

**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

**FINANCE COMMITTEE’S FIRST AMENDED RECOMMENDATION AND MOTION
FOR AUTHORIZATION TO MAKE PARTIAL PREMIUM PAYMENTS**

Pursuant to Article VII of the Settlement Facility and Fund Distribution Agreement between Dow Corning Corporation and The Claimant’s Advisory Committee (the “Settlement Facility Agreement”, attached as Exhibit “A”), the Finance Committee requests authorization from the Court to implement the following distribution recommendation in reference to the Settlement Facility-Dow Corning Trust (the “Settlement Facility”), a Qualified Settlement Fund under the Internal Revenue Code:

As soon as practicable after Court approval, fifty-percent Premium Payments from the Settlement Facility to Claimants whose claims were paid before January 1, 2011 (“Historical Claimants”), and fifty-percent Premium Payments from the Settlement Facility to claimants whose claims are paid on or after January 1, 2011 (“Future Claimants”).¹

I. BACKGROUND

The Settlement Facility became effective in 2004 as a mechanism to resolve certain claims against Dow Corning. (*See* Settlement Facility Agreement § 2.01.) The bulk of the claims arise from allegedly defective breast implants manufactured by Dow Corning. The claims settlement requirements and administration parameters are set out in the Settlement Facility

¹This recommendation assumes that all approvals and challenges to these 50% Premium Payments are complete so that the payments can be made no later than 2012. If that is not the case, a recommendation seeking premiums well in excess of 50% may be necessary.

Agreement. (*See* Settlement Facility Agreement.) In the seven years since it began paying claims, the Settlement Facility has paid claims and maintained data by the types of claims it has paid. (*See* Settlement Facility Agreement §§ 4.05, 7.01(d)(i).) Pursuant to the Settlement Facility Agreement, that data is periodically analyzed by a third party Independent Assessor, ARPC. After its analysis, ARPC also makes projections of expected future claims. (*Id.*)

ARPC's most recent report of claims projections and the supplements to it provide more than adequate assurance that discretionary settlement payments can be made to Historical Claimants and Future Claimants without jeopardizing the Settlement Facility's ability to pay First Priority Claims. By this motion, the Finance Committee seeks authorization to make those payments.

A. The Settlement Facility's Operations.

The Settlement Facility Agreement sets out a carefully thought-out system for paying claims. The Finance Committee is the body charged with distributing Settlement Facility funds, defending the Settlement Facility, and ensuring that the Settlement Facility Agreement is followed. (*See* Settlement Facility Agreement at § 4.08.) The Finance Committee has no financial stake in whether payments are made.²

The system of payments set out in the Settlement Facility Agreement classifies different types of payments for different types of claims. (*See id* § 7.01.) The payment types include: "First Priority Payments," "Settlement Fund Other Payments," "Second Priority Payments," and "Litigation Payments." (*Id.*) All of the payment categories are not treated the same; the

² There are, however, two other groups that theoretically could be financially affected by Facility payments: (1) Dow Corning, the entity that funds the payments; and (2) the Claimants' Advisory Committee ("CAC"), the entity that represents the claimants who receive those payments. (*See* Settlement Facility Agreement at § 4.09.) Pursuant to § 7.03(a) of the Settlement Facility Agreement, the CAC, Dow Corning's Representatives, the Shareholders (Corning, Dow Chemical, and Dow Holdings, Inc.), and the Non-Settling Personal Injury Claimants with pending claims are being served with this motion and recommendation.

Settlement Facility Agreement mandates that certain types of claims be paid before others. (*Id.* § 7.01-7.03.)

The payment hierarchy is straight-forward. “First Priority Claims” are to be paid first, and “Second Priority Claims” are to be paid with money that remains or is expected to remain after First Priority Claims are paid. (*See* Settlement Facility Agreement § 7.01(c).) The group of Second Priority Claims includes “Premium Payments.” (*See id.* § 7.01(a)(iii).) Premium Payments allow an extra twenty percent payment to all approved and paid First Priority claimants who meet certain settlement criteria and an extra twenty-five percent payment to all approved and paid First Priority claimants who show that a breast implant ruptured before it was removed from a claimant’s body. (*See* Annex B, Settlement Grid Personal Injury Claims, attached as Exhibit “B”; *also see* Settlement Facility Agreement § 7.01(a)(iii).)

