UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:

Settlement Facility Dow Corning Trust.

Case No. 00-00005
Honorable Denise Page Hood

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MEMORANDUM OPINION AND ORDER GRANTING THE FINANCE COMMITTEE'S MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

I. BACKGROUND

This matter is now before the Court on the Finance Committee's Motion for Authorization to Make Second Priority Payments filed December 30, 2016. (Doc. No. 1279) The Claimants' Advisory Committee ("CAC") and the reorganized Debtor Dow Corning Corporation and its Representatives (collectively, "Dow Corning") filed responses and replies to the Motion. A hearing was held on the matter. The parties thereafter filed post-hearing briefs. The CAC supports the Finance Committee's recommendation. Dow Corning opposes the motion.

On June 1, 2004, the Amended Joint Plan of Reorganization ("Plan") became effective governing the Dow Corning bankruptcy matter. The Court retains jurisdiction over the Plan "to resolve controversies and disputes regarding interpretation and implementation of the Plan and the Plan Documents" and "to allow,

disallow, estimate, liquidate or determine any Claim, including Claims of a Non-Settling Personal Injury Claimant, against the Debtor and to enter or enforce any order requiring the filing of any such Claim before a particular date." (Plan, §§ 8.7.3, 8.7.4, 8.7.5)

The Settlement Facility-Dow Corning Trust ("SF-DCT") implements the claims of those claimants who elected to settle their claims under the Settlement Program of the Plan. (Plan, § 1.131) The SF-DCT was established to resolve Settling Personal Injury Claims in accordance with the Plan. (Plan, § 2.01) The Settlement Facility and Fund Distribution Agreement ("SFA") and Annex A to the SFA establish the exclusive criteria by which such claims are evaluated, liquidated, allowed and paid. (SFA, § 5.01) The process for the resolution of claims is set forth under the SFA and corresponding claims resolution procedures in Annex A. (SFA, § 4.01)

On December 31, 2013, the Court entered an Order granting the Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments. On January 27, 2015, the Sixth Circuit Court of Appeals reversed the Court's Order finding that the "adequate assurance" standard was not the proper standard for assessing the availability of the funds. The Sixth Circuit adopted Dow Corning's terminology of a "virtual guarantee" to describe the required confidence standard to be applied by the Court. *In re Settlement Facility Dow*

Corning Trust, Case No. 14-1090, 592 F. App'x 473, 479-80 (6th Cir. Jan. 27, 2015). The Sixth Circuit also found that the Court, in its discretion, may consider "competent reports and testimony" challenging the methodology used in determining the availability of the funds. *Id.* at 480-81.

II. ANALYSIS

A. Plan Interpretation

Generally, the provisions of a confirmed plan bind the debtor and any creditor. 11 U.S.C. § 1141(a). In interpreting a confirmed plan, courts use contract principles, since the plan is effectively a new contract between the debtor and its creditors. *In re Dow Corning Corporation*, 456 F.3d 668, 676 (6th Cir. 2006); *see, Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 588 (9th Cir.1993). State law governs those interpretations, and under long-settled contract law principles, if a plan term is unambiguous, it is to be enforced as written, regardless of whether it is in line with the parties' prior obligations. *In re Dow Corning*, 456 F.3d at 676. A term is deemed ambiguous when it is "capable of more than one reasonable interpretation." *Id.* The Court has no authority to modify this language. Although bankruptcy courts have broad equitable powers that extend to approving plans of reorganization, these equitable powers are limited by the role of the bankruptcy court, which is to "guide the division of a pie that is too small to allow each creditor to get the slice for which

he originally contracted." *Id.* at 677-78 (quoting *In re Chicago*, 791 F.2d 524, 528 (7th Cir.1986)). "A bankruptcy court's exercise of its equitable powers is cabined by the provisions of the Bankruptcy Code." *Id.* at 678 (citing *In re Highland Superstores, Inc.*, 154 F.3d 573, 578-79 (6th Cir.1998)). New York law governs the interpretation of the Plan. (Plan, § 6.13) Under New York law, a court must first decide whether a contract term is ambiguous. *B.F. Goodrich Co. v. U.S. Filter Corp.*, 245 F.3d 587, 595 (6th Cir. 2001).

