That expectation, based on testimony of Dr. Dunbar presented by Dow Corning, proves the parties' intention that "assurance" must mean something short of an absolute guarantee.

Regardless of the standard of likelihood applied, payment of only 50 percent of premiums leaves a sufficient cushion to make it exceedingly likely that all future First Priority Payments can be made within the Settlement Fund cap. As the Finance Committee notes in its Recommendation, this partial payment will leave a cushion of *at least* $68 million NPV in the Settlement Fund. Recommendation at 12. Indeed, there are a series of factors that indicate that such an estimate errs significantly on the *conservative* side and that the actual cushion would probably be much *greater* than $68 million NPV:

First, the estimated cushion is based on the *constant* model – which assumes that claims activity continues at the same level going forward as it has in recent years. This is an exceptionally conservative assumption – in fact, claims performance has generally run much closer to ARPC's *decay* model, and as time goes by is likely to decline even further. As the Finance Committee states in the Recommendation, "the trend in relation to the Dow Corning settlement, as well as in many other mass tort settlements, is for the claims rate to drop over time." Recommendation at 11.

Second, this projection assumes that Dow Corning prevails on the TVC dispute and assigns no value to the possibility that the CAC may prevail or that the parties may at some point settle the dispute. *See id.* at 10.

Third, the projection assumes that *all* of ARPC's projected "scenarios" – some of which are highly speculative – materialize at the full amount, an unlikely occurrence. *See id.* at 11.

Fourth, even if unexpected events caused the projected cushions to be insufficient (and we are aware of no basis to believe that such an event is more than a remote possibility), there remains approximately $370 million in the Litigation Fund that could be accessed to pay remaining base claims. *See id.* at 3, 14-15.

To be sure, there are potential contingencies that could increase the Qualified Transfers needed *above* ARPC's projections, but they are likely to be limited and offset by one or more of the factors discussed above. These include the speculative possibility that claims will depart from past experience and actually *increase* rather than decreasing in the waning years of the SF-DCT, or that there will be an unexpected dramatic increase in the seriousness of diseases experienced by the claimant population. The existing cushion, however, more than adequately offsets any *foreseeable* departures from the ARPC projections.

Dow Corning can be expected to differ with this conclusion, because it alone among the parties has one interest only: to avoid making future payments to the SF-DCT. Any concerns that Dow Corning expresses for the interests of future claimants must therefore be taken with a massive grain of salt.

Moreover, Dow Corning has participated in discussions and meetings regarding ARPC's work for several years and has never challenged or objected to its basic methodology.

Like the CAC, Dow Corning made suggestions for small corrections and clarifications in ARPC's reports, which have generally been adopted. Only after the Finance Committee indicated that it was prepared to recommend the payment of 50 percent of accrued premiums did Dow Corning begin to articulate what we expect to be its principal argument against the Recommendation: that the Finance Committee somehow has the burden to go beyond ARPC's experience-based projections and conduct some type of additional epidemiological analysis of "the characteristics of the claimant population." Recommendation, Ex. I (June 7, 2011 Letter from Deborah E. Greenspan to Jeffrey S. Trachtman) at 4. But the Plan documents that Dow Corning negotiated and agreed to specifically provide that the Independent Assessor is to focus on analyzing claims *experience* in order to generate projections of likely future claims as the basis for the Finance Committee's premium recommendations. *See* SFA § 7.01(d)(i). The Recommendation is thus appropriately based on precisely the type of projections that the parties contemplated. *See* Recommendation at 13.

More generally, Dow Corning has in the past raised the prospect that unanticipated factors could unexpectedly drive claims up beyond all past and current experience and projections. Although Dow Corning has not yet fully articulated these concerns, they appear to be based on a supposed fear of an unexpected additional surge in disease filings and/or severity as the remaining claimant population ages. But there is simply no factual basis of which we are aware, based on all experience to date in the SF-DCT and the RSP, to conclude that these fears have a realistic possibility of materializing. To the contrary, all experience shows that as the population ages there will be further attrition not just in claimants who remain in touch with the Facility but in the rate of claim filing as well. We will address these concerns further if and when Dow Corning explains them more fully in an objection to the Recommendation.

Contrary to Dow Corning's purported fears, there is a far greater likelihood of *downward* departure from all current projections than there is of any unexpected spike. Experience to date has run consistently below both the Dunbar projections and ARPC's upper bound projections. As noted above, both the ARPC base case and its potential "scenarios" are based on exceedingly conservative assumptions. In addition to all the other factors discussed above, it is in fact likely that many claimants who have already qualified for Premium Payments will be unreachable or fail to cash their checks – providing yet another variable creating a cushion in ultimate solvency. As each of these variables is factored into the probability analysis, the realistic odds of the cap being exceeded become negligible *even assuming the payment of full Premiums*. A fortiori, *half* premiums can be paid without creating an appreciable risk of hitting the cap.

Moreover, the "cushions" discussed above are expressed in NPV dollars. As a practical matter, the "last dollars" will be paid so many years after 2004 that each dollar paid will reduce the NPV funding cap by only approximately 50 cents. Therefore, approximately twice the nominal dollars indicated by each "cushion" will actually be available to pay future claims – e.g., $136 million rather than $68 million. Since future claims are not increased for cost of living, the larger amount of available nominal dollars will assure the payment of that many more potential future claims.

No set of projections is entirely risk free, but we believe that the Court should weigh the undeniably tiny risk of a solvency problem towards the end of the 16 year claim program against the real and continuing prejudice of denying thousands of women who have already timely applied and qualified for settlements the benefit of their bargain when all indications are that plenty of money is available. As the Finance Committee points out, "[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." Recommendation at 14. The SFA was simply not written to require a *guarantee* that future base claims could be paid, only reasonable assurance.

Finally, the CAC endorses the Finance Committee's decision to recommend payment of 50 percent of future premiums as well as those accrued through December 2011, in view of the ample cushion available to make such payments going forward. However, the CAC notes that the Court has discretion, if it prefers, to approve only currently accrued premiums at this time. Nothing in the Plan documents requires any projections or assurances as to the Trust's ability to pay *future* premiums – only base claims – and there is similarly no requirement that later-filing claimants receive their premiums immediately when more timely claimants have been required to wait up to seven years to receive their first premium installments. As the Finance Committee notes (Recommendation at 8 n.5), the Plan favors early filers by setting time limits and providing no cost of living adjustments in benefits. If the Court prefers to preserve a slightly larger cushion, it has the discretion to approve only historical claims now and address future premiums separately at an appropriate time.

For all the foregoing reasons, the CAC respectfully submits that the time has arrived to authorize issuance of *at least* a part of the Premium Payments earned by claimants who have qualified for disease and rupture payments in the Settlement Facility. We hope that Dow Corning will agree that the risks of insolvency are slight and join with us in supporting the Finance Committee's Recommendation. But even if this result cannot be achieved consensually, we believe the Court can and should act promptly to approve the Recommendation and provide the necessary authority for the SF-DCT to begin making the promised payments.

Conclusion

For the reasons stated above and in the Recommendation and accompanying papers, the CAC respectfully requests that the Court approve the Recommendation and grant such other and further relief as is just and appropriate.

Dated: New York, New York
November 11, 2011

Respectfully submitted,

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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**

CERTIFICATE OF SERVICE

I hereby certify that on November 11, 2011 a true and correct copy of the following response was served via first class mail or electronic mail upon the parties listed below:

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