B. The Settlement Facility’s Funding.

The net present value (“NPV”) of the Facility is \$2.35 billion. (*See* Funding Payment Agreement Art. 2.01, attached as Exhibit “C”.) Of that amount, \$1.95 billion is the “Settlement Fund” that can be used to either pay First Priority Claims or to make Premium Payments. The remaining \$400 million is allocated to a separate “Litigation Fund.” (*See* Litigation Facility Agreement between Dow Corning Corp. and DCC Litigation Facility, Inc., attached as Exhibit “D”.) The Settlement Facility can use money allocated to the Litigation Fund to pay First Priority Claims in the increasingly unlikely event that the \$1.95 billion Settlement Fund is insufficient to cover First Priority Payments. (*See id.*; Settlement Facility Agreement at §§ 3.02(a); 7.01(b)(ii); 7.03(b).)

While money allocated to the Litigation Fund can be used to pay First Priority Claims, it cannot be used to make Premium Payments. (*See* Settlement Facility Agreement at § 7.03(b).) Further, any money remaining in the Litigation Fund at the end of 2019 will revert to Dow

Corning.³ (*See* Litigation Facility Agreement at § 8.03(b) (“Upon termination of the Litigation Facility under this Agreement . . . the balance, if any, of the Litigation Facility assets . . . shall be distributed to Debtor.”).)

As is detailed below, Premium Payments cannot be made until the Finance Committee requests authority from the Court to make the payments and the Court grants such authority. (*See* Settlement Facility Agreement at § 7.03(a).) The CAC first requested that the Finance Committee seek Court authorization to make Premium Payments in December 2009. (*See* Ltr. of Dec. 9, 2009, from Jeffrey Trachtman to Prof. Francis McGovern, et al., attached Exhibit “F”; Ltr. of Sept. 15, 2010, from Jeffrey Trachtman to Prof. Francis McGovern, attached as Exhibit “G”.) The Finance Committee did not request that the Court authorize Premium Payments at that time, however, because it wanted assurance that there were sufficient monies in the Settlement Fund to pay new and existing First Priority Claims. (*See, e.g.*, Ltr. of Oct. 1, 2010 from Finance Committee Dow Corning Trust to Hon. Denise Page Hood, attached as Exhibit “H”.) Two years later, after evaluating the additional and updated analysis, it is clear that the claims projections and underlying methodology are sound, and that partial Premium Payments reasonably can be made not only to Historical Claimants but also to Future Claimants in a manner that ensures that there is adequate provision in the Settlement Fund to pay new and existing First Priority Claims.

³ Dow Corning has a remainder interest in the Litigation Fund. Under the terms of that remainder interest, if Premium Payments are made now as opposed to 2019, it is theoretically possible that unanticipated new First Priority Claims will exhaust the Settlement Fund, and that payment of those new First Priority Claims will require the Finance Committee to use the Litigation Fund. That would leave less money to revert to Dow Corning. Dow Corning has, however, recognized the improbability of such a scenario: in connection with the 2001 settlement confirmation hearing, Dow Corning’s expert, Fred Dunbar, reported that he expected Premium Payments to be made in 2011. (*See* Report of National Economic Research Associates, Summary of Funding Adequacy at n. 2, attached as Exhibit “E” (discussing assumption that premium payments would be made after a seven year accrual period).)

C. Procedure for Determining Whether Premium Payments are Appropriate.

Importantly, Second Priority Payments are not to be held until the First Priority Claims' process is complete. (See Settlement Facility Agreement §§ 7.01(c) and 7.04(a) (discussing procedure for Premium Payments prior to conclusion of claims process).) Rather, the Settlement Facility Agreement contemplates that Second Priority Payments will be made contemporaneously with First Priority Payments where, as is the case now, adequate provision has been made to ensure money will be left to pay First Priority Claims.

