UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

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

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Before the Court is nominally titled the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments ("Motion"). Although the Motion purports to seek authorization to distribute 50% Second Priority Payments ("SPPs"), in actuality, the Finance Committee ("FC") admittedly filed the Motion for the sole purpose of obtaining judicial clarification of the phrase "virtual guarantee". To state the obvious, the FC cannot believe the "virtual guarantee" is satisfied if it is uncertain what the phrase means. The FC acknowledges as much, explaining that the legal standard "may very well preclude this recommendation from ever being implemented." Motion at 8. For that reason alone, the Court should deny the Motion.

Notwithstanding the FC's uncertainty, the standard for distributing SPPs is clear, and this rigorous standard is not met. As the Sixth Circuit's opinion dictates and as the phrase is employed throughout case law, virtual guarantee means that the risk that all First Priority Payments ("FPPs") will not be paid in full must be near zero. The Report of Independent Assessor End of Second Quarter 2016 (Oct. 18, 2016) (Exhibit B to the Motion) ("IA Report"), which the FC attaches to its Motion, presumably as a potential basis for finding that the requirement might be met, cannot provide that effective certainty. It admittedly rests on numerous assumptions and considerable *uncertainty*. The fact that some SPPs already were paid (between the time of the Court's earlier order and the Sixth Circuit's opinion reversing it), does

not and cannot provide a basis for distributing further SPPs. What matters—and what this Court must find—is that there is virtually no risk to FPPs. The FC acknowledges there is no such assurance under the current circumstances. The FC's motion must therefore be denied.

I. BACKGROUND

A. Plan Requirements.

The Settlement Facility and Fund Distribution Agreement ("SFA") (Exhibit A to the Motion) governs the distribution of payments to claimants and prospective claimants in this bankruptcy proceeding. It establishes two types of payments: (1) FPPs, which have the highest priority among creditors, are base payments—the amount of which depends on the nature of the claimant's injury—and are paid as soon as practicable following approval of a claim by the Settlement Facility-Dow Corning Trust ("SF-DCT"), SFA § 7.01(c)(ii), and (2) SPPs, which are lower priority payments, are comprised of three different types of payments—Premium Payments (i.e., additional payments made to certain classes of claimants), increased severity payments (i.e., additional payments for certain claimants whose conditions worsen), and Class 16 payments (money owed to the Dow Chemical Company for settlement payments made before the Bankruptcy Plan took effect)—and may be paid only if FPPs (and Litigation Payments) have been paid or if the FPPs are "assured". SFA §§ 7.01(c)(iv), 7.03(a).

Sections 7.01(c) and 7.03(a) of the SFA operate in tandem to avoid any risk to FPPs and dictate the timing of SPPs. Section 7.01(c)(iv) prohibits their distribution, "*unless and until* the District Court determines that all other Allowed and allowable Claims … have either been paid or adequate provision has been made *to assure* such payments." Section 7.03(a) requires that, before SPPs may be distributed by the Court, the FC must recommend the payments and provide an accounting of "Claims payments and distributions" and of "pending Claims," among other information. The Court must still, however, make a finding that the standard is met—*i.e.,* that all Allowed and allowable FPPs and Allowed and allowable Litigation Payments have been paid or that such payments are assured.

B. Prior Litigation.

The FC filed an amended motion on October 7, 2011 seeking distribution of 50% of Premium Payments. Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments, *In re Settlement Facility Dow Corning Trust*, No. 2:00-mc-00005-DPH ("*In re Settlement Facility Dow Corning Trust*") (E.D. Mich. Oct. 7, 2011), ECF No. 814 ("FC 2011 Amended Motion"). Among the parties' disputes was the definition of Section 7.01(c)(iv)'s "assure" standard. The FC and the Claimants' Advisory Committee ("CAC") rejected Dow Corning Corporation ("DCC") and the Debtor's Representatives' ("DRs") "virtual guarantee" standard and asserted instead that as long as it was "more likely than

not" or there was "adequate assurance" that FPPs would ultimately be fully paid, then Premium Payments could be made.[1]

This Court adopted the FC and CAC's proposed standard and directed distribution of 50% Premium Payments. *See In re Settlement Facility Dow Corning Trust*, 2013 WL 6884990 (E.D. Mich. 2013), *rev'd in part*, 592 Fed. App'x. 473 (6th Cir. 2015). DCC and the DRs' request for a stay of distribution was opposed by the CAC and denied by this Court and the Sixth Circuit.[2] As a result, the SF-DCT began distributing Premium Payments while DCC and the DRs pursued an appeal. Those payments stopped once the Sixth Circuit reversed.

