

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

IN RE:	§	
DOW CORNING CORPORATION,	§	CASE NO. 00-CV-00005DPH
REORGANIZED DEBTOR	§	Hon. Denise Page Hood
	§	

**SUPPLEMENTAL BRIEF TO FINANCE COMMITTEE’S
RECOMMENDATION AND MOTION FOR AUTHORIZATION TO MAKE
SECOND PRIORITY PAYMENTS**

I. INTRODUCTION

The Finance Committee has had the benefit of arguments and evidence presented by the parties and the Independent Assessor (“IA”) related to the question of authorizing 50% Second Priority Payments. There are three principal positions: 1) a position that Second Priority Payments should be made because there is only a “tiny risk” of insufficient funds to make all First Priority Payments; 2) a position that Second Priority Payments should not be made unless there is no risk of insufficient funds to make all First Priority Payments; and 3) a position that reconciles the Second Priority Payment language in the Settlement and Fund Distribution Agreement (“SFA”) and the “virtual guarantee” language of the Sixth Circuit articulated in *In Re Settlement Facility Dow Corning Trust*, 592 F. App’x 473 (6th Cir. 2015), relying on the Independent Assessor’s Report.

II. BACKGROUND

The Finance Committee was created by the SFA, which became effective on June 1, 2004. The Committee is composed of three members: the Special Master, the Appeals Judge and the Claims Administrator. SFA §4.08 (Doc #1279, Exh.1). These members are selected by the Claimants Advisory Committee and the Debtor's Representatives and approved by the District Court. SFA §§ 4.02, 4.07, 4.10 (Doc #1279, Exh. 1). The members have changed over the years, but have historically been legal and claims professionals with deep knowledge of mass tort liability and claims administration. Currently, Francis E. McGovern serves as the Special Master, Pamela R. Harwood serves as the Appeals Judge and Ann M. Phillips serves as the Claims Administrator. *See* Biographies of Finance Committee Members (Exh. 1). The Finance Committee, in conjunction with the IA, is charged with conducting the analysis and projections necessary to determine the availability of funds for payment of all categories of claims and making recommendations to the District Court regarding release of funds from the Settlement Facility-Dow Corning Trust ("SF-DCT"). SFA §4.08(b)(ii) (Doc #1279, Exh. 1). Indeed, the Finance Committee exists in great part to evaluate projections of liability and the existence of sufficient funds in order to make objective and sound recommendations to the District Court regarding payments.

Under the SFA, the IA is an independent third party selected by the Finance Committee, the Debtor's Representative and the Claimants' Advisory Committee. The IA oversees and makes recommendations concerning projected funding requirements and the availability or adequacy of assets in the Litigation and Settlement Funds. SFA § 4.05 (Doc #1279, Exh. 1). In addition, the IA is to provide the Finance Committee with annual reports. *Id.* Specifically, the IA prepares:

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 and knowable, be based upon and take into account all data (as of the date of 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 the (v) projected future filings with the Settlement Facility.

SFA § 7.01(d)(i)(1) (Doc #1279, Exh. 1).

The IA has prepared these reports for the Finance Committee for twelve years. The reports are provided to the parties for review and comment and final reports are presented to the District Court. This Court is very familiar with the IA's reports, having received them routinely. Importantly, the IA's reports have consistently exhibited claim forecasts that exceed that the actual claims paid by SF-DCT. Never in the history of the IA's forecast has it exceeded the actual claims paid.

In 2016, the Finance Committee requested the IA make its annual report and include the status of claim payments as of June 30, 2016.¹ The Final Report of the Independent Assessor End of Second Quarter 2016 was received on October 18, 2016 (“IA Report”). The IA Report estimated that a surplus of \$100.4 million NPV will remain in the Fund through the end of the Settlement Facility for claims and operating expenses if 50% of Second Priority Payments are made.²

The IA Report indicated that the costs of making Second Priority Payments through the end of the settlement program are as follows:

- Payment of 50% Premium Payments will cost \$30 million nominal/\$12.2 million NPV;
- Payment of 50% Class 16 Claims will cost \$11.9 million nominal/\$4.9 million NPV;
- Payment of 50% of the full capped amount allocated for Increased Severity Option 1 Claims will cost \$7.5 million NPV;
- Payment of 50% of all possible Option 2 Increased Severity Claims, which are not capped, will cost \$92.6 million nominal/\$38 million NPV;