Section 7.01(c) of the Settlement Facility Agreement provides in part:

(iv) *Second Priority Payments.* Premium Payments shall be deemed "Second Priority Payments." Second Priority Payments may not be distributed unless and until the District Court determines that all other Allowed and allowable Claims, including Claims subject to resolution under the terms of the Litigation Facility, have either been paid **or adequate provision has been made to assure such payments.**

(v) *Timing.* Noting herein shall be interpreted as limiting the discretion of the Finance Committee with the approval of the District Court 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.**

(Settlement Facility Agreement § 7.01(c) (emphasis added).)

Section 7.03(a) further provides that, if there is adequate provision for payment of First Priority Claims, the Finance Committee shall file a recommendation and motion with the Court requesting authorization to distribute full or partial Premium Payments, accompanied by a detailed accounting of the status of claims payments (the "Accounting"). (See Settlement Facility Agreement §§ 7.01(c)(iv), 7.03(a).) After such a recommendation is made, the Court is to consider the recommendation and determine whether there is in fact adequate provision for payment of First Priority Claims will be paid in light of available assets. (*Id.* §§ 7.03(a);

6.01(a).) An affirmative determination of that issue by the Court means that payments of Second Priority Claims or some portion of them can be made. (*Id.* § 7.03(a).)

D. Neither the Finance Committee nor Anyone Else has the Burden to Prove Premium Payments Should be Made.

The Settlement Facility Agreement does not place any burden of proof upon the Finance Committee with regard to a Premium Payment recommendation. (*See* Settlement Facility Agreement § 7.03(a).) Instead, the Court simply must consider the merits of any recommendation and determine whether adequate provision has been made to assure payment of First Priority Claims. (*Id.*) The Court’s determination is binding and cannot be overturned unless an objecting party can prove on appeal that the Court abused its discretion. (*Id.*)

E. “Adequate Provision” Exists When it is More Likely than not there Will be Enough Money To Pay First Priority Claims.

What constitutes adequate provision to assure payments is determined under New York law, which governs the construction of the Settlement Facility Agreement. (Settlement Facility Agreement § 10.07.) Several federal courts in New York and elsewhere have construed “adequate provision” in various contractual contexts, most notably in reference to bankruptcy obligations.

Courts have been clear—adequate provision to assure payments does not mean absolute certainty or require a guarantee of a future outcome or solvency. To the contrary, the phrase is given a practical, pragmatic construction in light of the facts of each case, and assurance can be “adequate” even if it falls considerably short of an absolute guarantee. *See In re M. Fine Lumber Co., Inc.* 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008); *In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985). **In fact, courts have generally held that adequate provision is shown so long as future performance appears more likely than not.** *See, e.g., In re Natco Indus., Inc.*, 54 B.R. at 440; *In re Res. Tech. Corp.*, 624 F.3d 376, 384 (7th Cir. 2010); Samuel

Williston & Richard A. Lord, A Treatise On the Law of Contracts § 78:54 (4th ed. 1993 & Supp. 2010); *see also Enron Power Mktg., Inc. v. Nevada Power Co.*, No. 01-16034 (AJG), 2004 WL 2290486, at *6 (S.D.N.Y. Oct. 12, 2004) (holding that, under the Uniform Commercial Code, “[i]n appropriate circumstances, a promise to perform can be an adequate assurance”).