The Sixth Circuit explained that the phrase "to assure" in the context of future payments means to "guarantee" that those payments will be made. *In re Settlement Facility Dow Corning Trust*, 592 Fed. App'x. 473 (6th Cir. 2015). Thus, the Sixth Circuit found that SPPs could not be distributed absent a "virtual guarantee" that all

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[1] *See id*. at 6-7; Reply of the Claimants' Advisory Committee in Further Support of Finance Committee's First Amended Recommendation and Motion for Authorization to Make Partial Premium Payments, *In re Settlement Facility Dow Corning Trust*, Dec. 23, 2011, ECF No. 848, ("CAC 2011 Reply") at 5.

[2] *See* Response of Claimants' Advisory Committee in Opposition to Motion to Stay the Court's Order Regarding Partial Premium Payment Distribution, *In re Settlement Facility Dow Corning Trust*, Feb. 3, 2014, ECF No. 951 ("CAC Opposition to Stay"); Order Denying Motion to Stay Pending Appeal, *In re Settlement Facility Dow Corning Trust*, Feb. 25, 2014, ECF No. 954; Order, *In re Settlement Facility Dow Corning Trust*, No. 14-1090 (6th Cir. Mar. 31, 2014), ECF No. 36-2.

FPP payments would be made.[3] *Id*. at 479-80. Following remand and briefing before the FC, the FC filed the Motion. Motion at 1-2.

C. The Current Motion.

The FC's Motion recommends distribution of 50% SPPs. But, as the FC explains, it did so not because it believes the standard is satisfied but because it seeks greater clarity of the standard's definition. Indeed, the FC expressly acknowledged that its recommendation was "made with full awareness that the Plan, legal standard and bankruptcy issues may very well preclude this recommendation from ever being implemented." Motion at 8. The Motion provides a brief outline of the calculations contained in the IA Report but makes clear that those calculations might or might not be relevant to determining whether SPPs may be issued. *Id*. at 2-4 ("Under the second assumption regarding the Plan, that projections based upon historic data are inadequate to assure sufficient funding for base payments, the IA's Report would never be adequate for that assurance because it is inherently founded on past experience.").

The critical issue, according to the Motion, is the meaning of the standard set forth in the Plan that governs the distribution of SPPs. The Motion identifies two possible interpretations of the term "virtual guarantee". Under one interpretation,

[3] The Sixth Circuit also ruled that the District Court may not "ignore otherwise competent reports and testimony" analyzing or critiquing the documentation and data used to support a recommendation. *Id.* at 481.

the distribution of SPPs could be based on an estimate of the cost of paying future, unknown FPPs. Under the other, the distribution of SPPs could only occur upon termination of the Plan. *Id.* at 2. The FC does not recommend a particular definition.

II. ARGUMENT

A. "Virtual Guarantee" Requires a Guarantee of all FPPs or a Miniscule Chance They Will Not Be Paid.

Pursuant to the SFA, SPPs may be distributed in only two circumstances: if all FPPs have been paid, or if the payment in full of FPPs is "assured." The first option provides an absolute guarantee and entails a zero percent chance of non-payment. The second option, which the FC asserts is unclear, requires, as per the Sixth Circuit's opinion, a "virtual guarantee" that all FPPs will be distributed. *In re Settlement Facility Dow Corning Trust*, 592 Fed. App'x. at 479-80.

One need look no further than the dictionary to ascertain the phrase's meaning. A "guarantee" is, among other things, "[a]n undertaking to answer for the payment or performance of another person's debt or obligation", "[s]omething that ensures a particular outcome" and "[a] formal assurance (typically in writing) that certain conditions will be fulfilled."[4] "Virtual" is defined as "being such in essence

[4] *Definition of Guarantee*, Oxforddictionaries.com, https://en.oxforddictionaries.com/ definition/guarantee (last visited February 9, 2017).

or effect though not formally recognized or admitted."[5] Thus, a virtual guarantee must be "in essence or effect" a guarantee.[6]