¹ Through June 30, 2016, the SF-DCT has paid \$1.33 billion for 134,809 claims. *See* Claims Processing Report for the Period Ending June 30, 2016 at 57(Exh. 2). This includes a total of \$614,060,056 in Class 5 Disease claims (plus Premium Payments of \$47,429,050); \$427,028,547 in Rupture claims (plus Premium Payments of \$42,410,384); \$150,717,426 in Explant payments; and \$45,095,406 in Expedited Release payments. *See* IA Report at 49 (Doc #1279, Exh. 2). Deadlines for Rupture claims, Class 7 claims, Class 9/10 claims and Explant claims have passed, leaving only Disease (Option 1 and 2) and Expedited Release claims, which must be filed by June 3, 2019. SF-DCT monthly reporting reveals that the filing of Disease claims, the most significant area of liability remaining for the Trust, has slowed. *See* Summary of Monthly Department Reporting, December 2016 (Doc #1285, Exh. 5).

² The basis for that conclusion was provided in the Finance Committee’s Recommendation and Motion for Authorization to Make 50% Second Priority Payments (“the Recommendation”) at 2-3 (Doc #1279).

- Payment of claims related to the “scenario³” involving 420 estimated Rupture claims will cost \$3.4 million NPV;
- Payment of claims related to the “scenario” involving all claims that have an acceptable POM, an unacceptable Disease claim, and no Expedited payment will cost \$3.0 million NPV;
- Payment of claims related to the “scenario” involving late claimants will cost \$1.0 million NPV;
- Payment of claims related to the “scenario” involving the NOI Excess cap will cost \$2.2 million NPV; and
- Payment of claims related to the “scenario” involving Dormant or Inactive Address Class 5 claims will cost \$1.2 million NPV.

IA Report at 12-16 (Doc #1279, Exh. 2). Therefore, 50% Second Priority Payments will cost approximately \$73 million NPV.

In finding the adequacy of funding for Second Priority Payments⁴, the IA explained:

Based on the existing evidence (i.e. claim filing behavior over the life of the Fund, existing policies and procedures, and the Settlement Agreement) Ankura believes that the \$100.4 million in remaining assets are sufficient to meet the 'virtual guarantee' standard of payment for First Priority Payments.

Ankura Response to Questions at 1 (Doc #1285, Exh. 8).

As in past years, after receiving the IA’s report, Dow Corning Corporation and the Debtor’s Representatives (“Dow Corning”) as well as the Claimant’s Advisory Committee (“CAC”) submitted questions to the IA and discussed the IA Report’s

³ The Finance Committee’s Recommendation and Motion for Authorization to Make Second Priority Payments describes these scenarios in footnote 7. (Doc #1279 at 3, n. 7).

⁴ The arguments, briefs, and evidence presented by the parties on the question of making Second Priority Payments since October 18, 2016, the date of the IA Report, have not changed the IA’s opinion regarding the propriety of making 50% Second Priority Payments. *See* IA Memo dated April 24, 2017 (Exh. 3).

findings with the IA. The Finance Committee asked the parties to submit position briefs in advance of a meeting that was held on December 7, 2016 that allowed for an open and thorough discussion of the issues concerning Second Priority Payments. After consideration of that information, on December 30, 2016, the Finance Committee filed its motion to authorize 50% Second Priority Payments.⁵ Dow Corning and the CAC filed response and reply briefs following the Finance Committee's recommendation, which attached declarations of experts and other evidence to support their positions. On March 23, 2016, oral argument on the Finance Committee's motion was held before this Court. The parties argued their positions and discussed the evidence in the record.

II. THE THREE POSITIONS

A) **A position that Second Priority Payments should be authorized because there is only a "tiny risk" of insufficient funds to cover First Priority Payments.**

Since 2011, when the issue of making Premium Payments was raised, the CAC has argued that to induce claimants to support the Plan of Reorganization and settle their claims, Dow Corning promised the SF-DCT would issue Second Priority

⁵ This is not the first such recommendation, on October 7, 2011, the Finance Committee recommended that the Court authorize 50% Premium Payments. Following briefing and a hearing, the Court authorized distribution of 50% Premium Payments on December 31, 2003. Pursuant to that order, SF-DCT paid approximately \$92.2 million in Premiums to thousands of claimants. IA Report at 15 (Doc #1279, Exh. 2). In 2015, the Sixth Circuit reversed the Court's order, holding that this Court should have applied a higher "virtual guarantee" standard to determine the adequacy of funding and should have considered expert reports and testimony regarding the reliability of the IA's forecast. *See In Re Settlement Facility Dow Corning Trust*, 592 F. App'x 473 (6th Cir. 2015).