II. ARGUMENT AND RECOMMENDATION

The CAC has suggested that Premium Payments should be made immediately and in full. (*See* Ltr. of Dec. 9, 2009, from Jeffrey Trachtman to Prof. Francis McGovern, et al.; Ltr. of Sep. 15, 2010, from Jeffrey Trachtman to Prof. Francis McGovern.) On the other hand, Dow Corning would like to delay all Premium Payments until 2019, when no further First Priority Claims can be asserted. (*See* Ltr. of June 7, 2011, from Deborah Greenspan to Jeffrey Trachtman, attached as Exhibit “I”.) On June 30, 2011, the Finance Committee filed a motion seeking approval of its recommendation that partial premium payments be made to “Historical Claimants” who had asserted claims before January 1, 2011 that were approved. (*See* Dkt. 794, Finance Committee’s Recommendation and Motion for Premium Payments.) Subsequently, ARPC provided additional analysis that provides adequate assurance to justify partial premium payments to both Historical Claimants and “Future Claimants” who have asserted or will assert claims on or after January 1, 2011 that are approved. (*See* Sept. 22, 2011 ARPC Memo Providing Updated Premium Payment Estimates, attached as Exhibit “J”; Sept. 20, 2011, ARPC Memo Regarding its Review of DCT Claims Filings January Through July 2011, attached as Exhibit “K”.)

After requesting and receiving updated and additional analysis, the Finance Committee recommends that the Court authorize a partial, fifty-percent Premium Payment beginning in 2012 (the “Recommendation”). Specifically, the Finance Committee requests that the Court authorize the Finance Committee to implement:

Fifty-percent Premium Payments to begin as soon as practicable to Historical Claimants, those whose claims were paid before January 1, 2011, and fifty-percent Premium Payments to “Future Claimants,” those whose claims have or will be paid on or after January 1, 2011.⁴

The required Accounting that supports the Recommendations is set out in the Report of Independent Assessor, End of Fourth Quarter 2010, Preliminary Report, May 20, 2011 (the “Accounting”), attached as Exhibit “L”. The Accounting is supported by the ARPC’s supplemental analysis. (See Report of Ind. Assessor; Memo of June 14, 2011, attached as Exhibit “M”; see also Memo of Sept. 22, 2011; Memo of Sept. 20, 2011 (updating estimates based on data from January through July 2011).)

The Recommendation should be approved because ARPC’s analysis shows that it can be implemented while ensuring that there is adequate provision that First Priority Claims will be paid.⁵ The Court should authorize the Recommendation as soon as possible because the internal administrative process required to make the payments may take significant time, and time does not work in favor of paying claims. In the years since the Settlement Facility became effective, claimants have died, moved, or otherwise become impossible to track down. This trend will, of course, exacerbate in the future, and delaying Premium Payments will likely result in fewer claimants being paid. That fact would be immaterial if adequate provision could not be made to assure payment of existing and future First Priority Claims. Fortunately, though, there is more

⁴ The Finance Committee is not recommending that other Second Priority Payments, such as Class 16 non-personal injury shareholder payments or increased severity payments be made at this time.

⁵ The Finance Committee notes that the Settlement Facility Agreement contemplates that Premium Payments will be made to the greatest extent possible consistent with ensuring that there is adequate provision that First Priority Claims will be paid. There is no requirement that claimants who have or will be paid after December 31, 2010 receive the same Premium Payment as others. In fact, the Settlement Facility Agreement favors early filers, as evidenced by the fact that the contemplated payment amounts are not adjusted for inflation, and that the Facility self-terminates in 2019, regardless of whether legitimate claims may remain unasserted at that time. The Court therefore has discretion to approve part of the Recommendation, though ARPC’s data supports the approval of the Recommendation in its entirety.

than adequate assurance that those payments can be made, and partial Premium Payments should be made now to maximize the number of claimants who will be paid.

As discussed below, under the most conservative estimate, Premium Payments to the Historical Claimants and to the Future Claimants along with payment of existing obligations will leave more than \$68 million NPV in the Settlement Fund, not including the millions of Litigation Fund dollars that will also be available to pay any new or existing First Priority Claims in the unlikely event that the projections are not accurate. (*See* Report of Ind. Assessor; Memo of June 14, 2011 from ARPC to David Austern; *See* Memo of Sept. 22, 2011; Memo of Sept. 20, 2011.)⁶

The Recommendation provides reasonable assurance that new and existing First Priority Claims will be paid. It also ensures that claimants will receive at least a portion of the Premium Payments to which they are entitled while they are still alive and can be located.