Consistent with its plain meaning, courts have ably used and interpreted the phrase "virtual guarantee" to mean something that is equivalent to a third party-guarantee. As the FC recognizes, the Supreme Court's opinion in *Marine Bank v. Weaver*, 455 U.S. 551 (1982) is instructive. There, the Court explained that a certificate of deposit is not a security because, unlike long-term debt obligations, a CD contains no risk. *Id*. at 551-52 (emphasis added). Rather, the Court explained, it is "virtually guaranteed" because deposits are insured by the Federal Deposit Insurance Corporation ("FDIC") and the FDIC reported that in failed bank cases 99.9 percent of depositors were assured of payment, while 99.8 percent of total deposits (*i.e.*, those above the legal limit) were paid or made available. *Id.* at 558. *See 1980 Annual Report of the Federal Deposit Insurance Corporation*, at 14 (1981) (available at https://fraser.stlouisfed.org/files/docs/publications/fdic/fdic_ar_1981_

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[5] *Definition of Virtual*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/virtual (last visited Feb. 9, 2017).

[6] The Sixth Circuit concluded that it should not interpret "assure" to require an *absolute* guarantee, since to do so would render Section 7.03(a) superfluous. *See* 592 Fed. App'x. at 478. The Sixth Circuit clearly reasoned that the assurance clause in Section 7.03(a) would be unnecessary if the standard were absolute guarantee since the first stated condition for the distribution of SPPs – where all FPPs have been paid – provides an absolute guarantee. Thus, assurance of payment does not require that all FPPs actually be *made* before SPPs may be issued, but that their payment must be effectively guaranteed.

v1.pdf)). *Id.* Thus, the Court equated "virtual guarantee" with a minimum of 99.8% certainty.

This understanding is in accord with numerous cases, which treat "virtual guarantee" as the equivalent of 100% certainty or something that is only infinitesimally less than that. *See, e.g., Trenchard v. Kell*, 127 F. 596, 597-600 (E.D.N.C. 1904) (agreement providing for "'not less (than) thirty-five million feet of'" timber imposed "virtual guaranty" that amount would be provided); *Chinery v. Metropolitan Life Ins. Co.*, 182 N.Y.S. 555, 557-558 (N.Y. App. Div. 1920) (describing incontestability clause in life insurance contract as "an assurance that … the beneficiary would receive the amount of [the policy] without any contest," and indicating such assurance was a "virtual guaranty that the company would pay the amount of the policy."); *Ruck v. Vassalotti*, 31 A.2d 596, 598 (Pa. Super. Ct. 1943) (describing seller's verbal assurance in connection with sale contract that business amounted to approximately $700 or $800 a week as a "virtual guaranty" of that amount of business by the seller and holding that this virtual guaranty was enforceable against the seller); *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 360 (E.D.N.Y. 1982) (finding that the terms of a settlement setting aside 215 units of a housing complex for minority applicants was a "virtual guarantee that nearly a tenth of the units at the Warbasse complex will be occupied by members of minority groups" and approving settlement because this virtual guarantee provided

certainty that the set-aside units would house minorities); *Reid v. IBM Corp.*, 1997 WL 357969, at *16 (S.D.N.Y. 1997) (concluding that because liability under the Federal Employers' Liability Act is presumed, "some award is virtually preordained" and characterizing this liability scheme—one in which an award is preordained—as a "virtual guaranty of recovery").

The FC's Motion recognizes the Sixth Circuit's interpretation but proposes to transform the term "virtual guarantee" into a burden of proof standard. Motion at 7. It is not necessary to translate the Sixth Circuit's clear articulation of the meaning of the word "assure" into burden of proof lexicon. No matter what it is called, the mandate is the same: FPPs may not be put at risk in order to pay SPPs. Even were one to accept the burden of proof concept outlined by the Motion, there is no discernable difference between the two burden of proof standards it offers up: beyond a reasonable doubt and beyond any reasonable possibility. If there is a reasonable possibility of risk of non-payment, then there must be a reasonable doubt that payment could be made and payment cannot be virtually guaranteed. The FC acknowledges that there are several risks to payment that it describes as reasonable. Motion at 7-8. The FC has thus answered its own question: there are sufficient risks to FPPs to preclude distribution of SPPs.

B. The IA Report Does Not and Cannot Provide A Basis For Finding That First Priority Payments Are Virtually Guaranteed.

The FC's Motion contemplates that to the extent SPPs may be made prior to FPPs, "[s]uch a payment must, by necessity, be based on 'known or knowable' projections." Motion at 4 (quoting SFA § 7.01(d)(1)). By this, the FC seems to suggest that that a projection of the number and value of unknown future FPPs could theoretically provide the basis for a determination that the payment of FPPs is assured. But the "known or knowable" language does not pertain to an assessment of whether SPPs may be made. Rather, the section of the SFA containing this language simply outlines the mechanism for the FC and IA to fulfill the obligation to make quarterly projections of the *likely* amount of funds that will be needed to pay FPPs. SFA 7.01(d)(i).[7] This obligation to make quarterly projections – using a lenient "likely" standard – does not affect or modify the stringent "virtual guarantee" standard required for authorizing SPPs.