B. Premium Payment Provision

Article VII of the SFA provides four categories of payments:

> **7.01** ***Timing of Disbursement/Prioritization of Payments.***
>
> **(a)** ***Categories of Payment Defined.***
>
> **(i)** ***First Priority Payments.*** Payments identified on the Settlement Grid, Annex B hereto, as Expedited Release Payments (for both Settling Breast Implant and Covered Other Products Claims), Explantation Payments, Disease Base Payments (for Breast Implant Claims), Rupture Base Payments (for Breast Implant Claims), Medical Condition Payments for Covered Other Products, and Silicone Material Payments, along with related administrative costs, as defined as "First Priority Payments." Payments to be distributed to or for the benefit of Allowed Claims of Settlement Claimants in Classes 4A, 6A, 6B, 6C and 6D, Classes 14 and 15 (as described at Article III), and, to the extent provided in the Litigation Facility Agreement, Litigated Shareholder Claims shall also be defined as First Priority Payments.

> **(ii)** ***Settlement Fund Other Payments.*** Payments for Allowed Claims of Non-Settling Claimants in Classes 11, 13, 14, 14A, 15 and 17 along with related administrative costs shall be defined as Settlement Fund Other Payments and shall be First Priority Payments.
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> **(iii)** ***Second Priority Payments.*** Payments identified on the Settlement Grid as "Premium Payments" for Breast Implant Disease Payment Option Claims and Rupture Payment Option Claims and for Covered Other Products Claims and payments for increased severity of disease or disability under Breast Implant Disease Payment Option (for both Disease Payment Option I and Disease Payment Option II) as outlined shall be defined as Second Priority Payments. Payments made to Class 16 Claimants in respect for the obligations in Section 6.16.5 and 16.16.6 of the Plan that are to be paid by the Settlement Facility shall be defined as Second Priority Payments.
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> **(iv)** ***Litigation Payments.*** Payments to be distributed to Non-Settling Personal Injury Claims, Allowed Claims of Claimants in Class 12, Assumed Third Party Claims, and, to the extent provided in the Litigation Facility Agreement, Litigated Shareholder Claims along with Litigation Facility Expenses shall be defined as "Litigation Payments."

(SFA, § 7.01(a))

The Finance Committee seeks to issue Premium Payments under the Second Priority Payments provision. 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. (Annex B to SFA, Settlement Grid Personal Injury Claims) Certain requirements and procedures must be met before the Court may authorize payment of Second Priority Payments under the SFA:

> **7.03** ***Requirements/Procedure for District Court Approvals.***
>
> **(a)** ***Payment of Second Priority Payments.*** To obtain authorization to distribute Second Priority Payments, the Finance Committee shall file a recommendation and motion with the District Court requesting authorization to distribute Second Priority Payments. Such recommendation shall be accompanied by a detailed accounting of the status of Claims payments and distributions under the terms of the Settlement and Litigation Facilities, including a detailed accounting of pending Claims and projections and analysis of the cost of resolution of such pending Claims as described in Section 7.01(d). The recommendation and motion shall be served on the Claimants' Advisory Committee, the Debtor's Representatives, the Shareholders, and all Non-Settling Personal Injury Claimants with pending Claims, and such parties shall have the opportunity to be heard with respect to the motion. The parties agree to cooperate in expedited procedures for review and resolution of issues under this subsection and consent to an expedited hearing. If the District Court rules 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, then the Second Priority Payments, or some portion thereof, may be distributed, unless the order of the District Court is stayed or reversed on appeal. The parties agree that any appeal of an order of the District Court regarding the provisions of this subsection shall be on an abuse of discretion standard.

(SFA, § 7.03(a))(emphasis added) The SFA provides under § 7.01(c), ***Priority of Payment for Claims***:

> **(v)** ***Timing.*** Nothing 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*.

(SFA, § 7.01(c)(v))(emphases added) Premium 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 Agreement, *have either been paid or adequate provision has been made to assure such payments*." (SFA, § 7.01(c)(iv))(emphasis added)

The SFA provides for procedures to determine assets available for distribution to claimants as follows:

> **(d)** ***Procedures for Determining Assets Available for Distribution to Claimants.***
>
> > **(1)** ***Settlement Facility Projections.*** In conjunction with the Independent Assessor, the Finance Committee shall, 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. Such projections 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 and payment of such Claims.