Payments once sufficient funds were confirmed. According to the CAC, the payment of Second Priority Payments before all First Priority Payments are paid was bargained for and now Dow Corning seeks to go back on its promise.

The CAC urges that the sufficiency of available funding to make 50% Second Priority Payments and First Priority Payments is “beyond good faith dispute.” CAC Response at 2 (Doc #1285). The CAC argues that the IA’s methodology is consistent with the projection procedure outlined in the SFA, which was agreed to by the parties and is objectively reliable. The CAC has presented declarations of its expert, Dr. Mark Peterson, who endorses the IA’s methods and projections. Dr. Peterson’s testimony also refutes Dow Corning’s attacks of the IA Report.

The CAC has argued that the IA’s forecast meets the “virtual guarantee standard” identified by the Sixth Circuit, because the projections are reliable and leave only a “tiny risk” that funds for First Priority Payments will run out if 50% Second Priority Payments are made. The heart of the CAC’s position is its definition of virtual guarantee as “a tiny risk.” According to the CAC a virtual guarantee means “some very small or slight, but not significant, uncertainty may remain.” CAC Reply at 1 (Doc #1305). Thus, “the Court should not approve these payments unless [it] agree[s] with [the CAC] that the risk [of insufficient funding] now is very farfetched and small. It is a tiny risk.” Motion Hearing Transcript at 21 (Exh. 4).

The decision to impart additional meaning to the Sixth Circuit’s description of “virtual guarantee” is understandable. But the drawback of this position is that its conclusion does not rest exclusively on the definition of virtual guarantee that was provided by the Sixth Circuit, i.e., “...this standard does not require absolute certainty, it is nonetheless stricter than the ‘strong likelihood’ or ‘more probable than not’ levels of confidence...” *In Re Settlement Facility Dow Corning Trust*, 592 F. App’x at 480.

B) A position that Second Priority Payments should not be made unless there is no risk of insufficient funding to cover First Priority Payments.

Dow Corning has taken a position that at the time the Plan of Reorganization was confirmed, the parties intended that Second Priority Payments would be paid only if all or virtually all First Priority Payments had been paid. The idea is that there would be either no risk or a mathematically certain amount that could be calculated to determine the funds necessary to pay remaining First Priority Payments.⁶ In arguing that Second Priority Payments can be made only after all First Priority Payments are

⁶ Counsel for Dow Corning made this argument during the hearing on March 23, 2017, stating:

[W]e all thought that there would be a significant number of claims that would be resolved through the expedited release payment process.... And the idea there was that we would clear out all these claims. And if that happened, we may be in a very different situation today. We may have very small number of people left who could make disease claims and we would be able to rely on some kind of analysis projection because we would know the outside limit of the value of these claims. But that is not what happened.”

Motion Hearing Transcript. at 80 (Exh. 5).

paid, or are capable of being calculated, this position essentially rejects the use of projections.

Dow Corning has explained: “[First Priority Payments] may not be put at risk in order to pay [Second Priority Payments]”; “...a virtual guarantee requires near 100% certainty of payment---near zero risk to [First Priority Payments]...”; and “...if there is no risk, then you have a virtual guarantee.” *See* Dow Corning Opposition at 9 (Doc #1287); Dow Corning Reply at 4 (Doc #1307); Motion Hearing Transcript at 47 (Exh. 6).

Dow Corning urges that the IA’s projections are unreliable and the IA Report’s approval of 50% Second Priority Payments does not meet the virtual guarantee standard because it is based on a series of assumptions and permits uncertainty. Dow Corning supports its position with declarations of its expert, Paul Hinson, and other evidence that highlights the IA’s assumptions and poses several “what ifs” to disturb those assumptions.

This position’s premise that the existence of uncertainty or risk defeats a finding of virtual guarantee renders the standard tantamount to absolute certainty, a notion that has been rejected by the Sixth Circuit. The Court of Appeals expressly stated: “because it is impossible to account for all future uncertainties, we will not impose an ‘absolute guarantee’ standard of confidence.” *In Re Settlement Facility Dow Corning Trust*, 592 F. App’x at 479.

C) A position that reconciles the SFA’s language with Sixth Circuit “virtual guarantee” language, relying on the IA Report.