Moreover, Section 7.01(c)(iv), as interpreted by the Sixth Circuit, precludes the use of a projection of unknown future claims as a basis to find that FPPs are virtually guaranteed. That is because a projection is "an estimate of future possibilities based on a current trend,"[8] and an estimate is an "approximate

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[7] These projections are relevant to assessing the annual cash flow needs of the SF-DCT with respect to the annual payment ceilings.

[8] *Definition of Projection*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/projection (last visited Feb. 9, 2017).

calculation" or "guess."[9] A guess, by definition, falls woefully short of a "virtual guarantee." An "approximate calculation" similarly falls short of providing near certainty.

Although the FC and the CAC previously argued that such a projection could be a basis for allowing SPPs, their contention was premised upon their belief that the standard was merely "more likely than not" or "adequate assurance" and that the Plan therefore permitted FPPs to be put at risk.[10] The Sixth Circuit flatly rejected that standard, and by imposing the virtual guarantee standard, rejected the concept that the Plan permits such a risk to FPPs and that an estimate of future filings could be sufficient to assure payment of FPPs. *See In re Settlement Facility Dow Corning Trust,* 592 Fed. App'x. at 480 (standard is stronger than a "strong likelihood").[11]

A simple review of the data and the components of the IA Report's calculation illustrates why such an estimate cannot provide the necessary virtual guarantee of

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[9] *Definition of Estimate*, Merriam-Webster.com, https://www.merriam-webster.com/thesaurus/estimate (last visited Feb. 9, 2017).

[10] Both the CAC and the FC admitted that an estimate, such as that contained in the IA Report, is inherently uncertain and that reliance on such an estimate could ultimately reduce the payment of FPPs. *See* FC 2011 Amended Motion, at 6, 14; CAC 2011 Reply, at 5, 10.

[11] Section 7.03(a) does not suggest that the finding that the Court must make to authorize SPPs could be based on a projection of future claims. In fact, the language states that the required recommendation of the FC must contain an accounting of pending claims and of claim payments. Nowhere does it mention any analysis of potential future claims.

payment of FPPs: it is predicated upon numerous assumptions that are admittedly uncertain and will undoubtedly prove to be unreliable.

The estimate assumes that the actions of past claimants will dictate the characteristics and actions of future claimants. But there is no basis to assume that the existing pool of known claimants is representative of the larger total pool. There are three relevant categories of claimants who can file or perfect claims over the remaining term of the settlement program: First, there are over 70,000 Class 5 Claimants who have not yet filed a disease or expedited release claim.[12] Second, there are over 17,000 filed Class 5 claims (for disease or other benefits) that currently have deficient proof of manufacturer submissions or have other deficiencies that can be cured. *Id.* at 27-28. Each of these claimants has the right to cure the deficiency and perfect their claim for an FPP. Third, there are Class 6.1 and 6.2 claimants who similarly remain eligible to file disease claims or to cure their previously filed

[12] The Motion indicates that there are 60,000 such claimants, but that figure is derived only from the subcategory of 115,338 individuals who are labelled as "eligible" with an "active" or "hold address" status in the SF-DCT database. IA Report at 24-26. Although there is some uncertainty in the data, which is being audited, there are other categories of claimants who legally have the right to seek a First Priority Payment. In addition to the 115,338, the IA Report notes there are 15,666 claimants labeled as either "conditional," "inactive address," "dormant," or "inactive" in the SF-DCT database, bringing the total universe of claimants in these categories to 131,010. *Id*. at 24-25. The SF-DCT monthly reporting indicates a total of 58,984 disease or expedited release filings as of June 30, 2016, which would leave over 70,000 Class 5 claimants remaining from the 131,010 who could still file a disease claim. *See* Exhibit A, SF-DCT Claims Processing Report for the Period Ending June 30, 2016, at 1-2.

claims. To put these numbers into context, the SF-DCT has paid a total of approximately 27,469 Class 5 disease claims as of June 30, 2016. *Id.* at 51. That is, the remaining eligible population among Class 5 claimants is more than double the population of claimants who have already been paid their FPPs.