(SFA, § 7.01(d)(1)) The Funding Payment Agreement provides that the net present value ("NPV") of the Settlement Facility is $2.35 billion. (Funding Payment Agreement, Art. 2.01) The Settlement Fund is allocated $1.95 billion and the Litigation Fund is allocated $400 million. (SFA, § 3.02(a))

In its January 27, 2015 Opinion, the Sixth Circuit rejected this Court's interpretation that the SFA requires an "adequate assurance" of payment and instead adopted Dow Corning's interpretation that the SFA requires "virtual guarantee" of payment. *In re Dow Corning*, 592 F. App'x at 479-80. The Court is bound by the Sixth Circuit's "virtual guarantee" standard of confidence as to whether under SFA § 7.03(a), payment should be issued under the Second Priority Payment provision.

C. The Finance Committee's Recommendation

The Finance Committee submitted its recommendation and motion to issue Premium Payments, stating that "the only way these issues can be resolved is with a recommendation supporting a fifty percent (50%) Second Priority Payment." (Motion, Doc. No. 1279, Pg ID 19681) The Finance Committee notes that if there was no recommendation for a Second Priority Payment, "the decision-making process would end without further review." *Id.* "If, on the other hand, the Finance Committee

recommends a fifty percent (50%) Second Priority Payment, the District Court, and perhaps the Sixth Circuit Court of Appeals, will have the opportunity to decide whether or not such a Second Priority Payment should be made." *Id.* The Finance Committee therefore recommends a fifty percent (50%) Second Priority Payment as follows:

1) premium payments for Breast Implant Disease and Rupture Payment Option Claims;
2) increased severity disease or disability under the Breast Implant Disease Payment Option; and
3) payments to Class 16 Claimants.

Id. The Finance Committee states that the "recommendation is made with full awareness that the Plan, legal standard, and bankruptcy issues may very well preclude this recommendation from ever being implemented." *Id.* The Finance Committee submitted the Report of the Independent Assessor, End of Second Quarter 2016, Final Report ("IA Final Report 2016") to support its recommendation. (Motion, Doc. No. 1279, Ex. B)

The Finance Committee argues that even if 50% of the Second Priority Payments were distributed, based on the estimation by the Independent Assessor, Ankura Consulting ("Independent Assessor"), there will remain a surplus in the Fund of $100.4 million NPV through the end of the operation of the Settlement Facility. The estimation of this amount is based on the following:

> The estimated future liability in the base case constant model, including base payments yet to be paid, scenarios and Trust expenses, is $65.0 million NPV. After deducting this amount, the NPV of surplus funds is an estimated $159.0 million NPV. If all Second Priority payments are made at 50% (with Option 2 Increased Severity as a "worst case" scenario), the estimated NPV of those payments is $62.9 million. The resulting estimated surplus funds total $100.4 million NPV.

(Motion, Doc. No. 1279, Pg ID 19676, notes 7 and 8) The Finance Committee argues that the Independent Assessor's projections were based on the claims data as of June 30, 2016 using a Constant Model, which methodology the Independent Assessor has always used in its analysis. The analysis included the historical trends and data based on over the last twelve (12) years of annual reports. The Independent Assessors's forecast has been conservative, overestimating liability, according to the Finance Committee.

The Finance Committee notes Dow Corning's concerns regarding the validity of the Independent Assessor's projections, including: 1) historical filing patterns from the calibration period changing; 2) historical qualification rates, approval rates, and claim values changing; 3) claim data having errors or misclassified claims; 4) policies and procedures changing; 5) changes in how claims are administered or how directions in the Plan are interpreted; and, 6) claimants waiting until June 2019 deadline to file a claim.

In response to Dow Corning's concerns, the Finance Committee argues that the

Independent Assessor has used available data from the beginning of the Trust since 2004 to make its projections. The first full Independent Assessor's Report (then Analysis Research Planning Corporation ("ARPC"), now Ankura) used data as of October 26, 2005 from the SF-DCT. The Finance Committee notes an example that there are over 60,000 Class 5 claimants who never filed a Claim Form for Disease or Expedited payment. These claimants have been subjected to multiple mailings over thirteen years advising them of the claims process, providing opportunities for early payment, and requesting a Claim Form and other documents. The Independent Assessor projects that less than 2,000 out of the 60,000 claimants will file the required forms and medical documentation by June 2019. The Finance Committee argues that this projection is based upon the known or knowable data regarding the SF-DCT. The Finance Committee claims that the Independent Assessor has consistently been more conservative and has overestimated the number of disease claims filed with the SF-DCT. For example, the projected number of filings for Class 5 disease claims made for 2015 in the 2014 analysis was 473, but the actual 2015 filings were 168. The Finance Committee asserts that the history of conservative estimates suggests that the Independent Assessor's projections for future filings will be higher than the actual, and there will be more, rather than less, surplus funding for the Second Priority Payments.