A. Excluding Money in the Litigation Fund, There is NPV \$1.95 Billion in Funds Available to Pay Claims.

Every quarter, an analysis of claims and payments is conducted. (*See* Settlement Facility Agreement § 7.01(d)(i).) Each year, a report on the “the development of projected funding requirements . . . and the assessment of the availability and adequacy of assets in the Litigation Fund and the Settlement Fund” is completed. (Settlement Facility Agreement §4.05; *see also* Settlement Facility Agreement § 7.01(d)(i) (“In conjunction with the Independent Assessor, the Finance Committee shall . . . on a quarterly basis . . . prepare projections of the likely amount of funds required to pay in full all pending, previously Allowed but unpaid and projected future First Priority Payments.”).) The most recent quarterly analysis, which covered the period up to December 31, 2010, indicates that there is \$1.95 billion NPV in the Settlement Fund available to

⁶ Premium Payments to Historical Claimants only plus payment of existing obligations will leave more than \$82 million NPV in the Settlement Fund not including the Litigation Fund.

pay First or Second Priority Claims.⁷ (See Report of Ind. Assessor, at p. 61; Memo of June 14, 2011.) Recently, ARPC confirmed that as of July 31, 2011, the estimates included in the Accounting were still reliable considering the claims experience for the first seven months of 2011. (See Memo of Sept. 20, 2011.)

Further, pending before the Court is Dow Corning's Motion to Enforce Application of Time Value Credits Under the Amended Joint Plan of Reorganization and Related Documents. Dow Corning essentially seeks a determination that it has to pay less money into the Facility going forward because the funds were made available earlier than required by the funding agreements. The Recommendation assumes that Dow Corning will prevail and receive the approximately \$200 million time value credit sought in the motion. (See Report of Ind. Assessor at 59; Memo of June 14, 2011.) If Dow Corning does not win the motion, however, the approximately \$200 million currently allotted to the time value credit will add to the already-substantial surplus provided by the Recommendation.

B. It Will Take \$1.83 Billion to Fund First Priority Claims.

In the Accounting, ARPC performed several cost projections related to First Priority Claims. (See generally Report of Ind. Assessor.) Some of the projections take into account various scenarios that assume the maximum number of First Priority Claims that will be asserted and paid, which in turn will minimize the amount of money available to make Premium Payments. (*Id.*) To ensure that adequate provision has been made for First Priority Claims, the Finance Committee has based its Recommendation upon the most conservative of those

⁷ The Figures in the Report of Independent Assessor, End of Fourth Quarter 2010, Preliminary Report, May 20, 2011 state that there is \$1.978 Billion NPV available to pay claims. This figure, however, is related to how the money in the two funds is allocated. For purposes of comparing the estimated liabilities with the funding available in the two funds, the Independent Assessor assumed that \$1.95 billion of the Settlement Fund is available to pay claims and that \$27.9 million NPV of the Litigation Fund would be available to pay claims. Thus, in the Independent Assessor's Report, the total funding cap is listed at \$1.9779 billion (\$1.95 billion + \$27.9 million).

projections. (*Id.*) That projection estimates that it will take \$1.83 billion to fund First Priority Claims. (*See* Report of Ind. Assessor at p. 66, 88; Memo of June 14, 2011; *affirmed* Memo of Sept. 20, 2011.)