The standards for any recommendation come from the SFA and the Sixth Circuit’s interpretation of that agreement. This position attempts to resolve any potential conflict between these sources. The SFA permits the Court to authorize Second Priority Payments if it 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 (Doc #1279, Exh. 1). The SFA also contemplates that projections of the IA would be used to determine whether adequate provisions to assure payments exist generally. SFA § 7.01(d) (Doc #1279, Exh. 1). Thus, the SFA creates an ability to make Second Priority Payments based upon the analytical tools of the IA. This assumption was credited by the Sixth Circuit, which stated: “while 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*’ those projections are neither immune from criticism, nor impervious to modification by the court, depending on the evidence developed at the hearing.” *In Re Settlement Dow Corning Trust*, 592 F. App’x at 481 (internal citations omitted) (emphasis added). If the elimination of any risk of error is the standard, then there would be no need for the IA’s analysis; there would be merely a mathematical calculation ensuring absolute certainty of sufficient funding before Second Priority Payments would be made. Instead, this position

reconciles any conflict between the SFA and the Sixth Circuit's opinion by taking as a given that the decision to make Second Priority Payments can be based upon the available data and methodology of the IA, if the IA's projections reach the level of a virtual guarantee. The task is to ensure that the data and methodology used by the IA provide sufficient evidence to support a recommendation to authorize Second Priority Payments.

i) *Confidence in the IA's projections.*

The IA has opined that with 50% Second Priority Payments, sufficient funds to make First Priority Payments are virtually guaranteed. The question then arises concerning any weaknesses in the IA's data or the methodology. The data relied upon by the IA constitutes all the potentially available data and there is no criticism of its correctness. The methodology used by the IA is the customary and accepted method used by trusts and courts to determine future mass claim liability and has proven extremely reliable over the settlement program. The IA, Ankura Consulting, employs nationally recognized experts who specialize in statistical and actuarial services. B. Thomas Florence, who works directly with the Finance Committee in developing the IA Report, is the most experienced prognosticator of claims liability in the country. *See* Florence Curriculum Vitae (Exh. 7). Mr. Florence is assisted by Dr. Jean Malone, who has more than 25 years of experience in risk assessment and

statistical analysis. *See* Malone Curriculum Vitae (Exh. 8). The IA describes its methodology as follows:

Ankura has undertaken the task of projecting liabilities of the Trust with respect to past and future claims filings and determining the adequacy of the Trust's assets in resolving those liabilities. Ankura 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. Ankura relies heavily on the Trust's historical experience to determine many of the components of this analysis. Because of this reliance, Ankura has scrutinized the supporting data to ensure that the information critical to this analysis is consistent and reliable.

IA Report, at 3. (Doc #1279, Exh. 2).

The evidence submitted by the Finance Committee and the CAC, including the IA Report, which demonstrates the IA's use of conventional statistical and actuarial techniques; and the declarations of Dr. Peterson, which validate the methodology, support the reliability of the IA's projections. *See e.g.*, 2017 Peterson Reply Declaration (Doc #1305, Exh. 13).

The IA's projections for the remaining two-plus years of the settlement program are based on conservative assumptions, including the occurrence of several "scenarios"⁷ and the application of a constant base case forecast, which assumes no further decay in claims filing.⁸ Because the IA has used the "most accurate and

⁷ *See* The Recommendation (Doc #1279 at 3, n. 7).

⁸ A constant model, which assumes that claims filings will stay constant over time, results in a higher liability forecast than a decay model, which assumes a reduction in filings over time.

timely data possible” in conjunction with the best available “conventional statistical and actuarial techniques,” there should be little doubt in the quality or reliability of these projections. IA Report at 3 (Doc 1279, Exh. 2).

The IA’s methodology has proven reliable over the course of the settlement program. As the IA notes: “the [SF-] DCT has a claims payment history of more than a decade, since 2004 and the 2019 final filing deadline is only three years in the future. In addition, the annual IA analyses have consistently predicted higher liability than actually occurred.” IA Report at 4 (Doc 1279, Exh. 2). For example, the projected number of filing for Class 5 disease claims made for 2015 in the 2014 report was 473; the actual 2015 filings totaled 168. This history of conservative estimates suggests that the IA’s projections for future filings will be higher than the actual, and that there will be more rather than less of a surplus for First Priority Payments.