Comparing the final MDL-926 and its Revised Settlement Plan ("RSP"), the Finance Committee claims that through 2015 payments, the SF-DCT payments were lower than the payments by the RSP facility. The Finance Committee states that the Independent Assessor's estimate of payable Inventory Claims and Forecasted Claims from 2016 through the end of the Trust is higher than the actual RSP experience. The Finance Committee argues that this provides further confidence that the Independent Assessor's Report has over-estimated, rather than under-estimated, the SF-DCT's final outcome.

The Finance Committee asserts that Second Priority Payments were contemplated before all claims are distributed because such a payment may be based on "known or knowable" projections under the Plan. (Motion, Doc. No. 1279, Ex. A, SFA, §§ 7.01(c)(iv-v); 7.03(a)) The Finance Committee claims that if the assumption to be used is based upon available data, analysis and projections prepared by the Independent Assessor, then Second Priority Payments should be distributed. The Finance Committee argues that the Independent Assessor's analysis is based on known and knowable data and projections.

On the other hand, if the assumption is that no Second Priority Payments can be made until termination of the SF-DCT because that is the only time that all actual, rather than projected data is available, then the Finance Committee concedes that no

Second Priority Payments can be issued until the end of the SF-DCT. In its supplemental post-hearing brief, the Finance Committee notes that it has had the benefit of arguments and evidence presented by the parties related to the question of authorizing the 50% Second Priority Payments. The Finance Committee again urges the Court to base its assumption that Second Priority Payments be distributed based on the available data, analysis and projections prepared by the Independent Assessor and that its recommendation to authorize the payments is properly supported.

D. The CAC and Dow Corning's positions

1. The CAC Arguments

The CAC supports the Finance Committee's recommendation and believes that the sufficiency of available funding to make the payments is "beyond good faith dispute." (CAC Resp., Doc. No. 1285, Pg ID 19997) The CAC submitted the Declaration of Mark Peterson which states that claim filings in this mature settlement process have tapered off to a virtual trickle. (CAC Resp., Doc. No. 1285, Ex. 9) While an uptick in disease claims is expected at the 2019 deadline, the CAC asserts that the experience of the parallel RSP offered by other breast implant manufacturers strongly suggests that it will be modest. The CAC argues that the Court need not rely on the RSP experience, because there is a "huge margin for error – a cushion of $300 million – that would absorb any reasonably possible variation." (CAC Resp., Doc.

No. 1285, Pg ID 19997) The CAC claims that in view of the categories of claims already fully resolved or assumed in the Independent Assessor's conservative projections to be paid at the maximum possible level, even an unexpected "huge spike" in claims would not exhaust the cushion. The CAC argues that this meets the requirement that future base claims be "assured" of payment to a "virtual guarantee" under any reasonable definition of those terms, which warrants prompt approval of the 50% Second Priority Payments.

The CAC identifies only two variables which could have a meaningful impact on the funding cushion. The CAC claims that as to the first variable, the number of Option 2 Increased Severity Claims which may be filed, the Independent Assessor, assuming a "literal worst case (indeed *worse* than worst case) scenario," despite multiple mailings over more than a decade reminding claimants of the benefit, only approximately 40 such claims have been filed through May 2016. (IA Final Report 2016 at 16) The Independent Assessor's projections of an "extreme assumption" that more than 1,800 claimants will seek and receive average supplemental payouts of approximately $101,855, would result in liability to the Trust of $185.3 million nominal, or $76 million NPV. (*Id.)* If 50% of those claims is authorized under the Finance Committee's recommendation, there remains an NPV surplus of approximately $100.4 million. (*Id.* at 18)