The IA Report does not attempt to evaluate the characteristics of all of these claimants. Instead, the IA Report estimates the aggregate value of future FPPs based on an assumption that an extremely small portion of the remaining eligible population will file disease claims. IA Report at 35. To derive that estimate, the IA Report assumes, *inter alia,* (1) that only 3% of the entire population of remaining Class 5 claimants will file disease claims, (2) that these individuals will be a mirror image of the claimants who filed claims during the historical calibration period chosen, (3) 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 (4) that their claims will be approved and paid at the current rates for approval and payment.[13]

[13] After making the computation described above, the IA Report calculates the net present value of the aggregate estimated value of these future FPPs by assigning the estimated future filings to specific time periods. The IA Report also makes an estimate of future administrative costs. Then the IA Report subtracts this estimate from the funds that may be available under the Plan. The IA Report then concludes that there would be some excess funds, assuming that all of the estimates and assumptions are actually fulfilled. *See* IA Report at 17-20. The calculated surplus is cited in the Motion as relevant under one of the two interpretations put forward by the FC to the determination of whether payment of FPPs is assured. *See* Motion at 2.

These assumptions are highly speculative, particularly given that the IA Report does not attempt to ascertain the characteristics of the remaining eligible population and does not attempt to compute the incidence of eligible conditions in this population.

The IA Report itself recognizes the inherent uncertainty in its estimate, offering a necessary cautionary note: it advises that, as a result of being assumption-based, the computations 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. *Id*. at 3, 6. It is thus no surprise that the IA does not itself assert that the assumed number of disease filings in the projection is "virtually guaranteed." *See* Exhibit B, ANKURA Response to Questions for IA on Final Report ("IA Responses to the DR's Questions") at Q.12.

Rather, the IA admits that the calculations are simply based on certain historical observations and an extrapolation of certain claims data, and appropriately cautions that there are many types of events or actions that would have an effect on the assumptions and the ultimate computations:

- "All filing forecasts like the one produced in this report are based on past patterns of activity and historical trends. These patterns may change as a result of unforeseen events as well as by design. From a claim filing perspective, for example, outreach programs such as mass mailings may produce filing behavior not predictable from historical data." IA Report at 3; *see also* IA Responses to the DR's Questions.
- "In addition, changes in how the claims are administered or how directions in the Plan are interpreted may create substantively different results than seen before in activities such as the approval and payment

of claims. Ankura has undertaken this study using the data and policies in place as of the end of the Second Quarter in 2016. Changes in procedures may cause variations from the forecasts presented in this report." IA Report at 3; *see also* IA Responses to the DR's Questions.

- "There may be additional uncertainties, not yet identified. For example, as we have seen in the past, any efforts to contact potential claimants would likely change filing patterns and outcomes, as would any changes in existing claim review and compensation policies." IA Report at 6.

In short, this estimate is fraught with uncertainty. In fact, the most certain aspect of the IA report is that one or more of the assumptions will be incorrect. As the IA Report acknowledges, the Report simply provides an analysis of what *might* happen:

- *If prior historical filing patterns from the calibration period remain the same*. The IA has made clear that it *does not* "guarantee" the projected number of future filings.

- *If prior historical qualification rates, cure rates, disease mix, and claim values remain the same.* If these assumptions do not prove accurate, claim values will be higher, more claims will be approved, the liability will rise, and the projected "surplus" will fall.[14]

[14] The many assumptions made about these factors all drive the results of the forecast. For example:

- For disease claim values, the IA Report notes that averages in 2014 and 2015 were higher than previous years, but states the assumption that this is "not expect[ed] … to be a trend" and so the Report uses a simple three-year average.
- For cure rates, the IA Report for the first time adds a new assumption that proof of manufacturer submissions filed in 2010 or earlier that have a Deficient or Failed Prescreen status will cure at a rate of only 2% based on selecting historical cure patterns from a period of time and assuming such behavior will be replicated in the future.

- *If the claims data is not found to have errors or to have misclassified claims.* The IA acknowledges that it has "limited information" on the procedures by which the SF-DCT is continuing to audit and correct claims data. *See* IA Responses to the DR's Questions.

- *If policies and procedures remain the same.*

- *If there is no effect of disease prevalence, incidence or disability cure rates.*

- *If there is no surge of disease filings in the coming years or at the filing deadline beyond what is forecasted.*

The IA Report cannot be used to support a finding that all FPPs are virtually guaranteed; rather, it can only be used to state that there would be a surplus if all of the assumptions about the unknown future claims used in the IA Report come true. This is not and cannot be the standard.

i. Expert Analysis Confirms That the Estimate in the IA Report Cannot Provide a Virtual Guarantee.