Likewise, there are other features of the IA’s methodology that lead to the belief that the IA’s projection will overestimate liability, thereby establishing a strong basis for a finding that First Priority Payments are virtually guaranteed with 50% Second Priority Payments. Those features include: 1) the IA has assumed that disease claim filings will continue to stay constant, rather than decline; 2) the IA has assumed that *every single* claimant with a valid Proof of Manufacturer (“POM”) will

receive either a disease or expedited release payment;⁹ and 3) the IA has used a maximum liability scenario for Increased Severity claims, which assumes the spending cap on Option 1 Increased Severity claims is met, and a 100% payment rate for Option 2 Increased Severity claims. IA Report at 13, 16 (Doc 1279, Exh. 2).

The IA's methodology and accuracy of its projections are also supported by the experience of the MDL-926 and its Revised Settlement Program ("RSP"), which closed in 2010. The RSP was a parallel settlement program involving overlapping populations. Many of the claimants were eligible for both MDL and SF-DCT payments. When examining comparable time periods, the SF-DCT made lower payments and had higher payments forecasted than the MDL. *See* Final Report of Claims Processing in the Revised Settlement Program (Doc # 1305, Exh. 6). Moreover, the SF-DCT will close nine years after the RSP, at which point more possible claimants will have died or otherwise lost touch with the settlement facility. These points provide more confidence that the IA Report has over-estimated, rather than underestimated, the final liability of the Settlement Facility. Additionally, the RSP did not face an unexpected surge of claimants at its end. Instead, there was a modest increase in claims filing at the RSP disease claim deadline. *Id.* This supports the view that an extreme surge in disease claims at the SF-DCT is unlikely, as predicted by the IA. The IA has projected that 1,836 future Disease claims will be

⁹ The IA makes this assumption even though multiple mailings over the years advising claimants of this potential benefit only resulted in 40 filed claims through May 2016.

filed from the possible 60,083 claimants who remain eligible. IA Report at 37 (Doc #1279, Exh. 2). This universe of claimants has been identified as the individuals who submitted Proof of Claims (“POC”) in the bankruptcy court approximately twenty years ago. The POC was simply a notice an individual made to the bankruptcy court that allowed them to pursue a claim once the SF-DCT was created. These prospective claimants have not pursued a claim in the SF-DCT. Because the SF-DCT was aware that these individuals had filed a POC in the bankruptcy court, they received multiple informational mailings with claim form packets from the SF-DCT. *See* Mass Mailing Index (Exh. 9). They were advised of the SF-DCT’s toll-free phone number and website. The CAC also maintains an informational website. They have not responded with a POM or a Claim form.¹⁰

ii) *Criticism of the IA Report*

The fundamental criticism of the IA’s methodology arises out of an inability to eliminate all future risks that may prove the recommendation incorrect; i.e. that there will not be sufficient funds to make the 50% Second Priority Payments and First

¹⁰ To pursue a claim, a claimant first must have filed a POC in the bankruptcy court by the bankruptcy court’s claim bar date deadline. Any notification to the bankruptcy court constituted a filing of a POC. Those claimants who provided the POC were then required to file a POM form establishing that a Dow Corning product was implanted and secondly, file a Claim Form for a specific benefit (i.e. Rupture, Disease, Explant, Expedited Release). It is important not to confuse a POC in the Bankruptcy Court with a Claims Form in the SF-DCT.

Priority Payments. These risks are real, but they are risks for which there is little or no evidence to support the reality that they would ever occur.

Criticisms have been raised to each of the assumptions made by the IA in making its projection. Primarily, the criticisms arise from the necessity of making assumptions at all. For example, Dow Corning's main argument has been that the IA ignores the risk that some or all the IA Report's assumptions may prove wrong. Thus, the IA is criticized for making assumptions at all.¹¹ Given the fact that the IA must make assumptions regarding events yet to occur, in order to make projections in accordance with the SFA, there will necessarily be assumptions. The criticism that there cannot be any assumptions that are included in the IA's recommendation runs contrary to the SFA's mandate to analyze the *known or knowable* data using state of the art methodology. The issue then becomes whether all those assumptions can be made with a level of certainty to meet the virtual guarantee standard. At the same time, if there are risks that are not included in the IA's methodology, as Dow Corning urges, there must be evidence to support the reality of those risks. There is always the possibility of any number of conceived risks, but those risks must "fit" the IA methodology.¹² Risks or uncertainties that do not fit into the accepted

¹¹ The IA has stated: "our forecast does not rest on any one assumption, but rather, is based on past patterns of activity and historical trends." Ankura Response to Questions at 1 (Doc #1287, Exh. B).