The second variable identified by the CAC is the possibility of an extreme and unexpected surge in disease claims during the remaining two and a half years of the SF-DCT. The Independent Assessor projects future diseases filings between 727 claims, under the decay model, and 1,836 claims, under the constant model, prior to the June 2019 deadline. (*Id.* at 39) These totals, argues the CAC, already assume a surge over the current pace of claim filing, which in 2016 was 214 disease claims. The CAC asserts that a surge in expedited release claims, the only other available benefit for which the deadline has not passed, cannot threaten the caps since the Independent Assessor already assumes that every claimant with a valid proof of manufacturer ("POM") on file will receive either a disease or expedited payment, which the CAC claims is another overly conservative assumption.

The CAC notes that the entire SF-DCT settlement program through June 2016 has paid only 29,268 total Class 5 disease claims, for a total nominal payment amount of $614,060,056. (*Id.* at 49-50) The CAC argues that the projected cushion equals nearly half the amount paid for all Class 5 disease claims since 2004. The CAC claims that this provides a "virtual guarantee" of funding adequacy under any reasonable definition of that term. The CAC asserts that in response to the Finance Committee's request for an opinion, the IA Final Report 2016 states that "a virtual guarantee is justified" that there will be sufficient funding for all First Priority

Payments based on payment of 50% Premiums to holders of base claims approved and paid through June 2015 and 50% of Class 16 payments. (*Id.* at 20) Also in response to written questions form the CAC, the Independent Assessor stated that the approximately $200,000 NPV impact of paying Premiums on base claims for one additional year through June 2016, "would not materially impact the [virtual guarantee] conclusion." The Independent Assessor further stated that even with approval of 50% of all projected Second Priority Payments through the end of the settlement program, "the $100.4 million [NPV] in remaining assets are sufficient to meet the 'virtual guarantee' standard of payment for First Priority Payments." (CAC Resp., Doc. No. 1285, Ex. 8)

The CAC, however, takes exception to the Finance Committee's posit of a false dilemma in suggesting that a supposed requirement of "actual certainty" means that "Second Priority Payments cannot be made until after all Base Payments have been made." (*Id.* at Pg ID 20008) The CAC asserts that neither the Plan, nor Dow Corning, advanced such a reading and that the Sixth Circuit confirmed that there is no conflict in that Second Priority Payments may be paid simultaneously with base payments once the latter are "assured," which means a "virtual guarantee," not an "absolute guarantee," that eliminates all "possible future uncertainties." *In re Dow Corning*, 592 F. App'x at 479. The CAC argues that the virtual guarantee standard is met.

2. Dow Corning's Arguments

Dow Corning responds to the Finance Committee's recommendation noting that the Finance Committee filed the motion "for the sole purpose of obtaining judicial clarification of the phrase 'virtual guarantee'." (DCC Resp., Doc. No. 1287, Pg ID 20082) Dow Corning argues that the Finance Committee's "virtual guarantee" standard is not satisfied if the Finance Committee is uncertain what the phrase means. Dow Corning asserts that the Finance Committee acknowledges as much, explaining that the legal standard "may very well preclude this recommendation from ever being implemented." Because the Finance Committee is unsure about the legal standard, Dow Corning urges the Court to deny the Motion.

Notwithstanding the Finance Committee's uncertainty, Dow Corning claims that the "virtual guarantee" standard cannot be met because the standard means that the risk that all First Priority Payments will not be paid in full must be near "zero." (*Id.* at Pg ID 20082) The Finance Committee's only support to its Motion is the Independent Assessor's Report which Dow Corning asserts rests on numerous assumptions and considerable uncertainty. Dow Corning notes that the Independent Assessor's estimate assumes that the actions of past claimants will dictate the characteristics and actions of future claimants.

Dow Corning argues there is no basis to assume that the existing pool of known

claimants is representative of the larger total pool. Dow Corning identifies three relevant categories of claimants who can file or perfect claims over the remaining term of the settlement program. The first category is the over 70,000 Class 5 Claimants who have not yet filed a disease or expedited release claim. The second category is the over 17,000 filed Class 5 claims for disease or other benefits that currently have deficient POM submissions or have other deficiencies that can be cured. Dow Corning asserts that each of these claimants has the right to cure the deficiency and perfect their claim for a First Priority Payment. The third category includes the Class 6.1 and Class 6.2 claimants who similarly remain eligible to file disease claims or to cure their previously filed claims. Dow Corning claims that compared to the approximately 27,469 Class 5 disease claims paid as of June 30, 2016, the remaining eligible population among Class 5 claimants is more than double the population of claimants who have already been paid their First Priority Payments.