As set forth in the accompanying Declaration of Paul J. Hinton, dated February 10, 2017 ("Hinton Dec.") (Exhibit C) – a Principal at The Brattle Group with over 15 years of experience in product liability estimation, finance and commercial disputes – 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'" but, rather, are done where the uncertainty of estimation is

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- For approval rates, rates are based on prior experience from the periods chosen.

Id. at 6, 41, 51.

recognized. *Id*. at ¶¶ 9-11. There are many sources of uncertainty in tort claims estimation. *Id*. at ¶¶ 15-17. For example, "[t]he nature of human behavior, epidemiology and decision making, such as the decision by a claimant or lawyer to file a claim, results in inherent uncertainty in the incidence and estimation of future claims." *Id*. at ¶ 15.

Moreover, unlike the most widely accepted method for making personal injury mass tort forecasts, which incorporate an epidemiology component with several steps, "the IA 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 IA calculation is a 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. "The IA Report does not quantify uncertainty inherent in its projections and cannot measure uncertainty in estimates arising from underlying drivers of claims not modeled in its methodology." *Id.* ¶ 23. The Court, therefore, cannot determine or assess the risk to the FPPs. If the Court cannot assess the risk, then the Court cannot find that the FPPs are virtually guaranteed.

ii. Courts Have Found Assumption-Based Claim Estimates To Be Demonstrably Inaccurate And Varied.

The history of the use of assumption based estimates of future tort claims further demonstrates why the estimate in the IA Report cannot be deemed to provide a virtual guarantee. Courts repeatedly and expressly have found that estimates of future tort claims are nothing more than educated guesses that *cannot* provide any level of "precision" or "certainty" – 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).

A review of the future claim projections in a few prominent mass tort bankruptcy cases illustrates the impropriety of using any assumption-based projection of future claim filings to determine that payment of FPPs is assured. In each illustrative case, several experts, including experts that have conducted analyses in this case, were provided with the same set of data typically consisting of records of claim filings, underlying medical conditions asserted by the claimant and the resolution of the claims. The experts used this data to project the number, timing and type of future claim filings and the cost of resolving those claims. In each case, the various experts reached materially different conclusions – solely because they applied different "assumptions" about the claiming behavior in the future. In each case, the expert stated that his or her assumptions were "better" than the assumptions

applied by a different expert. Courts consistently recognize that this great divergence in outcomes results from the fact that these estimations are simply *assumptions-based* methods of projecting future liability, and that changing the assumptions can lead to dramatically different results. If the assumptions change, the estimates change.

For example, in *Owens Corning*, the court evaluated competing estimates prepared by four experts. The court found that all of the experts "had extensive experience" and were "well qualified" – yet their liability projections differed dramatically (by as much as $9 *billion*) based on their divergent assumptions:

- $11.1B estimate by Dr. Peterson, expert for claimants committee;
- $8.15B by Dr. Rabinovitz, expert for the future claimants representative;
- $6.5 to $6.8B by Dr. Vasquez (ARPC), expert for the debtors; and
- $2.08B by Dr. Dunbar, expert for banks.

Owens Corning, 322 B.R. at 721. The court stated that the margin for error is "substantial," and that "[r]elatively minor variations in underlying assumptions can skew the end result enormously." *Id.* The court recognized that it was "beyond question" that "we are dealing with uncertainties, and are attempting to make predictions which are themselves based upon predictions and assumptions." *Id.*

In *Federal-Mogul,* the court was "similarly … confronted with two estimates that are submitted by two well-respected experts, but are based on radically different assumptions…." *In re Federal-Mogul*, 330 B.R. at 156. Dr. Peterson, expert for the

asbestos claimants, calculated two estimates that themselves differed by $2.9 *billion*. *Id*. at 144. In *Armstrong*, the three competing estimates varied tremendously because of differing assumptions:

- $1.96B by Dr. Chambers, expert for the plan opponents;
- $4.5B by Dr. Florence (ARPC), expert for the Legal Representative for Future Asbestos Claimants (the $4.5 billion was the median range of 32 different estimates prepared by Florence which all differed based on different assumptions); and
- $6.121B by Dr. Peterson, expert for the Asbestos Claimants Committee.