¹² "[A]nother aspect of relevancy is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.

methodology for making IA recommendations, and risks or uncertainties for which there is no evidence should not deter a reasoned finding that the virtual guarantee standard has been met. Indeed, the Sixth Circuit noted, “[b]ecause it is impossible to account for all possible future uncertainties, we will not impose an “absolute guarantee” standard of confidence....” *In Re Settlement Dow Corning Trust*, 592 F. App’x at 479. There are always risks of virtually anything happening or not happening. If the SFA had contemplated the elimination of all risk before Second Priority Payments could be made, then the SFA would have required mathematical certainty, not a Finance Committee recommendation based on the IA’s report.

Dow Corning’s principal criticism of the IA’s method is that the IA is engaged in rote extrapolation with no regard for the characteristics of the claimant population. Dow Corning also criticizes the IA’s key assumptions: 1) the population of potential claimants is known; 2) future claims filing patterns can be forecast from the trust filing history; 3) future filing surges arising from deadlines or outreach can be forecast from claimant’s responses to previous events; 4) future acceptance rates for filings and the pattern of cure of deficiencies in previously-filed claims can be forecast based on previous history; and 5) the average value of future claims can be forecast based on previous history.

The consideration has been aptly described by Judge Becker as one of ‘fit.’” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (internal citations omitted).

The criticism of the IA's methodology is that it "does not attempt to ascertain the number of claimants in the relevant population who are likely to have compensable conditions, but simply extrapolates filing rates without regard to the characteristics and qualifications of the remaining population" fails under closer scrutiny. *See* Hinton Reply Dec. at ¶¶ 32-33 (Doc #1307, Exh. A). While the IA Report does not include an analysis of potential compensable conditions in the population, the IA has reviewed literature on relevant diseases and concluded that given the age of the population and the expected age of onset of disease, the population is unlikely to see an increase in "defined" diseases. *See* Ankura Response to Questions at 2 (Doc #1287, Exh. B). In 2017, about 85% of the population of potential claimants who have not filed are age 60 or older. Dow Corning's expert, Mr. Hinton's analysis of compensable conditions is structured to show that there are many different combinations of conditions for the "undefined" diseases – atypical connective tissue disease and general connective tissue symptoms. However, Mr. Hinton does not analyze disability due to the underlying symptoms. This is significant because if the disability is clearly due to some other factor, such as diabetes, cancer, or stroke, then the Plan does not allow for payment of the claim. *See* Plan Annex A at 88-89 (Doc #1307, Exh. B). Thus, Mr. Hinton's analysis is misleading, because it omits this necessary factor.

The criticism of the IA Report for the assumption that the population of potential claimants is known is misplaced. As previously mentioned, more than 90% of claimants potentially eligible for a Disease or Expedited Release Claim filed a proof of claim (“POC”) twenty or more years ago and have not yet provided a proof of manufacturer (“POM”) or Claim form. There is no evidence that any meaningful number of claimants might be determined to be eligible who are not currently accounted for in the settlement facility. The base case in the IA Report includes all claimants who are eligible or conditionally eligible, whether they are active claimants or on hold for research of their contact addresses. Also, two of the forecasting scenarios include claimants who have been determined to be “dormant” or have an inactive address. Because it is possible that some of these claimants may contact the settlement facility, the forecast scenario assumes that these “lost” claimants will file at the same rate as active claimants. IA report at 24, 14, 73 (Doc #1279, Exh. 2); Ankura Response to Questions at 1 (Doc #1287, Exh. B).¹³ Other than Dow Corning’s assertion that it *is possible* that the approximately 60,000 claimants who filed a POC and have not yet submitted any actual claims, may decide to pursue their claims between now and the end of the settlement program, there is no evidence that any amount near that figure will. To the contrary, these claimants have failed to act

¹³ The Claro Group was engaged by SF-DCT to review aspects of claims adjudication. The Claro Group audit reports of April 2014 identified issues related to individual or small groups of claims. There is no suggestion that any issues remain that will have a material effect on the IA forecast. See 2014 Claro Audit Report (Exh. 10).

despite receiving multiple mailings over many years advising them about the claims process, providing opportunities for early payment, and requesting a claim form and/or a POM. For example, on April 26, 2013 notice of the June 2014 Explant Deadline was sent to 189,700 unrepresented claimants and 15,161 law firms that represent 67,840 claimants. As a result of that notice, SF-DCT received 484 Expedited Release Forms and 112 Disease Forms. *See* Explant Deadline Reminder Notice (Exh. 11).