In addition to the effect of the \$200 million Time Value Credits issue, the projection that underlies the Recommendation is conservative because it does not take into consideration future events that could very well increase the amount of money left in the Settlement Facility. First, the projection assumes a constant rate of eligible claimants will continue to make claims. In fact, 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. (*See* Report of Ind. Assessor at p. 66; Ltr. of June 7, 2011.) Second, the projection assumes that the Court will grant the CAC's request that \$7.5 million in tissue expander claims be considered breast implant claims that can be approved and paid. (Report of Ind. Assessor at p. 10.) The issue is currently under reconsideration. (*Id.*)

Third, the projection assumes that certain implant rupture expert evidence that is currently deemed unacceptable will be determined by the Court to be sufficient and admissible, and that an additional \$1.2 million in claims which rely upon that evidence will be approved and paid. (*Id.*) Those claims, however, only can move forward if the Court grants pending motions on the validity of those claims. Fourth, the projection assumes that all of the \$5.2 million estimated to be in a subset of rupture claims will be filed and paid. (*Id.*) Fifth, the projection contemplates a surge in claims at the 2014 explants filing deadline, and another surge preceding the scheduled end of the Settlement Facility in 2019. (*Id.* at p. 25) The rationale for these spikes is that there may be outreach that leads more claimants to file or pursue their claims before the deadlines, thereby possibly causing an increase in new claims. (*Id.*)

C. The Recommendation Provides a Surplus of Between \$68 and \$82 Million.

For the Historical Claimants, implementing the Recommendation, which contemplates fifty-percent Premium Payments to Historical Claimants beginning in 2012, will cost approximately \$69 million NPV.⁸ (*Id.*) Adding fifty-percent Premium Payments for Future Claimants beginning in 2012, increases the cost to approximately \$83 million NPV. (*See Report of Ind. Assessor at p. 89; Memo of Sept. 22, 2011.*)

Making fifty-percent Premium Payments to Historical Claimants will leave an estimated \$82 million NPV remaining in the Settlement Fund to pay any unanticipated claims. (*See Memo of June 14, 2011.*) Adding fifty-percent payments for Future Claimants still will leave an estimated \$68 million NPV remaining in the Settlement Fund to pay any unanticipated claims. (*See Memo of Sept. 22, 2011.*) ARPC has estimated that, making fifty-percent Premium Payments to both Historical and Future Claimants would still leave funds for 6,550 unanticipated disease claims to be asserted, approved, and paid without exhausting the Settlement Fund. (*Id.*) The total number of disease claims expected to be paid after December 2010 is only 8,319, which means that the number of future disease claimants could nearly double projections before the \$400 million Litigation Fund would even have to be touched, much less be exhausted. (*Id.*)

D. The Projections are Based on the Appropriate Information.

There have been suggestions that Premium Payments are inappropriate because: (1) the projections undergirding future payments are based upon trends involving eligible claimants and not on an analysis of the underlying population of claims; and (2) there might be a dramatic spike in the number of claims as the claim population ages and develops symptoms that could lead to claims. (*See Ltr. of June 7, 2011.*) Neither of these concerns has merit.

⁸ If Class 16 Payments were paid at the same time, the costs would increase to just over \$69 million for 50% payments. As noted above, the Recommendations do not include Class 16 payments at this time.

First, an epidemiological-like study is not required; there is no need to analyze claimants who are not eligible to assert claims. As to relying upon past trends, the Settlement Facility Agreement specifically contemplates and dictates that any projections will take into account past trends. (*See* Settlement Facility Agreement at §7.01(d)(i).) Specifically, the Settlement Facility Agreement mandates how projections are to be made, stating:

[P]rojections shall, to the extent known or knowable, be based upon and take into account all data (as of the date of the analysis) regarding (i) the number of Claims filed with the Settlement Facility, (ii) the rate of Claim filings in the Settlement Facility, (iii) the average resolution cost of Claims in the Settlement Facility, (iv) the pending Claims in the Settlement Facility, and (v) projected future filings with the Settlement Facility. Such projections shall also state the anticipated time period for the resolution of such Claims.

(*Id.*) Those are the factors that were considered in the Recommendation, and those factors provide adequate assurance that the appropriate payments will be made.