Id. at 129, 134. The court observed, regarding the inherent nature of assumption-based estimates, that "[a]s is apparent not just from the final estimates in the instant case, but in estimation cases in general, '[r]elatively minor variations in underlying assumptions can skew the end result enormously.'" *Id.* (quoting *Owens Corning*, 322 B.R. at 721). The court stated that the projection of liability was "an uncertain number" and that "*the number of possible variables makes any pretense to certainty illusory.*" *Id.* at 114-15 (emphasis added).

Hindsight has proven that virtually all estimates conducted in the context of asbestos litigation have proven to be wrong and payments have had to be adjusted. *See* Hinton Dec. at 5. In fact, litigants recognize the imprecision of the estimates and incorporate procedures to re-evaluate and adjust payments on a regular basis.[15]

[15] For example, the Owens Corning trust reduced the Owens Corning Subfund payment percentage from 40% to 10%, then to 8.8% as a result, *inter alia*, of the greater than anticipated claims payments, then increased it to 11.1%. The initial

C. Experience From Trustees of Other Limited Funds Supports the Standard.

The virtual guarantee standard is not unique: it is consistent with the standards employed by trustees in limited fund distributions. As set forth in the attached

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payment set in the Babcock & Wilcox bankruptcy in February 2006 was reduced three years later from 34% to 15%, then subsequently to 11.9%, then to 7.5% based on estimates of the number, types and values of present and future claims, then increased to 11.9%.

Owens Corning: *See* Annual Report and Account of the Owens Corning/Fibreboard Asbestos Personal Injury Trust For the Fiscal Year Ending December 31, 2010, at 12, *In re Owens Corning,* No. 00-3837 (JKF) (Bankr. D. Del. Apr. 29, 2011) (Dckt. 21018); June 4, 2009 letter from Trustee to Claimants' Counsel, *available at http://www.ocfbasbestostrust.com/update-regarding-owens-corning-payment-percentage-change-642009/*; September 28, 2012 letter from Trustee to Claimants' Counsel, *available at http://www.ocfbasbestostrust.com/wp-content/uploads/2014/07/OC-SubAccount-Revised-Percentage-Proposal-Letter-9-28-12.pdf*; and December 2, 2015 letter from Trustee to Claimants' Counsel, *available at http://www.ocfbasbestostrust.com/wp-content/uploads/2015/12/OC-Sub-Account-Trustee-Executed-Payment-Percentage-Change-C0457461x9DB18.pdf*.

Babcock: *See* Annual Report and Account of the Babcock & Wilcox Company Asbestos PI Trust for the Fiscal Year Ending December 31, 2010, at 10-11, *In re Babcock & Wilcox Co.,* No. 00-10992 (Bankr. E.D. La. Apr. 27, 2011) (Dckt. 7835); August 4, 2009 letter from Trustee to Claimants' Counsel, *available at http://www.bwasbestostrust.com/wp-content/uploads/2014/05/BW-ltr-to-Claimants-Counsel.pdf*; December 21, 2011 letter from Trustee to Claimants' Counsel, *available at http://www.bwasbestostrust.com/wp-content/uploads/2014/05/B-W-Payment-Percentage-Notices-to-claimants-counsel-and-pro-se-claimants-P0224314.pdf;* September 28, 2012 letter from Trustee to Claimants' Counsel, *available at http://www.bwasbestostrust.com/wp-content/uploads/2014/05/BW-Notice-Revised-P-Proposal-Letter-9-28-12.pdf;* and December 2, 2015 letter from Trustee to Claimants' Counsel, *available at http://www.bwasbestostrust.com/wp-content/uploads/2015/12/BW-letter.payment-percentage-12.2.2015-C0457558x9DB18.pdf*.

Declaration of Jonathan Rosen, dated February 10, 2017 ("Rosen Dec."), (Exhibit D) who served as the Chief Operating Officer of The Home Insurance Company in Liquidation ("Home"),[16] administrators of a limited fund must be certain that sufficient funds are available to pay all higher priority creditors in full before they make distributions to lower priority creditors (or create subclasses within a priority class). Rosen Dec. at 4. This decision can be made only after the value of all of the losses is known or capable of being established with certainty and not before. *Id*.