Dow Corning states that the Independent Assessor's Report does not evaluate the characteristics of all of these claimants, but rather estimates the aggregate value of future First Priority Payments based on an assumption that an "extremely" small portion of the remaining eligible population will file disease claims. The Independent Assessor, according to Dow Corning, derives the estimate by assuming that only 3% of the entire population of remaining Class 5 claimants will file disease claims, that

these individuals will be a mirror image of the claimants who filed claims during the historical calibration period chosen, that they will seek payment for the same conditions at the same severity levels as those who filed claims during that selected period of time, and, that their claims will be approved and paid at the current rates for approval and payment.

Dow Corning notes that the Independent Assessor Report itself recognizes the inherent uncertainty in its estimate, cautioning that the computation could be incorrect and that the projected number of filings could be affected by outside sources or events, including notice and publicity and any changes in processing operations. The Independent Assessor does not assert that the assumed number of disease filings in the projection is "virtually guaranteed," but rather admits that the calculations are simply based on certain historical observations and an extrapolation of certain claims data. (DCC Resp., Doc. No. 1287, Ex. B) The Independent Assessor notes that there are many types of events or actions that would have an effect on the assumptions and the ultimate computations, including outreach programs such as mass mailings, how the claims are administered and changes in procedures, and unidentified uncertainties. The Independent Assessor's estimate is fraught with uncertainty according to Dow Corning. Dow Corning argues that the Independent Assessor's Report cannot be used to support a finding that all First Priority Payments are "virtually guaranteed." Rather,

Dow Corning claims it can only be used to state that there would be a surplus if all of the assumptions about the unknown future claims in the Independent Assessor's Report come true. Dow Corning argues this is not and cannot be the standard.

Dow Corning submitted the Declaration of Paul J. Hinton dated February 10, 2017, a Principal at The Brattle Group with over 15 years of experience in product liability estimation. Hinton states that mass tort forecasts have not been accepted "for the purpose of determining whether the payment of certain yet to be filed claims is 'assured' or 'virtually guaranteed'." (DCC Resp., Doc. No. 1287, Ex. C) Rather, mass tort forecasts are done where the uncertainty of estimation is recognized. (*Id.* at ¶¶ 9-11) Hinton opines that the Independent Assessor's Report "simply extrapolated the claimant filings over a certain period without regard to epidemiology and the demographics, exposure, injury incidence, or economic behavior of claimants and lawyers." (*Id*. at 18-19) The simple extrapolation of what could happen if future claims are filed at the same rate as in the past and that future claimants have exactly the same conditions and behave in the same way. (*Id*. at 22) Such extrapolation without modeling underlying sources of uncertainty, cannot provide claim estimates with precise measures of uncertainty. (*Id*. at 17) Dow Corning argues that the Court cannot determine or assess the risk to the First Priority Payments based on the Independent Assessor's Report, therefore the Court cannot find that the First Priority

Payments are "virtually guaranteed."

Dow Corning cites various cases which expressly found that estimates of future tort claims are nothing more than educated guesses that cannot provide any level of precision or certainty, which Dow Corning asserts is the very thing that is required to support a "virtual guarantee." *See In re Owens Corning*, 322 B.R. 719, 721 (Bankr. D. Del. 2005); *In re Federal-Mogul Global Inc.*, 330 B.R. 133, 155 (D. Del. 2005); *In re Armstrong World Industries, Inc.*, 348 B.R. 111, 114-15 (D. Del. 2006).