The criticism of the IA report based on the assumption that future claims filing patterns can be forecast from filing history also fails. The deadline for filing Rupture and Explant claims has passed, leaving only Disease and Expedited claims, which have a filing deadline of June 3, 2019. A Class 5 Expedited claim has a value of \$2,000, which equals \$820 in Net Present Value. Even if all remaining eligible claimants filed Expedited claims and all 50% Second Priority Payments were made, the total would not exceed the estimated surplus funds. *See* IA Report at 18 (Doc #1279, Exh. 2). For every IA forecast from 2007 through 2015, the constant model prediction was higher than actual received Class 5 Disease claims for every future filing year. *See* IA report at 70 (Doc #1279, Exh. 2). Thus, the comparison of forecast with actual outcome provides support for the IA report.

The criticism of the IA's assumption that future surge filings can be forecast from trust claims history is not persuasive. While there may be valid alternatives to

forecasting future claims surges, the IA's practice of utilizing existing data around surges at deadline periods and claimant reaction to outreach has consistently resulted in forecasts that overestimate liability. For example, all disease filing patterns after the 2006 Rupture deadline surge have been consistent with forecasts, with fewer actual Disease claim filings than the constant model forecast in any year following any of the outreach efforts. The IA report forecasted a surge of claim filings for Disease and Expedited claims associated with the June 2014 Explant deadline and the June 2019 Disease/Expedited deadline based on the surge that occurred in 2006 associated with the Rupture deadline. This forecast considers only the highest filing month associated with the Rupture deadline. It assumes the SF-DCT will engage in outreach activities shortly before the June 2019 Disease Option deadline, and that the effects of the outreach will be similar to the effects observed in connection with the Rupture deadline. *See* IA Report at 70 (Doc #1279, Exh. 2); Ankura Response to Questions at 2 (Doc #1287, Exh. B). This method was effective in forecasting the surge of claims filing at the Explant deadline in June 2014. At that time, the actual Class 5 Disease filings were considerably lower than the IA's predicted surge filings. *See* IA Memo dated April 24, 2017 at 2 (Exh. 3); IA Report at 70 (Doc #1279, Exh. 2).

The criticism of the IA report for its assumption that future acceptance and cure rates can be forecast from trust claims history is also unpersuasive. Almost

2,000¹⁴ of the Class 5 Disease claims that have been filed are deficient, and were filed more than 5 years ago. Given the strict requirements for providing an acceptable POM,¹⁵ the likelihood of cure after this significant passage of time is slim. The IA estimates that 2% will become acceptable, and approximately 170 will be paid. Even if all 2,000 claims had been paid in 2016, the NPV would equal about \$21 million, which would not affect the IA's liability conclusion. That amount would be absorbed by the surplus. *See IA Report at 46-47 (Doc #1279, Exh. 2).*

Finally, confidence in the IA's report is not reduced because it assumes that future disease payment averages can be forecast from trust claims history. Disease payments are determined based on whether they are Option 1 or Option 2, the Severity Level A through C, and the type of Disease. The value for disease payments Option 2 Sjoren Syndrome/Systemic Lupus Erythematosus ("SS/SLE") is three to five times higher than the highest level for Option 1. *See Plan Annex A at 13-14 (Doc #1307, Exh. B).* An increase in these types of claims could substantially increase the average disease payment. However, the rates for Option 2 claims filing, approval and payment is low. The number of paid Class 5 Option 2 claims that have been filed since 2010, including SLE, SS, and GCTS, which would constitute potential increases in claim payments is fewer than 40 per year. In addition, the research

¹⁴ The 2,000 deficient claims include 258 Disease claims that were not accepted and 1,747 Disease claims that had unacceptable POMs. IA Report at 46 (Doc #1279, Exh. 2).

¹⁵ The requirements are provided at Annex A at 7-8 (Doc #1307, Exh. B).

literature on the epidemiology of SLE and SS also supports the assumption that there will not be meaningful increase in filing of these diseases. Most of the SF-DCT population is older than the general onset age for these diseases. The peak onsets for the diseases reported in the literature are during women's childbearing years. The age of onset for scleroderma is 30 to 50 years of age,¹⁶ and eighty-five percent of patients with SLE have disease onset by age 55¹⁷ with peak incidence between 15 and 40 years¹⁸. In 2016, more than 90% of either eligible or conditional claimants with active or hold-for-address statuses, who have not filed a Disease or Expedited Release claim were age 55 or older.¹⁹ Therefore, according to the literature, the peak onset of the diseases with the highest payment for the population of claimants who had not yet filed has already occurred. Thus, both past filing history for Class 5 disease and the literature on the epidemiology of the diseases with the highest values support the IA's assumption.