Similarly, the Trustees for the A.H. Robins Bankruptcy Plan (which resolved claims for injuries related to the Dalkon Shield intrauterine contraceptive device) determined that they could not permit lower priority distributions until they had received, reviewed and valued every higher priority claim. Declaration of Georgene M. Vairo, Nov. 10, 2011, Exhibit E to Opposition of DCC, the DRs and the Shareholders to Finance Committee's Recommendation and Motion for Authorization to Make Partial Premium Payments, *In re Settlement Facility Dow Corning Trust*, Nov. 11, 2011, ECF No. 826-7 ("2011 Vairo Declaration"). The Robins plan provided for pro rata distributions of any surplus remaining after payment of all personal injury claims. In order to support any such distribution, the

[16] In the Home liquidation, the statutory scheme governing the order of distribution required that "every claim in each class shall be *paid in full or adequate funds retained* for the payment before the members of the next class receive any payment." N.H. Rev. Stat. Ann. § 402-C:44 (emphasis added).

Trustees were required "to ensure that all claims are paid in the same proportions" or "to ensure equality in distribution among claimants and the continued availability of funds to pay all valid non-subordinated claims." 2011 Vairo Declaration Attachment 4, Dalkon Shield Trust Claims Resolution Facility, ¶ G.3.

As set forth in the accompanying Declaration of Georgene M. Vairo, dated February 10, 2017 ("Vairo Dec.") (Exhibit E), a Trustee of the Dalkon Shield Claimants Trust and Chairperson of the Board of Trustees, the Trustees interpreted the Dalkon Shield Plan to permit distribution of pro rata payments at such time as the Trustees had actual claim data so that they could be assured that all qualified timely and late claims would be paid in full. The Trustees of the Dalkon Shield Plan thus recognized the need to require virtual certainty – the same level of confidence as is required by the Plan.

D. Distribution of SPPs Could Result in Impermissible Inequity Among Claimants.

The FC states that there is a "horizontal equity problem that cannot be avoided absent approval of the continuation of fifty percent (50%) [SPPs]." Motion at 8. The fact that some claimants erroneously received 50% Premium Payments, after DCC's motion for a stay was opposed by the CAC and denied, cannot be undone. But the Court should not compound that error by allowing additional SPPs to be issued now and then face the possibility that FPPs at the end of the process will not be paid in full. Such an outcome would violate the Plan and the Bankruptcy Code.

It would mean that the lower priority payments were favored over higher priority payments and would create permanent "horizontal inequity" among the higher priority claimants.

In any event, any perceived "inequity" results not from the Plan or bankruptcy law (as the FC's Motion suggests) but from the FC's original motion to authorize 50% Premium Payments, and the CAC's opposition to DCC's motions to stay this Court's order granting the FC's original motion pending appeal to the Sixth Circuit. *See* CAC Opposition to Stay. "[A] party may not complain … of errors that he himself invited or provoked the court or the opposite party to commit." *Stembridge v. Davis*, 2008 WL 283722, at *5 (E. D. Mich. 2008) *citing to United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993). "In particular, the doctrine of invited error prevents a party from inducing a court to follow a course of conduct and then 'at a later stage of the case us[ing] the error to set aside the immediate consequences of the error.'" *In re Bayer Healthcare and Merial Ltd. Flea Control Products Marketing and Sales Practices Litigation*, 752 F.3d 1065, 1072 (6th Cir. 2014) (citation omitted). In short, the claimed "inequity" provides no basis for issuance of additional SPPs in the absence of a "virtual guarantee" as mandated by the SFA language.

III. CONCLUSION

For the foregoing reasons, the Recommendation and Motion for Authorization to Make Second Priority Payments should be denied.

Dated: February 10, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

PROPOSED ORDER OF DOW CORNING CORPORATION AND THE DEBTOR'S REPRESENTATIVES DENYING FINANCE COMMITTEE'S RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE SECOND PRIORITY PAYMENTS

The Court has considered Dow Corning Corporation and the Debtors Representatives' Opposition to the Finance Committee's Recommendation and Motion for Authorization to Make Second Priority Payments (the "Motion"), and the Court finds and concludes that the Motion lacks merit and should be denied with prejudice.

ACCORDINGLY, it is hereby ORDERED that the Recommendation and Motion for Authorization to Make Second Priority Payments is DENIED with prejudice.

Dated: _____

_____
DENISE PAGE HOOD
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2017, I electronically filed the *Opposition of Dow Corning Corporation and the Debtor's Representatives to Recommendation and Motion for Authorization to Make Second Priority Payments* with the Clerk of the Court using the ECF system. The persons listed below were sent notification through the ECF system, or served via electronic mail or first-class mail if non-ECF participants.

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