In the *Owens Corning* case, the court evaluated competing estimates prepared by four experts. Even though the court found that all of the experts were well qualified and experienced, their liability projections differed dramatically, by as much as $9 billion based on their divergent assumptions ($11.1B, $8.15B, $6.5 to $6.8B, and $2.08B). *Owens Corning*, 322 B.R. at 721. The court noted that the margin for error was substantial and that relatively minor variations in the underlying assumptions can skew the end result enormously. *Id*. The court stated that "we are dealing with uncertainties, and are attempting to make predictions which are themselves based upon predictions and assumptions." *Id*. Dow Corning also cites *In re Federal-Mogul* case where two estimates differed by $2.9 billion. *In re Federal-Mogul*, 330 B.R. at 144. In the *Armstrong* case, Dow Corning cites that three competing estimates varied tremendously because of differing assumptions, $1.96B,

$4.5B and $6.121B. *Id*. at 129, 134. In the context of asbestos litigation, Dow Corning asserts that hindsight has proven that virtually all estimates conducted have proven to be wrong and payments have had to be adjusted. (DCC Resp., Doc. No. 1287, Ex. C, Hinton, Decl. at 5)

As to limited trust fund distributions, Dow Corning claims the "virtual guarantee" standard is not unique. In *The Home Insurance Company in Liquidation* matter, the administrators of the limited fund had to be certain that sufficient funds were available to pay all higher priority creditors in full before they made distributions to lower priority creditors. (DCC Resp., Doc. NO. 1287, Ex. D, Rosen Decl. at 4) In the *A.H. Robins* Bankruptcy Plan, the lower priority distributions could not be paid until the trustees had received, reviewed and valued every higher priority claim. (Doc. No. 826-7, Vairo Decl. Ex. E) The Trustees of the *Dalkon Shield* Plan also did not permit distribution of pro rata payments until they had actual claim data so they could be assured that all qualified timely and late claims would be paid in full. (DCC Resp., Doc. No. 1287, Ex. E)

E. The Court's Review

The Plan allows the Court to grant authorization of any Second Priority Payment after a hearing is held and determines 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 . ..." SFA § 7.03(a). As the Sixth Circuit ruled, this means the Court must determine whether there is a "virtual guarantee" that all First Priority Claims will be paid before authorizing any Second Priority Payment. The Sixth Circuit noted "this standard does not require absolute certainty, it is nonetheless stricter than the 'strong likelihood' or 'more probable than not' levels of confidence that describe 'adequate assurance.'" *In re Settlement Facility*, 592 F. App'x at 480. The Sixth Circuit noted that the district court "is correct in that it must make its decision to authorize Second Priority Payments '*based on* the Independent Assessor's analysis and projections.'" *Id*. The Court is allowed to consider criticisms of the projections, which the Court may modify, depending on the evidence developed at the hearing. *Id*. at 481.

The Court begins its analysis with the Independent Assessor's projection. The Independent Assessor "has utilized conventional statistical and actuarial techniques to estimate the number, dollar amount and timing of these liabilities in assessing the overall solvency of the Trust." (Doc. No. 1279, IA Report, at 3) It "relies heavily on the Trust's historical experience to determine many of the components of this analysis . . ." and "has scrutinized the supporting data to ensure that the information critical to this analysis is consistent and reliable." (*Id.)* The evidence submitted by the Finance Committee is that *even* if 50% of the Second Priority Payments were distributed,

based on the estimation by the Independent Assessor, there will remain a surplus in the Fund of $100.4 million NPV through the end of the operation of the Settlement Facility. *Id.* In its supplemental brief, the Finance Committee admits that the risks are real that there will not be sufficient funds to make the 50% Second Priority Payments and First Priority Payments. However, the Finance Committee argues that there is little or no evidence to support the reality that this would occur.

Dow Corning submits several criticisms of the Independent Assessor's projections noted above. However, as the CAC argues, Dow Corning offers no scenario analysis by its experts as to how the Independent Assessor's projections could be off by $300 million ($100.4 million NPV cushion), which already takes into account the 50% Second Priority Payments. Dow Corning essentially argues that the Court should wait until the end of the settlement when all uncertainty is eliminated. Dow Corning's argument, as presented through the various cases and expert opinions it cites, essentially transforms the standard from "virtual" to "actual" certainty. Dow Corning's assertion that predicting future claims based on prior claims history should not be the basis of the Court's decision to ensure "virtual guarantee" runs counter to the parties' agreement as to the Independent Assessor's projection methodology. As noted by the CAC, throughout the voting and approval process of the Plan and the disclosures sent to the claimants, the parties intended to pay premiums less than

halfway through the settlement process. During the earlier period, there was more uncertainty than it exists at this time, in light of the longer claim processing history. The Independent Assessor's methodology has been proven to be correct and more conservative throughout the years. The evidence shows through the CAC's expert that the Independent Assessor's projection techniques is the standard and the only reasonably available method of predicting future claims in a closed pool of claimants for which no relevant epidemiology is, or could be, available. There is disclaimer language and built-in uncertainties, but this does not change the fact that the Independent Assessor's projections have proven accurate.