III. CONCLUSION

After deliberating in accordance with the process described above, the Finance Committee finds that the projection the IA made under the terms of the SFA meets

¹⁶ See Jimenez, Sergio A., "Scleroderma: Practice Essentials, Background, Pathophysiology" [Internet]. *Medscape*, at 6 (Exh. 12).

¹⁷ See Schur, Peter H. and Bevra H. Hahn, "Epidemiology and pathogenesis of systemic lupus erythematosus" [Internet] *UpToDate* at 2 (Exh. 13).

¹⁸ See Gaubitz, M., "Epidemiology of connective tissue disorders." *Rheumatology* 2006, 45: iii3-iii4, p. iii3 (Exh. 14).

¹⁹ Excluded is approximately 2% of the population without a birthdate on file.

the Sixth Circuit's standard and therefore recommends that the Court authorize 50% Second Priority Payments.

The SFA provides that the Finance Committee undertake the process of deciding whether to recommend Second Priority Payments, to obtain an IA Report, to analyze that report, to benefit from evidence and arguments provided by the parties regarding the propriety of Second Priority Payments, to apply the Sixth Circuit's standard of certainty and to make a recommendation to the Court. The Finance Committee specifically finds that the IA's projection and statement that with 50% Second Priority Payments there will be sufficient funds for First Priority Payments to be reliable and to constitute a "virtual guarantee," which is defined as not "absolute certainty, [but] nonetheless stricter than the "strong likelihood" or "more probable than not" levels of confidence...." *In Re Settlement Dow Corning Trust*, 592 F. App'x at 480. The Finance Committee, therefore, specifically finds that the criticisms of the IA Report do not alter the IA's conclusions either because the criticisms are factually inadequate, do not fit the prediction methodology, or have no evidentiary support. The Finance Committee specifically recommends to the Court that it authorize 50% Second Priority Payments.²⁰

²⁰ This recommendation is the result of application of the facts and evidence in the record to the Sixth Circuit's "virtual guarantee" standard. Unlike the standard of review that may apply to the district court's factual determination regarding Second Priority Payments---clear error, abuse of discretion, or substantial deference---the Finance Committee's finding is reviewed de novo by this Court. Ordinarily, the bankruptcy court's factual findings are reviewed for clear error. *In Re Monclova Care Ctr., Inc.*, 59 F. App'x 660, 662 (6th Cir.

The Finance Committee also remains concerned about bankruptcy inequities should Second Priority Payments not be authorized. *See* The Recommendation at 8 (Doc #1279). When the Sixth Circuit’s opinion regarding Premium Payments was issued, the Finance Committee ceased making Premium Payments. As a result, some similarly situated claimants received these payments and others did not. Further delay may result in some claimants missing the opportunity to receive Second Priority Payments altogether.

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Respectfully submitted,

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2003). If the issue on appeal is a mixed question of fact and law, the court of appeals breaks the issue into its component parts and applies the appropriate standard of review to each part. *Id.* When the court of appeals is reviewing the bankruptcy court’s interpretation of a plan that it confirmed, however, the standard of review is abuse of discretion. *In re Terex*, 984 F.2d 170 (6th Cir.1993). The Sixth Circuit has noted a “special” standard of review in the *In Re Settlement Facility Dow Corning Trust* cases due to the complexity and long-running nature of the bankruptcy and Judge Hood’s extensive familiarity with the plan. It is a standard that applies when the Sixth Circuit is “reviewing a district court’s interpretation of a bankruptcy plan where the judge did not confirm the plan but has extensive knowledge of the case.” *In re Settlement Facility Dow Corning Trust*, 592 F. App’x at 477-78.

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

IN RE: §
DOW CORNING CORPORATION, § **CASE NO. 00-CV-00005DPH**
REORGANIZED DEBTOR § **Hon. Denise Page Hood**
§

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2017, I electronically filed the *Supplemental Brief to Finance's Committee's Recommendation and Motion for Authorization to Make Second Priority Payments* with the Clerk of Court using the ECF system which will send notice and copies of the aforementioned document to all registered counsel in this case.

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