Moreover, the Recommendation assumes that the rate that claims are filed will remain constant, a conservative measure that likely inflates the number of claims that will actually be asserted. In truth, the data collected indicates that the number of claims will likely decrease substantially, because most people who have manifested compensable diseases already have filed claims, and because most claimants with lawyers (who are statistically more likely to file claims) have already filed their claims. For example, the number of claim form filings through September 2011 shows a dramatic decrease in the number filings over time. (*See* Claim Form Filings Through Sept. 2011, attached as Exhibit "N".) The same is true of the number of claims paid by year; the number has decreased over time. (*See* Claims Paid by Year though August 2011, attached as Exhibit "O".) There is no data or other evidence that in any way suggests that the Recommendation will not leave adequate provision for payment of First Priority Claims.

Second, the adequate provision standard in the Settlement Facility Agreement permits Premium Payments to be made even if there is a possibility that some First Priority Claims might not be paid. It 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. If the goal of the Settlement Facility Agreement was to ensure with certainty that First Priority Claims would be paid even if some statistically insignificant possibility plays out, it could have been written so that Premium Payments were paid only when the Settlement Facility closes in 2019. But that is not what the Settlement Facility Agreement provides.

By definition, any projection contains some uncertainty. The adequate provision standard articulated in the Settlement Facility Agreement acknowledges that axiom, and it authorizes Premium Payments to be made even if doing so could mean that under some circumstances all First Priority Claims will not be paid. The Recommendation is based upon conservative methodology and projections, and even under that cautious prediction, it is clearly more likely than not that there will be sufficient funds available to pay First Priority Claims. *See In re Natco Indus., Inc.*, 54 B.R. at 440; *In re Res. Tech. Corp.*, 624 F.3d at 384 (discussing the adequate provisions standard). The Recommendation thus provides the adequate assurance required by the Settlement Facility Agreement. (*See* Settlement Facility Agreement §§ 7.01(c); 7.03(a).)

E. Additional Money is Available in the Litigation Fund.

The cushion provided by the Recommendation does not include any of the Litigation Fund money that is available to pay First Priority Claims under the Settlement Facility Agreement. (*See generally* Settlement Facility Agreement § 7.03(b).) Those funds, however, are available, and they are worth mentioning. (*Id.*) As of the most recent calculations, the Litigation Fund has spent approximately \$31.7 million on claims and expenses. There are fewer

than thirty claimants asserting demands on the Litigation Fund. In the unlikely event that the Settlement Fund is exhausted before all First Priority Claims are paid, most of the more than \$368 million currently in the Litigation Fund will be available to pay existing or future First Priority Claims. (*Id.*) Nothing prohibits the Court from considering that additional financial backstop in determining whether the Recommendation provides adequate provision that First Priority Claims will be paid. (*Id.*)

III. CONCLUSION

For the above reasons, the Finance Committee recommends that the Court authorize the Finance Committee to implement the Recommendation. The Finance Committee requests that the Court authorize the Recommendation as soon as possible, so that the administrative process can be completed in time to make Premium Payments beginning in 2012.⁹ The Finance Committee further requests that the Court grant the Finance Committee all other just relief.

⁹ As noted above, if the process for Premium Payments is not completed in time for the 50% premium payments to be made in 2014, a recommendation seeking premiums well in excess of 50% may be needed.

Dated: October ___, 2011

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

/s/ Edward B. Adams, Jr.

Edward B. Adams, Jr.

Texas State Bar No. 00790200

Nicholas A. Morrow

Texas State Bar No. 24051088

Fulbright Tower

1301 McKinney, Suite 5100

Houston, TX 77010-3095

Telephone: (713) 651-5151

Facsimile: (713) 651-5246

eadams@fulbright.com

nmorrow@fulbright.com

– and –

Kyle R. Dufrane (P58809)

Susan Artinian (P28680)

Dykema Gossett PLLC

400 Renaissance Center

Detroit, MI 48243

(313) 568-6529

kdufrane@dykema.com

sartinian@dykema.com

**Counsel for The Finance Committee of the
Settlement Facility—Dow Corning Trust**

CERTIFICATE OF SERVICE

I hereby certify that on October ___, 2011, the foregoing motion (and proposed order) has been electronically filed with the Clerk of Court using the ECF system, and same has been mailed via Certified Mail/Return Receipt Requested or via email to the following:

Susan K. McDonnell
V.P., General Counsel & Secretary
Dow Corning Corporation
2200 W. Salzburg Rd.
Auburn, MI 48611

Dianna L. Pendleton-Dominguez
Law Offices of Dianna Pendleton
401 N. Main Street
St. Marys, OH 45885

Ernest H. Hornsby
Farmer, Price, Hornsby & Weatherford,
L.L.P.
100 Adris Place
Dothan, AL 36303

Sybil Niden Goldrich
256 South Linden Drive
Beverly Hills, CA 90212

Mr. Jeffrey S. Trachtman
Kramer, Levin, Naftalis & Frankel
1177 Avenue of Americas
New York, NY 10036

Mr. Douglas Schoettinger
DCC Litigation Facility, Inc.
2200 W. Selzburg Rd.
P.O. Box 2089, Mail DCLF
Midland, MI 48686

Kevin W. Scroggin
Dow Corning Corporation
2200 West Salzburg Rd.
Mail Stop CO1314 / P.O. Box 994
Midland, MI 48686-0994

Eudio Gil
The Dow Chemical Company
2030 Dow Center/B1 South Office 115
Midland, MI 48674

Counsel Served via E-Mail:
Ana Carolina Souza dos Santos
Aristeu Felipe Temes
Antonio Carlos Borsa dos Santos Filho
Francisco Antonio de Oliveira Stockinger
Yara Maria Ely Temes
Guilherme Gomes de Sousa Machado
Jivago Augusto Ely Temes
Fernando Ely Temes
Ricardo da Silva Sabbi
temes@via-rs.net

Yeon-Ho Kim
yhkimlaw@unitel.co.kr

Arivaldo Amancio dos Santos
contato@arivaldoamancio.adv.br

Fernando Vergueiro
Carlos Alberto da Silva Leite
Cassio Augusto Mendes
Elisabeth Cardoso Paes da Rocha
Danilo Lozano Junior
Tadashi Sato
fv.sillic@terra.com.br
fv.yara@terra.com.br
advogado@fernandovergueiro.com.br

Yara de Mingo Ferreira
fv.yara@terra.com.br

Anna Luisa Barros Campos Coimbra Paiva
Sandro Cesar Tadeu Macedo
jlbayeux@uol.com.br
sandroctmacedo@uol.com.br

Elisabeth Cardoso Paes de Rocha
Alessandra Teixeira Gockino
Cezar Augusto Ferreira Nogueira
Erika Maria Oliveira da Silva
Yara de Mingo Ferreira
fv.yara@terra.com.br
fv.beth@terra.com.br

David H. Tennant
Nixon Peabody LLP
Clinton Square, Suite 1300
Rochester, NY 14604

John Donley
Douglas Smith
Kirkland & Ellis
300 North LaSalle
Chicago, IL 60654

Laurie Strauch Weiss
Orrick, Herrington & Sutcliffe, LLP
666 Fifth Avenue
New York, NY 10103-0001

Deborra Garrett
1700 D Street
P.O. Box 5226
Bellingham, WA 98227

James L. Elsman
The Business Building
635 Elm Street
Birmingham, MI 48009

Mitchell Toups
P.O. Box 350
Beaumont, TX 77704

Freeda Clark
7343 SE 84th Foxgrove Ave.
The Villages, FL 32162

Michael Fucci
45 Gramercy Road
Old Bridge, NJ 08857

Patricia Ann Cresswell
60 Gunnersbury Way, Nuth
Nottingham, England
NG161QD

Sonia Cartelli
Maria Celina Deschamps
contato@plena.adv.br

Nelson Pedro da Silva
nps@aasp.org.br

Walter Jose Faiad de Moura
Bruna C. Lamounier Ferreira
escritorio@waltermoura.com.br

/s/ Edward B. Adams, Jr.
Edward B. Adams, Jr.