Dow Corning's experts do not criticize the Independent Assessor's application of its methodology, but rather submits examples of other tort litigations, such as the asbestos litigation, which does not relate to the closed number of claimants in this breast implant litigation. Dow Corning does not submit any expert testimony analyzing the similar MDL-926 RSP, where the Independent Assessor's projections could be better compared. Dow Corning's comparison to the *Dalkon Shield* matter also does not assist this Court in that the terms of the settlement imposed a strict rule of absolute priority. The terms in the SFA expressly provides Second Priority Payments if funding can be adequately assured. Dow Corning agreed to the terms of the SFA and, during the plan approval process, presented Dr. Frederick Dunbar's

projection of funding adequacy where he testified that more than $150 million in 100% Premium Payments could be issued in year eight. (CAC Rep., Doc. No. 1305, Exs. 2 and 10 at 18) The SF-DCT is now further out than Dr. Dunbar's projection and now there is less risk to the base payments than Dr. Dunbar presented before the bankruptcy court.

Dow Corning also does not present any alternative methodology which the Independent Assessor should use, other than the methodology agreed to by the parties in the SFA. Although Dow Corning claims that the Independent Assessor should base its projections on epidemiology, Dow Corning does not identify such data. As noted by the CAC's expert, no relevant epidemiology exists even for Atypical Connective Tissue Disease, the largest single category of disease claims in the settlement. (CAC Rep., Doc. No. 1305, Exs. 9 and 13, Peterson Decl.)

The Sixth Circuit noted that it is impossible to account for all possible future uncertainties and, therefore did not impose the "absolute guarantee" standard. The Finance Committee requested the Independent Assessor to opine on the "virtual guarantee" standard. Although the Independent Assessor did not guarantee that its projections would be perfectly accurate in every respect, Dow Corning's criticism that the Independent Assessor declined to opine that each element of its projections satisfies the "virtual guarantee" standard does not diminish the Independent

Assessor's "virtual guarantee" as to its ultimate projection. It is impossible to show that each element can be guaranteed, such as the precise number of claims in each category. The analysis and projection by the Independent Assessor takes into account many variables, based on historical claim filing rates, and conservative assumptions.

Dow Corning's claim that there are 70,000 claimants who have yet to file a claim and that this number is more than what the SF-DCT has paid out does not render the Independent Assessor's projection speculative. As noted by the CAC, many of these claimants filed proofs of claims more than 20 years ago and have taken no action to date, despite repeated notices sent out over the years. Many of the claimants also filed proofs of claims, but later revealed that their implants were not manufactured by Dow Corning. The Independent Assessor's analysis on the remaining population indicates that the behavior is predictable, based on the MDL-926 RSP and other mass tort experience. There is no dispute that claim filing has slowed considerably and Dow Corning has not rebutted with any expert testimony that this trend will somehow dramatically reverse course.

After review of the Independent Assessor's Report and the parties' submissions, the Court finds that *even* if 50% of the Second Priority Payments were distributed, along with payment of all projected First Priority Payments, there will remain a surplus in the Fund of $100.4 million NPV through the end of the operation of the

Settlement Facility. The Court finds there is adequate provision or a "virtual guarantee" that Allowed and Allowable First Priority Claims will be paid based on the available assets even with the distribution of the 50% of the Second Priority Payments. The Court authorizes the Second Priority Payments of 50% Premium Payments as recommended by the Finance Committee.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Finance Committee's Motion for Authorization to Make a Fifty Percent (50%) Second Prior Payments filed December 30, 2016 **(Doc. No. 1279)** is **GRANTED** as recommended by the Finance Committee to the following:

1) premium payments for Breast Implant Disease and Rupture Payment Option Claims;
2) increased severity disease or disability under the Breast Implant Disease Payment Option; and
3) payments to Class 16 Claimants.

S/DENISE PAGE HOOD
DENISE PAGE HOOD
Chief Judge

DATED: December 27, 2017